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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.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

10 CFR Part 1706

[Docket No. RM-92-1]

Rules Governing Organizational and Consultant Conflicts of Interest

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Final rule.

SUMMARY: The Defense Nuclear Facilities Safety Board (Board) is issuing final regulations establishing the guidelines, requirements and procedures that the Board will follow to identify and avoid or mitigate conflicts of interests and potential conflicts of interests by those providing assistance to the Board under contracts with the Board. Organizational and consultant conflicts of interest should be avoided and, if they cannot be avoided, should be mitigated. The rules also cover arrangements for obtaining the expert services of personnel working for the National Laboratories under the cognizance of the Department of Energy.

EFFECTIVE DATE: October 29, 1992.

FOR FURTHER INFORMATION CONTACT: Robert M. Andersen, General Counsel, 625 Indiana Avenue NW., suite 700, Washington, DC 20004, telephone (202) 208-6387.

SUPPLEMENTARY INFORMATION:

I. Background

The Board is comprised of "* * * respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board." (42 U.S.C. 2286(b)(1).) In fulfilling its statutory responsibilities, the Board utilizes the expert judgment of its members in making determinations related to public health and safety at defense nuclear facilities. In addition to its staff, the Board finds it necessary, from time to time, to seek assistance from outside sources, particularly where expertise in specialized technical fields is involved. The independent technical capability inherent in the Board provides an important check against contractor work being improperly influenced by an organizational or consultant conflict of interest (OCI). Nevertheless, it is important for the Board to be aware of and make judgments respecting potential conflicts of interests of its offerors and contractors.

On July 14, 1992, the Board published for comment its proposed regulations for identifying, evaluating and resolving organizational and consultant conflicts of interest. A 30-day comment period was provided. The Board received one set of comments, which it has carefully considered. The Board has made some clarifying modifications to the proposed rule in response to one of the comments.

II. Board Consideration of Comments

Contractors Doing Other Business With the Department of Energy ("DOE")

The commenters objected to what they characterized as the broad exclusion of all contractors or subcontractors doing business with DOE, as not being in the best interests of the Board. The comment was based on language in Section II of the Notice of Proposed Rulemaking, "Summary of the Provisions of the Proposed Rule", that "anyone engaged in performing work or services under a DOE contract or subcontract, particularly one relating to a defense nuclear facility, will be assumed to have a potential conflict of interest in regard to potential assistance to the Board." The commenters believe that this language suggests that Board will exclude all contractors with DOE contracts, even though, in the view of the commenters, this group of contractors presumably contains the best source of experts for the Board. The commenters also assert that the proposed regulation does not appear to contain as broad an exclusion as the Summary suggests, so that they find an inconsistency between the Summary and certain sections of the proposed regulation. The commenters propose that a simple notification requirement for DOE contractors, combined with a limitation of conflicts to related contracts, should be sufficient for the Board's purpose without excluding a broad category of subject matter experts.

The Board has carefully considered this comment, but does not agree with the commenters that the regulation "excludes" from consideration any contractor who has dealings with DOE. In the Board's view, however, where a contractor performing work under contract for the Department of Energy is financially dependent on those contracts, the objectivity of the contractor performing contract work for the Board could be impaired, even if the DOE contracts do not relate to defense nuclear facilities. Whether an actual conflict of interest does or might exist is a question of fact that depends on the particular circumstances. Because of the nature of the Board's statutory duties with respect to oversight of DOE's defense nuclear facilities, it is imperative that the Board receive objective advice from the experts it engages, and that the public perceive these experts as impartial. Accordingly, the Board believes that it must have the ability to examine each situation where a contractor is doing business with DOE to establish whether in fact there is an actual or potential conflict of interest.

The fact that the Board will give close scrutiny to cases where an offeror is also a DOE contractor does not mean, however, that in each such case the offeror will be disqualified on account of an OCI. The universe of qualified experts from whom the Board can seek services is small, and because of the specialized nature of the expertise, many of the experts whom the Board might wish to use also do business with DOE. To automatically disqualify all of those experts would deprive the Board of the assistance that it needs to carry out its responsibilities. Thus, where the Board determines that there is an OCI that cannot be avoided, the Board must weigh the possible harms that the existence of an OCI could cause in the particular situation against the usefulness and importance of the expertise that the particular contractor can furnish, the prospects of finding that expertise in a contractor who has no OCI, and the possibilities of mitigating the OCI. Moreover, in some cases the Board may conclude that in fact there is no actual or potential OCI.

Furthermore, the Board does not find an inconsistency between the Summary of the proposed rule and the text of the proposed regulation. Although § 1706.5(a)(2) of the proposed rule only precludes the evaluation of products or services offered or provided to DOE by an offeror, § 1706.7(a) requires the Board to disqualify any offeror with an actual or potential OCI that cannot be avoided, unless the OCI is waived by the Board. As explained above, in the Board's view, an offeror's contractual relationships with DOE may represent an OCI with respect to services to be performed for the Board, even if those services would be in areas unrelated to the work performed for DOE. Consequently, under § 1706.7, such an offeror might be disqualified from a contract award if the Board concluded that an OCI existed and could not be avoided, and that it was not in the best interests of the Government for the Board to waive that OCI.

Nonetheless, in order to clarify what the commenters found ambiguous or inconsistent in the Notice of Proposed Rulemaking, the Board has added an additional subparagraph to § 1706.5(a), specifically stating that contracts will generally not be awarded to an offeror for any services (other than those described in subparagraphs (1) or (2) of § 1706.5(a)) covered by the regulation where the Board has determined, pursuant to § 1706.7, that an actual or potential OCI exists and cannot be avoided, but the Board does not waive that OCI. The caption of § 1706.5(a) has also been changed to reflect the additional text.

Contractor Use of Non-Public Information

The commenters also question the time limitations in § 1706.5(e), which prohibits the release of certain information that is not publicly available by contractors with access to internal Board information. Section 1706.5(e)(2) would preclude contractors with such access from using such information for unsolicited proposals for one year after it is made public, and in competing for new work for six months after such information is made public. The commenters believe that such time limitations exceed what is necessary to protect the interests of the Government, since, in view of the commenters, there is no competitive advantage to a contractor once all contractors have the same public information.

In the view of the Board, however, a contractor who has had access to non-public information may indeed continue to have a competitive advantage for some period of time after the information has become public, until enough time has elapsed for other persons to acquire and absorb that information. Clearly, a contractor who had valuable information for several months before a response to a Request for Proposals was due would have an advantage in preparing a proposal over someone who obtained access to the information only one week before the due date. Similarly, in the case of unsolicited proposals, a contractor who has had access to relevant non-public information may be able to develop a unique or innovative proposal for the Government using that information, which someone without access to the information would not likely conceive of or develop. As the Government can accept unsolicited proposals without competitive bidding, earlier access to information by one contractor than another could constitute a preemptive competitive advantage.

Thus, the Board believes that it is appropriate to prevent contractors from using non-public information to which they have had access by virtue of contracts with the Board for some specified period of time after public availability. The Board views the one-year and six-months time limitation as reasonable. The Nuclear Regulatory Commission and the Department of Energy have both utilized the one-year and six-months periods with respect to use of previously non-public information by their contractors.

List of Subjects in 10 CFR Part 1706

Government procurement.

Accordingly, chapter XVII of title 10 of the Code of Federal Regulations is amended by adding a new part 1706 to read as follows:

PART 1706—ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTERESTS

Sec.

1706.1 Scope; statement of policy.
1706.2 Definitions.
1706.3 Applicability.
1706.4 Head of the contracting activity.
1706.5 General rules.
1706.6 Solicitation provisions.
1706.7 Procedures.
1706.8 Waiver.
1706.9 Examples.
1706.10 Remedies.
1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

Authority: 42 U.S.C. 2286b(c).

§ 1706.1 Scope; statement of policy.

(a) *Scope.* This part sets forth the guidelines, requirements, and procedures the Defense Nuclear Facilities Safety Board will follow in determining whether a contractor or offeror has an organizational or consultant conflict of interest (OCI) and in avoiding, neutralizing, or mitigating OCIs.

(b) *Policy.* It is the policy of the Board to identify and then avoid or mitigate organizational and consultant conflicts of interest. Normally, the Board will not award contracts to offerors who have OCIs and will terminate contracts where OCIs are identified following contract award. In exceptional circumstances, the Board reserves the right to waive conflicts of interest if it determines that such action is in the best interests of the Government, pursuant to § 1706.8, and to take such mitigating measures as it deems appropriate pursuant to such section.

§ 1706.2 Definitions.

Advisory or assistance services means services acquired by contract to advise or assist the Board, whether with respect to its internal functions or its oversight of defense nuclear facilities, or otherwise to support or improve policy development or decisionmaking by the Board, or management or administration of the Board, or to support or improve the operation of the Board's management systems. Such services may take the form of the provision of information, advice, reports, opinions, alternatives, conclusions, recommendations, training, direct assistance, or performance of site visits, technical reviews, investigation of health and safety practices or other appropriate services.

Affiliates means associated business concerns or individuals if, directly or indirectly, either one controls or can control the other or a third party controls or can control both.

Board means, as the context requires, the Defense Nuclear Facilities Safety Board, its Chairman, or any other officer of the Defense Nuclear Facilities Safety Board to whom the appropriate delegation has been made under 42 U.S.C. 2286(c)(3).

Contract means any contract, agreement, or other arrangement with the Board, except as provided in § 1706.3.

Contractor means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, or other entity, or any group of one or more of the foregoing, which is a party to a contract with the Board, and the affiliates and successors in interest of such party. The term "contractor" also includes the chief executive and directors of a party to a contract with

the Board, the key personnel of such party identified in the contract, and current or proposed consultants or subcontractors to such party. The term "contractor" shall also include consultants engaged directly by the Board through the use of a contract.

Defense nuclear facility means any United States Department of Energy (DOE) defense nuclear facility, as defined in 42 U.S.C. 2286g, subject to the Board's oversight.

Evaluation activities means activities that involve evaluation of some aspect of defense nuclear facilities.

Mitigating means, with respect to an organizational or consultant conflict of interest, reducing or counteracting the effects of such a conflict of interest on the Board, but without eliminating or avoiding the conflict of interest.

National Laboratories means laboratories operated by educational institutions or business entities under management and operating contracts with DOE.

Offeror means any person, firm, unincorporated association, joint venture, partnership, corporation, or other entity, or any group of one or more of the foregoing, submitting a bid or proposal to the Board, solicited, unsolicited or otherwise invited by the Board, to obtain a contract, and the affiliates and successors in interest of such a bidder or proposer. The term "offeror" also includes the chief executive and directors of such a bidder or proposer, the key personnel of a bidder or proposer identified in the bid or proposal, and proposed consultants or subcontractors to such bidder or proposer.

Organizational or consultant conflict of interest means that, because of other past, present, or future planned activities or relationships, an offeror or contractor is unable, or potentially unable, to render impartial assistance or advice to the Board, or the objectivity of such offeror or contractor in performing contract work for the Board is or might be otherwise impaired, or such offeror or contractor has or would have an unfair competitive advantage. The term "organizational or consultant conflict of interest" shall include, but not be limited to, actions or situations that would preclude the award or extension of a contract under, or would be prohibited by, § 1706.5.

Potential organizational or consultant conflict of interest means a factual situation that indicates or suggests that an actual organizational or consultant conflict of interest may exist or arise from award of a proposed contract or from continuation of an existing contract. The term is used to signify those situations that merit conflicts review prior to contract award or that must be reported to the contracting officer for conflicts review if they arise during contract performance.

Research means any scientific, engineering, or other technical work involving theoretical analysis, exploration, or experimentation.

Subcontractor means any subcontractor of any tier which performs work under a prime contract with the Board.

Task order contract means a Board contract that contains a broad scope of work but does not authorize the contractor to perform specific tasks within that broad scope until the contracting officer issues task orders.

Unfair competitive advantage means an advantage obtained by an offeror or contractor to the Board by virtue of the relationship of the offeror or contractor with the Board or access to information not available to other offerors or contractors, and recognized in appropriate legal precedent as unfair.

In determining the meaning of any provision of this part, unless the context indicates otherwise, the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1706.3 Applicability.

(a) *General applicability.* This part applies to contractors and offerors only, except as otherwise herein provided. This part shall be incorporated by reference and made a part of all Board contracts in excess of the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). In addition, if determined appropriate by the contracting officer for the Board, this part may be incorporated by reference and made a part of Board contracts below the small purchases threshold, except as provided in the last sentence of this § 1706.3(a). This part does not apply to the acquisition of services, including, without limitation, consulting services, through the personnel appointment process or to Board agreements with other federal government agencies, but shall apply to Board agreements with the management and operating contractors (and subcontractors and consultants thereto) of the National Laboratories.

(b) *Subcontractors and consultants.* The requirements of this part shall also apply to subcontractors and consultants proposed for, or working on, a Board contract, in each case where the amount of the subcontract or consultant agreement under which such subcontractor or consultant is or will be working is expected to exceed $10,000, and in each other case where the contracting officer for the Board deems it appropriate to make the requirements of this part applicable to a subcontractor or consultant proposed for, or working on, a Board contract. The certificates or disclosures submitted by offerors or contractors pursuant to this part shall include certificates or disclosures from all subcontractors and consultant to contractor or offerors in those cases where this part applies by its terms to such subcontractors or consultants or has been applied to such persons by the contracting officer. Contractors and offerors shall assure that contract clauses giving effect to this § 1706.3(b), satisfactory to the contracting officer, are included in subcontracts and consultant agreements of any tier involving performance of work under a prime contract covered by this subpart.

§ 1706.4 Head of the contracting activity.

The head of the contracting activity for the Board shall be the General Manager.

§ 1706.5 General rules.

(a) *Award of Contracts.* Contracts shall generally not be awarded to an offeror.

(1) For any services where the award would result in the offeror evaluating products or services it has provided to the Board, is then providing to the Board, or is then offering to provide for the Board;

(2) For evaluation activities or research related to the Board's oversight of defense nuclear facilities, where the award would result in the offeror evaluating products or services it has provided, is then providing, or is then offering to provide to DOE or to contractors or subcontractors for defense nuclear facilities; or

(3) For any other services (the acquisition of which is otherwise covered by this part), where the Board has determined, pursuant to § 1706.7, that an actual or potential OCI exists and cannot be avoided, and the Board does not waive that OCI paragraphs (a)(1) and (2) of this section also apply when award would result in evaluation of products or services of another entity where the offeror has been, is, or would be substantially involved in the development of the product or performance of the service, or has other substantial involvement regarding the product or services.

(b) *Subsequent related contracts.* (1) A Board contractor under a Board contract shall normally be ineligible to participate in Board contracts or

subcontracts that stem directly from the contractor's performance of work under a previous Board contract, where the Board determines that an OCI would exist because:

(i) The expectation of receiving the subsequent contract is likely to diminish the contractor's capacity to give impartial assistance and advice, or otherwise result in a biased work product; or

(ii) An offeror on the subsequent contract would have an unfair competitive advantage of virtue of having performed the first contract.

(2) If a contractor under a Board contract prepares a complete or essentially complete statement of work or specifications in the performance of a contract, the contractor shall be ineligible to perform or participate in the initial contractual effort that is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications.

(c) *National Laboratory personnel.* The Board may engage personnel of the National Laboratories who have expertise needed by the Board in the performance of its oversight responsibilities, provided that prior to each such engagement, the Board determines either:

(1) That the nature of work performed by such personnel for DOE does not pose actual or potential OCIs with respect to the particular work covered by the Board contract; or

(2) That such engagement is in the Government's best interests and that a waiver should be granted pursuant to § 1706.8. In all cases involving National Laboratory personnel, notice of the circumstances of the contract, stating the rationale for use of the personnel, shall be published in the **Federal Register**.

(d) *Work for others.* During the term of any Board contract, the contractor may not enter into consulting or other contractual arrangements with other persons or entities, the result of which could give rise to an OCI with respect to the work being performed under the contract. The prime contractor shall ensure that all of its employees, subcontractors, and consultants under the contract abide by this paragraph. If the contractor has reason to believe that any proposed arrangement with other persons or entities may involve an actual or potential OCI, it shall promptly inform the Board in writing of all pertinent facts regarding such proposed arrangement. In the case of task order contracts, this paragraph applies, subject to § 1706.7(c), only to specific ongoing tasks that the contracting officer authorizes the contractor to perform.

(e) *Contractor protection of Board information that is not publicly available.* If the contractor in the performance of a Board contract obtains access to information, such as Board plans, policies, reports, studies, or financial plans, or internal data protected by the Privacy Act (5 U.S.C. 552a), proprietary information, or any other data which has not been released to the public, the contractor shall not:

(1) Use such information for any private purpose until the information has been released or is otherwise made available to the public;

(2) Compete for work for the Board based on such information for a period of six months after either the contract has been completed or such information has been released or otherwise made available to the public, whichever occurs first, or submit an unsolicited proposal to the Government based on such information until one year after such information is released or otherwise made available to the public, unless a waiver permitting such action has been granted pursuant to § 1706.8; or

(3) Release the information without prior written approval of the contracting officer, unless such information has previously been released or otherwise made available to the public by the Board.

§ 1706.6 Solicitation provisions.

(a) *Advisory or assistance services.* There shall be included in all formal Board solicitations for advisory or assistance services where the contract amount is expected to exceed $25,000 (or the then applicable small purchases threshold), a provision requiring a certificate representing whether award of the contract to the offeror would present actual or potential OCIs. Apparent successful offerors will be required to submit such certificates, but the Board may also require such a certificate to be submitted in other circumstances, such as:

(1) Where the contracting officer has identified certain offerors who have passed an initial screening and has determined that it is appropriate to request the identified offerors to file the certificate in order to expedite the award process; or

(2) In the case of modifications for additional effort under Board contracts, except those issued under the "changes" clause. If a certificate has been previously submitted with regard to the contract being modified, only an updating of such statement shall be required for a contract modification. In addition, if determined appropriate by the contracting officer for the Board, such certificates may be required in connection with any other contracts subject to this subpart or in which this part has been incorporated by reference

(b) *Marketing consultant services.* There shall further be included in all Board solicitations, except sealed bids, where the contract amount is expected to exceed $200,000, a provision requiring an organizational conflicts of interest certificate from any marketing consultants engaged by an offeror in support of the preparation or submission of an offer for a Board contract by that offeror.

§ 1706.7 Procedures.

(a) *Pre-award disclosure and resolution of OCIs.* If a certificate under § 1706.6 indicates, or the Board otherwise learns, that actual or potential OCIs could be, or would appear to be, created by contract award to a particular offeror, the Board shall afford the affected offeror an opportunity to provide in writing all relevant facts bearing on the certificate. If the Board thereafter determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

(1) Disqualify the offeror;

(2) Include in the contract appropriate terms and conditions which avoid the conflict, in which case no waiver is required; or

(3) Make a finding that it is in the best interests of the Government to seek award of the contract under the waiver provisions of § 1706.8, and, where reasonably possible, include contract terms and conditions or take other measures which mitigate such conflicts.

(b) *Post-award disclosure and resolution of OCIs.* (1) If, after contract award, the contractor discovers actual or potential OCIs with respect to the contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement shall include a description of the action that the contractor has taken or proposes to avoid or mitigate such conflicts.

(2) If a disclosure under this section indicates, or the Board otherwise learns, that actual or potential OCIs exist, the Board may afford the contractor an opportunity to provide all relevant facts bearing upon the problem. If at any time the Board determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

(i) Terminate the contract, or, in the case of a task order contract, terminate the particular task;

(ii) Insist on appropriate contract terms and conditions which avoid the OCIs, in which case no waiver is required; or

(iii) Make a finding that it is in the best interests of the Government to permit the contractor to continue to perform the contract (or task) under the waiver provisions of § 1706.8, and, where reasonably possible, insist on appropriate contract terms and conditions or take other measures which mitigate the OCIs.

(c) *Task order contracts.* (1) Because a task order contract generally entails a broad scope of work, apparent successful offerors shall be required to identify in their certificates filed in accordance with § 1706.6 any actual or potential OCIs that come within the full scope of the contract. The Board may decline to award a task order contract to an offerer based upon such information or it may decline to approve performance of a particular task by the contractor if an actual or potential OCI is subsequently identified with respect to that particular task. The Board may also take the other actions identified in § 1706.7(a) to avoid or mitigate such conflicts.

(2) Contractors performing task order contracts for the Board shall disclose to the contracting officer any new work for others they propose to undertake that may present an actual or potential OCI with regard to the performance of any work under the full scope of the Board contract. Such disclosure shall be made at least 15 days prior to the submission of a bid or proposal for the new work. The disclosure shall include the statement of work and any other information necessary to describe fully the proposed work and contemplated relationship.

(3) If the Board has issued a task order or a letter request for proposal under the contract with a contractor who has disclosed to the contracting officer that it proposes to undertake new work for persons other than the Board as described in § 1706.7(c)(2), for services in the same technical area and/or at the same defense nuclear facility that is the subject of the proposed new work (including overlap based upon generic work performed for others by the contractor), the Board shall inform the contractor that entering into a contract for the new work may result in termination by the Board of the task order contract, if the Board determines that such work would give rise to an OCI and the Board does not grant a waiver.

(d) *Decisions on OCIs.* The contracting officer shall make recommendations to the General manager regarding disqualification or actions to be taken by the Board to avoid or mitigate any actual or potential OCI.

(1) The General Manager shall have the authority to approve, modify, or disapprove such recommendations regarding avoidance of an actual or potential OCI. If an offeror or contractor disagrees with the actions approved by the General Manager and requests review of the action, the Chairman shall make the decision on the actions to be taken by the Board.

(2) Any recommended action respecting the best interests of the Government and mitigation measures to be taken with respect to an actual or potential OCI must be approved by the Chairman in conjunction with the decision to grant a waiver pursuant to § 1706.8, and any recommended action to terminate a contract or a particular task on account of an actual or potential OCI must be approved by the Chairman.

(3) Decisions on OCIs by the General Manager or the Chairman shall be made with the advice of the Office of the General Counsel.

§ 1706.8 Waiver.

(a) *Waiver of OCIs.* The need for a waiver of any OCI in connection with the award or continuation of specific contracts may be identified either by the contracting officer for the Board or other Board employee or by a written request filed by an offeror or contractor with the contracting officer. The request may be combined with the certificate or disclosure required under §§ 1706.6 or 1706.7, or with additional statements filed under § 1706.7 regarding matters raised in the certificate or disclosure. The contracting officer shall review all of the relevant facts brought to his attention and shall bring the matter to the General Manager, who shall make a written recommendation to the Chairman of the Board regarding whether a waiver should be granted for a contract award or for continuation of an existing contract.

(b) *Criteria for Waiver of OCIs.* (1) The Chairman is authorized to waive any OCI (and the corresponding provision of § 1706.5 where applicable) upon a determination that awarding or extending the particular contract, or not terminating the particular contract, would be in the best interests of the Government. Issuance of a waiver shall ordinarily be limited to those situations in which:

(i) The work to be performed under contract is vital to the Board program;

(ii) The work cannot be satisfactorily performed except by a contractor or offeror whose interests give rise to a question of OCI; and

(iii) Contractual and/or technical review and supervision methods can be employed by the Board to mitigate the conflict.

(2) The Chairman is also authorized to waive any OCI (and the corresponding provision of § 1706.5 where applicable), without regard to the foregoing factors, if the Chairman determines, notwithstanding the existence of the OCI, that it is in best interests of the Government to award or extend the particular contract, or not to terminate it, without compliance with § 1706.8(b)(1).

(c) *Waiver of Rules or Procedures.* The Chairman is also authorized to waive any rules or procedures contained in this part upon a determination that application of the rules or procedures in a particular situation would not be in the best interests of the Government. Any request for such a waiver must be in writing and shall describe the basis for the waiver.

(d) *Office of General Counsel.* Waivers of OCIs or of any rule or procedure contained in this part shall be made after consultation with the Office of General Counsel.

(e) *Federal Register.* Except as otherwise provided in § 1706.8(c), notice of each waiver granted under this section shall be published in the **Federal Register** with an explanation of the basis for the waiver. In the discretion of the Board, notices of instances of avoidance of OCIs may also be published in the **Federal Register**.

§ 1706.9 Examples.

The examples in this section illustrate situations in which questions concerning OCIs may arise. The examples are not all inclusive, but are intended to provide offerors and contractors with guidance on how this subpart will be applied.

(a) *Circumstances*—(1) *Facts.* A Board contractor for technical assistance in the review of a safety aspect of a particular defense nuclear facility proposes to use the services of an expert who also serves on an oversight committee for a contractor of other defense nuclear facilities.

(2) *Guidance.* Assuming the work of the oversight committee has no direct or indirect relationship with the work at the facility that is the subject of the Board's contract, there would not be an OCI associated with the use of this expert in the performance of the Board contract.

(b) *Circumstances*—(1) *Facts.* A Board contractor studying the potential for a chemical explosion in waste tanks at a

defense nuclear facility advises the Board that it has been offered a contract with DOE to study the chemical composition of the waste in the same tanks.

(2) *Guidance.* The contractor would be advised that accepting the DOE contract would result in termination of its performance under its contract with the Board.

(c) *Circumstances*—(1) *Facts.* The Board issues a task order under an existing contract for the evaluation of the adequacy of fire protection systems at a defense nuclear facility. The contractor then advises the Board that it is considering making an offer on a solicitation by DOE to evaluate the same matter.

(2) *Guidance.* The contractor would be advised that entering into a contract with DOE on the solicitation could result in the contract with the Board being terminated.

(d) *Circumstances*—(1) *Facts.* A firm responding to a formal Board solicitation for technical assistance provides information regarding a contract it currently has with DOE. The effort under the DOE contract is for technical assistance work at DOE facilities not subject to Board oversight and outside its jurisdiction.

(2) *Guidance.* The Board would analyze the work being performed for DOE to ensure no potential or actual conflict of interest would be created through award of the Board contract. Should the Board determine that no potential or actual conflict of interest exists, the contractor would be eligible for award. If the Board determines that a potential or actual conflict of interest would arise through a contract award, it may disqualify the firm or, if the Board determines that such action is in the best interests of the Government, the Board may waive the conflict or the rules and procedures and proceed with the award.

(e) *Circumstances*—(1) *Facts.* The Board discovers that a firm competing for a contract has a number of existing agreements with DOE in technical areas which are unrelated to the Board's oversight authority. While these contracts may not represent a potential or actual conflict of interest regarding the substance of the technical effort, their total value constitutes a significant portion of the firm's gross revenues.

(2) *Guidance.* A conflict of interest may exist due to the firm's substantial pecuniary dependence upon DOE. Consequently, the Board may question the likelihood that the contractor would provide unbiased opinions, conclusions, and work products because of this extensive financial relationship. The Board will review and consider the extent of the firm's financial dependence on DOE, the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere, and whether the likelihood of the firm's providing objective technical evaluations and opinions to the Board could be influenced in view of its DOE relationship. Based on this analysis, the Board may either determine that there is no conflict and make the award, waive the conflict if one is identified and establish procedures to mitigate it where possible, or disqualify the offeror.

(f) *Circumstances*—(1) *Facts.* The Board discovers that a firm competing for a contract has a substantial business relationship in technical areas unrelated to the Board's oversight authority with a contractor operating a defense nuclear facility under a DOE contract. Similar to the situation described in paragraph (e) of this section, the total value of the contracts with the DOE contractor constitutes more than half of the firm's gross revenues, even though those contracts do not represent a potential or actual conflict of interest regarding any of the particular matters to be covered by the contract with the Board.

(2) *Guidance.* The firm's substantial financial and business dependence upon the DOE contractor may give rise to a conflict of interest, in that the likelihood of the firm's rendering impartial, objective assistance or advice to the Board may be impaired by its extensive financial relationship with the DOE contractor. In this situation, the Board will review and consider the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere. The Board will also review and consider the extent of the firm's financial dependence on the DOE contractor and whether the firm would be impartial and objective in providing technical evaluation and opinions to the Board, especially on matters in which the DOE contractor is involved, notwithstanding the relationship with the DOE contractor. Based on this analysis, the Board may determine that there is no actual conflict of interest and make the award. Alternatively, if the Board identifies a conflict that cannot be avoided, the Board may determine to waive the conflict in the best interests of the United States, with or without the establishment of procedures to mitigate the conflict, or it may disqualify the offeror.

§ 1706.10 Remedies.

The refusal to provide the certificate, or upon request of the contracting officer the additional written statement, required by §§ 1706.6 and 1706.7 in connection with an award shall result in disqualification of the offeror for that award. The nondisclosure or misrepresentation of any relevant information may also result in the disqualification of the offeror for that award. If such nondisclosure or misrepresentation by an offeror or contractor is discovered or occurs after award, or in the event of breach of any of the restrictions contained in this subpart, the Board may terminate the contract for convenience or default, and the offeror or contractor may also be disqualified by the Board from consideration for subsequent Board contracts and be subject to such other remedial actions as provided by law or the contract.

§ 1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

As prescribed in or permitted by § 1706.6(a), insert the following provision in Board solicitations:

Organizational and Consultant Conflicts of Interest Certificate—Advisory and Assistance Services (Oct. 1990)

(a) An organizational or consultant conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) In order to comply with the Office of Federal Procurement Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, the offeror shall provide the certificate described in paragraph (c) of this provision.

(c) The certificate must contain the following:

(1) Name of the agency and the number of the solicitation in question.

(2) The name, address, telephone number, and federal taxpayer identification number of the offeror.

(3) A description of the nature of the services rendered by or to be rendered on the instant contract.

(4) The name, address, and telephone number of the client or clients, a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in

the 12* months preceding the date of the certification, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter as the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable.

(5) A statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory or assistance services to be provided in connection with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and

(6) The signature, name, employer's name, address, and telephone number of the person who signed the certificate.

(d) Persons required to certify but who fail to do so may be determined to be nonresponsible. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

[End of provision]

* If approved by the head of the contracting activity, this period may be increased up to 36 months.

Dated: September 23, 1992.

John T. Conway,

Chairman.

[FR Doc. 92-23483 Filed 9-28-92; 8:45 am]

BILLING CODE 6820-KD-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 92-ANM-16]

Amended Transition Area; Lewiston, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the transition area at Lewiston, Idaho, to provide additional controlled airspace to accommodate the holding pattern for the VOR/DME-B approach for the Lewiston-Nez Perce County Airport, Lewiston, Idaho. This action will accurately define controlled airspace for pilot reference.

EFFECTIVE DATE: 0901 UTC, December 10, 1992.

FOR FURTHER INFORMATION CONTACT: Robert L. Brown, ANM-535, Federal Aviation Administration, Docket No. 92-ANM-16, 1601 Lind Avenue SW., Renton, WA 98055-4056, Telephone: (206) 227-2535.

SUPPLEMENTARY INFORMATION:

History

On July 23, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to provide additional controlled airspace for Lewiston, Idaho, (57 FR 32749).

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. The coordinates in the proposal were North American Datum 27; however, the coordinates in the final rule have been updated to North American Datum 83. In addition, distances are expressed in nautical miles. Otherwise, the rule is adopted as proposed. Transition areas are published in § 71.181 of Handbook 7400.7 effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The transition area listed in this document will be published subsequently in the Handbook.

The Rule

This amendment to part 71 of the Federal Aviation Regulations provides additional controlled airspace to accommodate the holding pattern for the VOR/DME-B approach for the Lewiston-Nez Perce County Airport, Lewiston, Idaho. The transition area will be depicted on aeronautical charts for pilot reference.

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

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Transition area.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991 is amended as follows:

Section 71.181 Designation

* * * * *

ANM ID TA Lewiston, ID [Revised]

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at lat. 46°29'25"N., long. 117°34'09"W.; east to lat. 46°30'45"N., long. 117°00'49"W.; north to lat. 46°34'25"N., long. 117°04'44"W.; then via the arc of a 14.4 nautical mile radius centered on the Lewiston VOR/DME (lat. 46°22'54"N., long. 116°52'11"W.); to lat. 46°27'00"N., long., 116°32'09"W.; east to lat. 46°25'30"N., long., 116°26'03"W.; south to lat. 46°13'20"N., long., 116°30'04"W.; west to lat. 46°14'33"N., long., 116°35'15"W.; then via the arc of a 14.4 nautical mile radius centered on the Lewiston VOR/DME; to lat 46°09'00"N., long., 116°46'54"W.; north to lat. 46°17'00"N., long., 116°49'14"W.; west to lat. 46°18'05"N., long., 117°00'15"W.; west to lat. 46°17'42"N., long., 117°22'04"W.; south to lat. 46°10'30"N., long., 117°26'24"W.; west to lat. 46°12'00"N., long., 117°35'44"W.; north to point of beginning; that airspace extending upward from 1200 feet above the surface, within an area bounded by a line beginning at lat. 46°00'00"N., long., 116°00'04"W., to lat. 46°00'00"N., long., 116°23'04"W., to lat. 45°39'00"N., long., 116°10'03"W., to lat. 45°30'00"N., long., 116°14'03"W., to lat. 45°23'00"N., long., 116°21'03"W., to lat. 45°25'00"N., long. 116°34'04"W., to lat. 45°30'00"N., long. 116°46'04"W., to lat. 46°00'00"N., long. 116°56'04"W.; thence west along lat. 46°00'00"N., to the Walla Walla VOR/DME (lat. 46°05'13"N., long. 118°17'33"W) 16.6 nautical mile radius, thence north along the 16.6 nautical mile radius until intercepting V536, thence east along V536 to long. 116°00'00"W.; thence south along long. 116°00'00"W., to lat. 46°00'00"N. to beginning.

* * * * *

Issued in Seattle, Washington on September 11, 1992.

Helen M. Parke,

Assistant Manager, Air Traffic Division.

[FR Doc. 92-23569 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 92-AEA-05]

Alteration of Transition Area; Dover, DE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This notice revises the legal description of the Dover, DE, 700 foot Transition Area to incorporate a name change of the Kenton VORTAC to the Smyrna VORTAC. Additionally, minor technical revisions are being incorporated into the description to reflect the actual geographic locations of all airports in this area. This action establishes that amount of controlled airspace deemed necessary by the FAA to contain aircraft operating under instrument flight rules.

EFFECTIVE DATE: 0901 U.T.C. December 10, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857.

SUPPLEMENTARY INFORMATION:

History

On May 12, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise the 700 foot Transition Area established at Dover, DE, due to a name change for an air navigational aid contained in the description (57 FR 22186). The proposed action would update all names contained in the legal description and revises the geographic location of all airports contained in the description.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments on the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. The coordinates for this airspace docket are based on North American Datum 83. Transition Areas are published in § 71.181 of FAA Handbook 7400.7 effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The Dover, DE, Transition Area listed in this document will be published subsequently in the Handbook.

The Rule

This amendment to part 71 of the Federal Aviation Regulations revises the Dover, DE, 700 foot Transition Area due to a name change for a navigational facility. This action also updates the geographical location of all airports contained in the description based on North American Datum 83.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Transition areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991, is amended as follows:

Section 71.181 Designation

* * * * *

AEA DE TA Dover, DE [Revised]

Dover AFB, DE (lat. 39°07′48″N., long. 75°27′59″W.)

Dover TACAN (lat. 39°07′57″N., long. 75°28′03″W.)

Smyrna VORTAC (lat. 39°13′54″N., long. 75°30′57″W.)

Delaware Airpark, DE (lat. 39°13′06″N., long. 75°35′47″W.)

That airspace extending upward from 700 feet above the surface within a 7.9-mile radius of Dover AFB and within 3.1 miles each side of the Dover TACAN 177° radial extending from the 7.9-mile radius to 9.2 miles south of the TACAN and within 3.1 miles each side of the Dover TACAN 133° radial extending from the 7.9-mile radius to 9.2 miles southeast of the TACAN and within a 6.3-mile radius of the Delaware Airpark and within 5.7 miles north and 4 miles south of the Smyrna VORTAC 078° and 258° radials extending from the 6.3-mile radius of Delaware Airpark to 10 miles east of the VORTAC.

* * * * *

Issued in Jamaica, New York, on August 31, 1992.

Gary W. Tucker,

Manager, Air Traffic Division.

[FR Doc. 92-23570 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 91-AEA-10]

Alteration of Transition Area; Dunkirk, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This notice modifies the existing 700 foot Transition Area at Dunkirk, NY, by enlarging that portion to the southwest of the Chautauqua County/Dunkirk Airport, Dunkirk, NY, to accommodate a new instrument approach procedure to Runway 6 at the airport. This action revises that amount of controlled airspace deemed necessary to contain aircraft operating under instrument flight rules. Additionally, the airport name and geographic location are being updated to reflect current designations.

EFFECTIVE DATE: 0901 U.T.C. December 10, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857.

SUPPLEMENTARY INFORMATION:

History

On April 9, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise the 700 foot Transition Area established at Dunkirk, NY, by enlarging that portion to the southwest due to the establishment of a new instrument approach procedure to Runway 6 at the

Chautauqua County/Dunkirk Airport, Dunkirk, NY (57 FR 15265). Subsequent corrections to the original notice were issued on May 22, 1992 (57 FR 24412). The proposed action would revise that amount of airspace deemed necessary by the FAA to contain aircraft operating under instrument flight rules in controlled airspace.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Transition Areas are published in section 71.171 of FAA Handbook 7400.7 effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The Dunkirk, NY, Transition Area listed in this document will be published subsequently in the Handbook.

The Rule

This amendment to part 71 of the Federal Aviation Regulations revises the 700 foot Transition Area established at Dunkirk, NY, due to the development of an instrument approach procedure to Runway 6 at the Chautauqua County/Dunkirk Airport, Dunkirk, NY. The coordinates for this airspace docket are based on North American Datum 1983.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas. Incorporated by Reference

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991, is amended as follows:

Section 71.181 Designation

* * * * *

AEA TA NY Dunkirk, NY [Revised]
Chautauqua County/Dunkirk Airport, Dunkirk, NY (lat. 42°29'36"N, long. 79°16'19"W)

That airspace extending upward from 700 fee above the surface within a 6.8-mile radius of the Chautauqua County/Dunkirk Airport and within a 11.8-mile radius of the airport extending clockwise from a 022° to a 264° bearing from the airport.

* * * * *

Issued in Jamaica, New York, on August 10, 1992.

John S. Walker,
Acting Manager, Air Traffic Division.

[FR Doc. 92–23572 Filed 9–28–92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No 92-ANM-18]

Removal of VOR Federal Airway V-349; WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; amendment.

SUMMARY: This action amends the final rule that removed Federal Airway V–349 located in the vicinity of Bellingham, WA. The Bellingham VHF Omnidirectional Range (VOR) navigational signal between Seattle, WA, and Bellingham has deteriorated to the point where the minimum en route altitude (MEA) had to be raised from 5,400 feet mean sea level (MSL) to 10,000 feet MSL; therefore, the airway was removed. However, at Canada's request the 4-nautical-mile segment between Bellingham and the United States/Canadian Border will be retained. This action reinstates that segment of V–349.

EFFECTIVE DATE: 0901 UTC, October 15, 1992.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9250.

SUPPLEMENTARY INFORMATION:

History

Federal Register Document 92–19990, Airspace Docket No. 92–ANM–18, published on August 21, 1992 (57 FR 37878), removed Federal Airway V–349. At Canada's request, the 4-nautical-mile segment of V–349, between Bellingham and the United States/Canadian Border, will be retained. This action reinstates that segment of V–349. Domestic VOR Federal Airways are published in section 71.123 of Handbook 7400.7 effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The Domestic VOR Federal airway listed in this document will be published subsequently in the Handbook.

The Rule

This amendment to part 71 of the Federal Aviation regulations reinstates the 4-nautical-mile segment of Federal Airway V–349, which was inadvertently removed, between Bellingham and the Untied States/Canadian Border. Accordingly, since this action is merely a technical amendment in which the public is not particularly interested, notice and public procedure under 5 U.S.C. 553(b) are unnecessary. Furthermore, because the final rule that removed Federal Airway V–349 becomes effective October 15, 1992, and because there is an immediate need to incorporated the segment of V–349 between Bellingham and the United States/Canadian Border onto the next chart to avoid pilot confusion, I find that good cause exists, pursuant to 5 U.S.C. 553(d), for making this amendment effective in less than 30 days.

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

List of Subject in 14 CFR Part 71

Aviation safety, Domestic VOR Federal airways, Incorporation by reference.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991, is amended as follows:

Section 71.123 Domestic VOR Federal Airways.

* * * * *

V–349 [Revised]

From Bellingham, WA, to Williams Lake, BC, Canada. The airspace within Canada is excluded.

* * * * *

Issued in Washington, DC, on September 21, 1992.

Willis C. Nelson,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 92–23573 Filed 9–28–92; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

Missouri Permanent Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is announcing approval of a proposed amendment, with certain exceptions, submitted by the State of Missouri as a modification to its permanent regulatory program (hereinafter referred to as the Missouri program) approved under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This amendment was submitted to OSM on October 10, 1990, and pertains to: Prime farmlands, signs and markers, topsoil, hydrologic balance, air resources, explosives, excess spoil, coal waste, backfilling and grading, postmining land use, roads and other transportation facilities, revegetation, prohibitions and limitations on mining, coal exploration, requirements for legal, financial, and compliance information, requirements for information on environmental resources, requirements for operation and reclamation plans, review and approval of permit applications, bond requirements, duration and release of reclamation liability, permit revocation, bond forfeiture and authorization to expend reclamation fund monies, definitions, inspection and enforcement, penalty assessment, applicability and general requirements, and revegetation success guidelines. The amendment is intended to revise the State program to be consistent with the corresponding Federal standards, incorporate the additional flexibility afforded by the revised Federal regulations, and improve operational efficiency.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Jerry R. Ennis, Telephone: (816) 374–6405.

SUPPLEMENTARY INFORMATION:

I. Background on the Missouri Program

On November 21, 1980, the Secretary of the Interior conditionally approved the Missouri program. General background information on the Missouri program, including the Secretary's findings, the disposition of comments, and the program can be found in the November 21, 1980, **Federal Register** (45 FR 77017). Subsequent actions concerning Missouri's program and program amendments can be found at 30 CFR 925.10, 925.12, 925.15, and 925.16.

II. Submission of Amendment

On October 10, 1990, Missouri submitted to OSM a proposed program amendment (Administrative Record No. MO–519). The proposed amendment consists of revisions to: 10 CSR 40–3.010/3.170, Signs and Markers for Surface and Underground Operations; 10 CSR 40–3.030/3.190, Requirements for Topsoil Removal, Storage, and Redistribution at Surface and Underground Operations; 10 CSR 40–3.040/3.200, Requirements for Protection of the Hydrologic Balance at Surface and Underground Operations; 10 CSR 40–3.050/3.210, Requirements for the Use of Explosives at Surface and Underground Operations; 10 CSR 40–3.060/3.220, Requirements for the Disposal of Excess Spoil at Surface and Underground Operations; 10 CSR 40–3.080/3.230, Requirements for the Disposal of Coal Processing Waste at Surface and Underground Operations; 10 CSR 40–3.250, Requirements for the Protection of Fish, Wildlife, and Related Environmental Values and Protection Against Slides and Other Damage; 10 CSR 40–3.110/3.260, Backfilling and Grading Requirements for Surface and Underground Operations; 10 CSR 40–3.120/3.270, Revegetation Requirements for Surface and Underground Operations; 10 CSR 40–3.130/3.300, Postmining Land Use Requirements at Surface and Underground Operations; 10 CSR 40–3.140/3.290, Road and Other Transportation Requirements for Surface and Underground Operations; 10 CSR 40–4.030, Operations on Prime Farmland; 10 CSR 40–5.010, Prohibitions and Limitations on Mining in Certain Areas; 10 CSR 40–6.010, General Requirements for Permits, Permit Applications, and Coal Exploration; 10 CSR 40–6.020, General Requirements for Coal Exploration Permits; 10 CSR 40–6.030/6.100, Surface and Underground Mining Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information; 10 CSR 40–6.040/6.110, Surface and Underground Mining Permit Applications—Minimum Requirements for Information on Environmental Resources; 10 CSR 40–6.050/6.120, Surface and Underground Mining Permit Application—Minimum Requirements for Reclamation and Operations Plan; 10 CSR 40–6.060, Requirements for Permits for Special Categories of Surface Coal Mining and Reclamation Operations; 10 CSR 40–6.070, Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions; 10 CSR 40–7.011, Bond Requirements; 10 CSR 40–7.021, Duration and Release of Reclamation Liability; 10 CSR 40–7.031, Permit Revocation, Bond Forfeiture, and Authorization to Expend Reclamation Fund Monies; 10 CSR 40–8.010, Definitions; 10 CSR 40–8.030, Permanent Program Inspection and Enforcement; 10 CSR 40–8.040, Penalty Assessment; 10 CSR 40–8.070, Applicability and General Requirements; and Phase III Liability Release Guidelines.

The amendment currently proposed by Missouri responds to five 30 CFR 732.17(d) notifications sent by the Director of OSM: (1) A June 11, 1986, notification known as "Regulatory Reform I," (Administrative Record No. MO–295); (2) a November 3, 1988, notification known as "Regulatory Reform II," (Administrative Record No

MO–406); (3) a November 6, 1989, notification known as "Regulatory Reform III," (Administrative Record No. MO–478); (4) a May 11, 1989, notification that addresses ownership and control, and permit rescission issues (Administrative Record No. MO–434); and (5) a February 7, 1990, notification regarding coal extraction incidental to the extraction of other minerals as set forth in section 701(28) of SMCRA (Administrative Record No. MO–495). It also addresses previous rulemaking that was not submitted to OSM for program amendment approval and various rulemaking needed to strengthen Missouri's program.

In this submittal Missouri is also addressing State program provisions that were affirmatively disapproved and as codified at 30 CFR 925.10, and certain required program amendments that the Director placed on the Missouri program and as codified in the Federal regulations at 30 CFR 925.16. The State has also submitted several rules on its own initiative to strengthen its program.

OSM published a notice in the November 1, 1990, **Federal Register** (55 FR 46076), announcing receipt of the proposed amendment and in the same notice opened the public comment period and provided opportunity for a public hearing on the substantive adequacy of the amendment (Administrative Record No. MO–526). The public comment period closed on December 3, 1990. A public hearing was not held because no one requested an opportunity to testify.

In a February 20, 1991, letter (Administrative Record No. MO–530) OSM notified Missouri of numerous concerns it had with the proposed regulations. Missouri responded to OSM in a February 28, 1991, letter (Administrative Record No. MO–531) stating, in part, that they did not intend to submit additional materials.

III. Director's Findings

The Director finds in accordance with SMCRA and 30 CFR 732.15 and 732.17, that Missouri's amendment, with certain exceptions, as submitted by Missouri on October 10, 1990, meets the requirements of SMCRA and 30 CFR chapter VII as discussed below.

1. Required Program Amendments

Missouri's October 10, 1990, proposed program amendment addresses required program amendments that were placed on the Missouri program in past rulemaking actions. The Director finds that the following proposed State regulations satisfies the required program amendments and is approving them [the codified required amendments at 30 CFR 925.16 are indicated in brackets with the corresponding Federal rulemaking action]: 10 CSR 40–3.040(6)(T) and 3.200(6)(T), concerning quarterly examination of impoundments not meeting the criteria of 30 CFR 77.216(a) [30 CFR 925.16(f)(2) January 3, 1991, (56 FR 190)]; 10 CSR 40–3.040(10) (G) and (I) and 3.200(10) (G) and (I), concerning the requirement that all dams and embankments be inspected and be certified as being constructed and maintained as designed in accordance with the approved plan and regulation requirements [30 CFR 925.16(f) (3) and (4) January 3, 1991, (56 FR 190)]; 10 CSR 40–3.050(6)(C) and 3.210(6)(C), concerning the need for blasting records to contain the certification number of each individual conducting a blast [30 CFR 925.16(l)(4) June 16, 1988, (53 FR 22475)]; 10 CSR 40–3.060(1)(H) and 3.220(1)(H), concerning the requirement that excess spoil that is acid- or toxic-forming or combustible, be adequately covered with non-acid or non-toxic noncombustible material, or treated, in accordance with 10 CSR 40–3.040 [30 CFR 925.16(f)(5) January 3, 1991, (56 FR 190)]; 10 CSR 3.250(1)(B), concerning underground mining activity that is likely to jeopardize the continued existence of endangered or threatened species [30 CFR 925.16(e)(1) January 3, 1991 (56 FR 190)]; 10 CSR 404.030(4) (A), concerning the need for all affected property owners' consent for the creation of water bodies on prime farmlands [30 CFR 925.16(n)(1) December 11, 1989, (54 FR 50744)]; 10 CSR 40–5.010(2)(C), concerning the requirements for areas where mining is prohibited or limited [30 CFR 925.16(c) (2) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.040(5)(A), concerning the requirements for a description of the areal and structural geology including cross-sections, maps, and plans, etc. [30 CFR 925.16(c)(3) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.040(11)(E) and 6.110(11)(E), concerning surface and underground mine operations site-specific fish and wildlife resource information needs [30 CFR 925.16(b)(2) June 5, 1990, (55 FR 22907) and 30 CFR 925.16(c)(7) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.040(11)(F) and 6.110(11)(F), concerning the regulatory authority's responsibility to make wildlife resources information available to the U.S. Fish and Wildlife Service [30 CFR 925.16(c)(6) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.050(7)(B)1 and 6.120(12)(B)1, concerning the fish and wildlife plan requirements to be based upon the best technology currently available [30 CFR 925.16(b)(3) June 5, 1990, (55 FR 22907)]; 10 CSR 40–6.050(9)(C)5 and 6.120(5)(C), concerning supplemental hydrology information requirements [30 CFR 925.16(c)(5) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.060(4) (A), concerning criteria for permit revision and renewal, single continuous mining pits, and single continuous surface coal mining operations, when prime farmlands are involved [30 CFR 925.16(c)(1) July 6, 1990, (55 FR 27811)]; 10 CSR 40–6.070(8)(L), concerning the need for a written finding when approving a long-term intensive agricultural postmining land use [30 CFR 925.16(n)(2) December 11, 1989, (54 FR 50744]; 10 CSR 40–6.110(5) (A) and (B), concerning underground mining general geology description and test boring requirements [30 CFR 925.16(c)(4) July 6, 1990, (55 FR 27811)]; and 10 CSR 40–7.011(5)(D)2.D., concerning the requirement that audits be based on generally acceptable accounting principles [30 CFR 925.16(g)(17) May 8, 1991, (56 FR 21281)].

Accordingly, the Director is removing the required program amendments as identified above from the Missouri program and as codified at 30 CFR 925.16.

2. Missouri Regulations That Are Substantively the Same as Federal Regulations

Missouri proposes revisions to the following regulations that are substantive in nature and contain language substantially the same as the corresponding Federal regulations [counterpart Federal regulations are in brackets]: Sediment pond storage and dewatering, 10 CSR 40–3.040(6)(B), and 3.200(6)(B) [30 CFR 816.46(c)(1)(iii)(A) and 817.46(c)(1)(iii)(A)]; Covering coal seams, acid- and toxic-forming materials and combustible materials, 10 CSR 40–3.110(3)(A)1. and 3.260(3)(A)1. [30 CFR 816.102(f) and 817.102(f)]; Quick growing cover and limited exception for cropland post-mining land use, 10 CSR 3.120(1) (D) and (E) and 3.270(1) (D) and (E), [30 CFR 816.111 (c) and (d) and 817.111 (c) and (d)]; Revegetation success liability, 10 CSR 40–3.120(6)(B)1 and 3.270(6)(B)1.[30 CFR 816.116(c)(1) and 817.116(c)(1)]; Revegetation success standards for previously disturbed areas, 10 CSR 40–3.120(6)(B)2.I. and 3.270(6)(B)2.I. [30 CFR 816.116(b)(5) and 817.116(b)(5); Ground cover to achieve the postmining land use, 10 CSR 40–3.120(7)(C)3.C. and 3.290(7)(C)3.C. [30 CFR 816.116(b)(3)(iii) and 817.116(b)(3)(iii)]; Revegetation success, 10 CSR 40–3.120(8)(A) 5, 6, 7, and 8 and 3.270(8)(A) 5, 6, 7, and 8 [30 CFR 816.116(c)(2) and 817.116(c)(2)]; As built certification for Class I and II roads, 10 CSR 40–3.140 (1)(D)1. and (8)(D)1. and 3.290 (1)(D)1. and (8)(D)1. [30 CFR

816.151(a) and 817.151(a); 1.3 safety factor for road embankments, 10 CSR 40–3.140 (3)(D)9. and (10)(D)9. and 3.290 (3)(D)9. and (10)(D)9. [30 CFR 816.151(b) and 817.151(b)]; Roads maintained to meet performance standards, 10 CSR 40–3.140 (6)(D), (13) (D), and (20) (D) and 3.290 (6)(D), (13)(D), and (20)(D) [30 CFR 816.150(e)(1) and 817.150(e)(1)]; Control or prevent erosion, siltation and air pollution for roads, 10 CSR 40–3.140(8)(A) and (15)(A) and 3.290 (1)(A), (8)(A), and (15)(A) [30 CFR 816.150(b)(1) and 817.150(b)(1)]; Road damaged by catastrophic event, 10 CSR 40–3.140 (13)(C) and (20)(C) and 3.290 (13)(C) and (20)(C) [30 CFR 816.150(e)(2) and 817.150(e)(2)]; Public parks and historic places, 10 CSR 40–5.010(3)(F)1. [30 CFR 761.12(f)(1)]; Definition of owned or controlled, 10 CSR 40–6.010(2)(E) [30 CFR 773.5]; Exploration map and narrative, 10 CSR 40–6.020 (2)(B)3, (3)(B)3, and (5) [30 CFR 772.11(b) (3) and 772.12 (b)(3) and (b)(5)]; Concerning commercial use or sale of coal extracted during coal exploration operations, 10 CSR 40–6.020(5) [30 CFR 772.14 (a) and (b)]; Permit application information on ownership and control, 10 CSR 40–6.030(1) (A), (C), (D), and (H) and 6.100(1) (A), (C), (D), and (H) [30 CFR 778.13 (a), (b), (c), (d), and (i)]; Update and correction of violations, 10 CSR 40–6.030(2)(D) and 6.100(2)(D) [30 CFR 778.14(d)]; Fish and Wildlife Service information request, 10 CSD 6.040(11)(F) [30 CFR 780.16(c)] ; Fish and wildlife plan requirements, 10 CSR 40–6.050(7) (A), (B)1., (B)2., (C)1., (C)3. and 6.120(12) (A), (B)1., (C)1., and (C)3. [30 CFR 780.16 (a) (2)(i), (2)(ii), (b), (b)(1), and 784.16 (a) (2) (i), (2)(ii), (b), and (b)(1)]; Impoundment design compliance, 10 CSR 40–6.050(11)(C) and 6.120(7)(C) [30 CFR 780.25(c)(1) and 784.16(c)(1)]; Stream fords and crossing design and schedules for removal and certification of Class I, II, and III roads, 10 CSR 6.050(17)(A) 1 through 9 and 6.120(15)(A) 1 through 9 [30 CFR 780.37(a) and 784.24(a)]; Support facilities, 10 CSR 40–6.050(18) and 6.120(16) [30 CFR 780.38 and 784.30]; Ownership and control requirements, 10 CSR 40–6.070 (7) (F), (G), and (8)(I) [30 CFR 773.15(b)(2), (b)(3), and (e)]; Permit approval and denial actions, 10 CSR 40–6.070 (10)(B)1.A. and (10)(E)2. [30 CFR 773.11(a) and 773.19(b)]; Improvidently issued permits and rescission, 10 CSR 40–6.070 (11)(A) 2., 3., and (11)(B) [30 CFR 773.20 (b), (c), and 773.21]; Follow up information requirements for a cessation order, 10 CSR 40–6.070(13)(E) [30 CFR 773.17(i)]; Independent bonding increments, 10 CSR 40–7.011(3)(C) [30 CFR 800.11(b) (4)]; Full cost bond amounts, 10 CSR 40–7.011(4)(E) [30 CFR 800.14(b)]; Definitions of adjacent areas, pasture, prime farmland, woodland, water, and undeveloped land, 10 CSR 40–8.010(1)(A) 4. and 51. B, D, I, and J [30 CFR 701.5]; Notify owner and controllers of cessation order, 10 CSR 40–8.030(6)(G) [30 CFR 843.11(g)]; and Informal conference review, 10 CSR 40–8.040(8)(A) [30 CFR 845.18(a)].

The Director therefore finds that these proposed revisions to Missouri's regulations are no less effective than the corresponding Federal regulations and is approving them.

3. Signs and Markers

At 10 CSR 40–3.010(5) and 40–3.170(5), Missouri proposes to add the requirement that where the permit area is bonded incrementally, the area bonded shall be clearly marked before the beginning of surface mining activities. The Federal counterpart regulations that provide for signs and markers at 30 CFR 816.11 and 817.11 do not specifically require that incrementally bonded areas be marked. However, the Director finds that Missouri's proposed requirement will assist in the administration of its program and is not inconsistent with or no less effective than the Federal program requirements. The Director is approving the proposed change.

4. Requirements for Topsoil Removal, Storage, and Redistribution

At 10 CSR 40–3.030(1)(C) and 3.190(1)(C), Missouri proposes to add the requirement that "[t]opsoil and subsoils to be saved under section (2) of this rule shall be removed twenty-five feet (25') in advance of mining, unless otherwise stated in the permit." The Federal regulations that address the timing of topsoil and subsoil removal at 30 CFR 816.22(a)(4) and 817.22(a)(4) do not specifically require removal 25 feet in advance of mining. However, the Director finds that Missouri's proposed requirement will assist in the administration of its program and is not inconsistent with or no less effective than the Federal program requirements. The Director is approving the proposed change.

5. Water Quality Standards and Effluent Limitations, General Limitations

Missouri proposes to revise its rules at 10 CSR 40–3.040(2)(A)1 and 3.200(2)(A)1 to require that all surface drainage from the disturbed area shall be passed through a sedimentation pond, to additionally allow that, " * * * areas that are in the process of topsoil placement and revegetation will not be required to meet total suspended solids effluent limitations."

In a United States Court of Appeals for the District of Columbia action, *In re: Surface Min. Regulation Litigation*, 627 F.2d 1346 (D.C. Cir 1980), the court ruled that where there was an overlap of regulation between SMCRA and the Clean Water Act (CWA), 33 U.S.C. 1251–1387, the provisions of the CWA must "control so as to afford consistent effluent standards nationwide." Missouri's proposal would provide an exemption from the requirement to comply with a particular parameter of effluent limitations in certain situations. SMCRA and the Federal regulations place a general requirement that effluent limitation be met. The specific elements required in meeting effluent limitations would come under the control of the CWA and implementing regulations at 40 CFR part 434 administered by the U.S. Environmental Protection Agency (EPA). In a letter dated July 29, 1991, (Administrative Record No. MO–540), EPA concurred that Missouri's proposed amendment can be implemented consistent with the CWA. Therefore, the Director is approving Missouri's proposed change based upon this concurrence. However, before Missouri can enforce the waiver in meeting total suspended solids of the effluent limitation requirements, the existing permits obtained under the CWA should be reviewed and revised if necessary in order to allow implementation of this new rule requirement.

6. Certification of Stream Channel Diversions

At 10 CSR 40–3.040(4)(B)3. and 3.200(4)(B)3., the Missouri regulations requires that the design and construction of stream channel diversions be certified by a professional engineer. It proposes to add that diversions also be certified as meeting the performance standards of this rule.

The Federal regulations at 30 CFR 816.43(b)(4) and 817.43(b)(4) provide for the same requirements but additionally require the certification of any design criteria set by the regulatory authority. Missouri's proposal does not require certification of regulatory authority design criteria. Missouri is therefore required to further amend its program to provide for this certification.

In a January 3, 1991, rulemaking action (56 FR 190) at 30 CFR 925.16(f)(1), a required program amendment was placed on the Missouri program to correct the above deficiencies. The Director finds that Missouri's proposed change satisfies this required program amendment to the extent that diversions

must be certified as meeting the performance standards. Therefore the required amendment will be modified to reflect this situation.

7. Maintenance of Sedimentation Ponds

At 10 CSR 40–3.040(6)(C) and 3.200(6)(C), Missouri proposes to delete language that defines theoretical detention time and the conditions when approval may be given for a detention time of less than 10 hours. It would retain the requirement that "Sedimentation ponds shall provide the required theoretical detention time for the water inflow or runoff entering the pond from a ten (10-year, twenty four (24)-hour precipitation event (design event)." The Federal regulations at 30 CFR 816.46(c)(1)(iii)(C) and 817.46(c)(1)(iii)(C) also require retention of a 10-year, 24-hour precipitation event but additionally would allow the ability to "treat" rather than "contain" the water and to provide a design based on a lesser event if approved by the regulatory authority. Since adoption of the additional flexibility afforded in the Federal regulations is discretionary to the regulatory authority, the Director finds that Missouri's option not to adopt the more flexible language of the Federal regulations does not render its program to be less effective and is approving the proposed deletions.

8. Dewatering Device

At 10 CSR 40–3.040(6)(D) and 3.200(6)(D), Missouri provides requirements for dewatering of sedimentation ponds. The requirement states "[T]he water storage resulting from inflow shall be removed by a nonclogging dewatering device that has been designed, constructed, and maintained in accordance with subsection (6)(C) of this rule or a conduit spillway approved in the permit and plan. The dewatering device shall not be located at a lower elevation than the maximum elevation of the sedimentation storage volume." Missouri is proposing to add the phrase "* * * that has been designed, constructed, and maintained in accordance with subsection (6)(C) of this rule * * *." Subsection (6)(C) of the State rule requires that sedimentation ponds be designed to provide a theoretical detention time to hold the runoff entering from a 10-year, 24-hour precipitation event (design event).

The counterpart Federal regulations for nonclogging dewatering device at 30 CFR 816.46(c)(1)(iii)(D) and 817.46(c)(1)(iii)(D) require it to be adequate to maintain a detention time that will allow the effluent from ponds to meet State and Federal effluent limitations. Additionally the Federal regulations at 30 CFR 816.46(c)(1)(iii)(C) and 817.46(c)(1)(iii)(C) requires a detention time to hold a 10-year, 24-hour precipitation event as is required at (6)(C) of the Missouri regulations.

The Missouri rule requirements at 10 CSR 40–3.040(6)(D) and 3.200(6)(D) do not specifically require a detention time that would allow State and Federal effluent standards to be met. However, at 10 CSR 40–3.040(2)(B) and 3.200(2)(B), the Missouri regulations require that water discharged from disturbed areas must be in compliance with all applicable State and Federal water quality laws and regulations.

Therefore, the Director finds that Missouri's proposed changes at 10 CSR 40–3.040(6)(D) and 3.200(6)(D) along with its other rule requirements combine to provide for no less effective than requirements of the Federal regulations at 30 CFR 816.46(c)(1)(iii) (C) and (D) and 817.46(c)(1)(iii) (C) and (D), and is approving the change.

9. Sedimentation Pond Storage

At 10 CSR 40–3.040(6)(H) and 3.200(6)(H), Missouri proposes to delete the requirement to remove sediment from sediment ponds when the volume of sediment accumulates to 60 percent of the design sediment storage volume. In addition, Missouri proposes to delete language regarding the circumstances under which an operator may provide additional sediment storage for sediment and/or water above the required design standard. Missouri's rule, as modified, would simply require that sediment shall be removed from sedimentation ponds.

The Federal regulations at 30 CFR 816.46(c)(iii)(F) and 817.46(c)(iii)(F), require that sediment ponds shall "[b]e designed, constructed, and maintained to * * * provide periodic sediment removal sufficient to maintain adequate volume for the design event."

The Director is approving Missouri's proposed amendment but is requiring the State to further amend its rule to require that sediment ponds be designed, constructed, and maintained to provide periodic sediment removal sufficient to maintain adequate volume for the design event.

10. Sediment Pond Removal

At 10 CSR 40–3.040(6)(U) and 3.200(6)(U), Missouri requires that sediment ponds shall not be removed until the disturbed area has been restored and the revegetation requirements of 10 CSR 40–3.120 and 3.270 are met and the drainage entering the pond has met the applicable State and Federal water quality requirements of the receiving stream.

These requirements are substantively the same as the March 13, 1979, Federal regulation requirements at 30 CFR 816.46(u) and 817.46(u). However, in a September 26, 1983, rulemaking, OSM modified those regulations and now require, at 30 CFR 816.46(b)(5) and 817.46(b)(5), that siltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than 2 years after the last augmented seeding. As discussed in the preamble to the Federal regulations (48 FR 43956, 44040, September 26, 1983) and in response to a commenter who questioned the 2-year period based on one study in eastern Kentucky, OSM stated:

> While it is true that the two-year standard is based on one study, the study data represents a sufficient base on which to establish a minimum requirement for retention of a siltation structure during the reclamation period of mining. The regulatory authority will need to consider site-specific characteristics in order to decide whether, and for how long the structures must be retained past the two-year period.

Based on the above, the Director is requiring Missouri to further amend its rules at 10 CSR 40–3.040(6)(U) and 3.200(6)(U) to include the requirement that siltation structures shall be maintained until removal is authorized by the regulatory authority and that in no case shall the structures be removed sooner than 2 years after the last augmented seeding in accordance with 30 CFR 816.46(b)(5) and 817.46(b)(5).

11. Sedimentation Pond Design Standards

At 10 CSR 40–3.040(6)(Q) and 3.200(6)(Q) Missouri proposes to modify its regulation that determines design requirements for sedimentation ponds in accordance with the size of the structure by adding "open channel" to the phrase "crest of the *open channel* emergency spillway" and continue with "* * * unless the emergency spillway is a pipe, whereupon it is measured to the lowest point in the top of the embankment, * * *" The Federal counterpart regulations at 30 CFR 816.46(c) and 817.46(c) do not contain the specific language proposed by Missouri, but instead refer, in part, to the Mine Safety and Health Administration (MSHA) standards in the Federal regulations at 30 CFR 77.216(a) to determine sedimentation pond design. The standards in 30 CFR 77.216(a) do not

contain specific language that address pipes being used instead of emergency spillways. It instead provides for an acre-feet storage volume criteria determined by embankment height or crest of an emergency spillway (elevation). However, since Missouri's criteria uses spillway channel elevation or, if an emergency spillway pipe is used, then the lowest point of the top of the embankment must be considered, Missouri's criteria results in the same test for storage volume as required by the Federal regulations.

The Director finds that Missouri's proposed regulations are no less effective than the Federal requirements and is approving the proposed change.

12. Quarterly Examination of Impoundments

At 10 CSR 40-3.040(6)(T) and 3.200(6)(T), Missouri proposes to require quarterly inspection of impoundments that do not meet the criteria of 30 CFR 77.261(a). The counterpart Federal regulations at 30 CFR 816.49(a)(11) and 817.49(a)(11) require quarterly inspections for impoundments that do not meet the criteria of 30 CFR 77.216(a). Missouri's rule would appear to be no less effective than the Federal regulation, however Missouri has incorrectly cited its reference to 30 CFR 77.216(a) as "30 CFR 77.261(a)." The Director finds that the incorrect reference does not render the Missouri proposal less effective than the Federal requirements and is approving the proposed change. However, with this notice the Director is notifying Missouri of the reference error and the need to correct this citation error at 10 CSR 40-3.040(6)(T) and 40-3.200(6)(T) from 30 CFR 77.261(a) to 30 CFR 77.216(a).

13. Certification Reports for Dams and Embankments

At 10 CSR 3.040(10)(I) and 3.200(10)(I), Missouri proposes to require that certification reports for all dams and embankments shall be provided certifying that the impoundment has been constructed and maintained as designed and in accordance with the approved plan and this chapter. Five specific statement requirements are then listed which must be included in the report.

Federal regulations at 30 CFR 816.49(a)(10)(iii) and 817.49(a)(10)(iii) provide for the same requirements. However, the Federal regulations additionally require that the certification report include discussion of any appearance of instability, structural weakness, or other hazardous condition.

The Director is approving Missouri's proposed rule change with the requirement that Missouri further amend its rule to provide that certification reports include discussion of any appearance of instability, structural weakness, or other hazardous condition in a manner consistent with the Federal regulations.

14. Disposal of Excess Spoil

At 10 CSR 40-3.060(1)(A), Missouri proposes to modify its general requirements for disposal of excess spoil by adding the requirement that such spoil shall be hauled or conveyed to and placed in designated disposal areas within a permit area "within a time approved by the Director in the permit and plan." The counterpart Federal regulation at 30 CFR 816.71(a) does not contain this provision. However, the Director finds that Missouri's additional requirement will provide for more effective administration of its program and is not inconsistent with the Federal program requirements. The Director is approving the proposed change.

15. Waste Bank Subdrainage Systems

At 10 CSR 40-3.080(3)(A) and 3.230(3)(A), Missouri proposes to change its existing regulatory requirements regarding water control measures necessary in connection with the disposal of coal processing waste. Specifically, Missouri is amending its regulations to allow an operator to forego the usual requirement for a subdrainage system for a coal processing waste bank if the operator can demonstrate to the director that "* * * a subdrainage system is not required to ensure the structural integrity of the coal processing waste bank and the protection of the surface and ground water quality in the immediate vicinity of the disposal area * * *."

The counterpart Federal regulations at 30 CFR 816.81-816.83 and 817.81-817.83 do not specifically provide a mechanism whereby an operator can forego the requirements for a subdrainage system for coal processing waste bank. Instead, the Federal requirements, that apply to the disposal of coal mine waste in general (the term "coal mine waste," as used in the Federal regulations, includes underground development waste, as well as coal processing waste), simply outline the circumstances under which a subdrainage system is required. Specifically, the Federal regulations require coal mine waste refuse piles to include underdrains, as well as diversions, "* * * as necessary to control erosion, prevent water infiltration into the disposal facility and ensure stability * * *" whenever the disposal area "contains springs, natural or manmade watercourses, or wet weather seeps * * *."

Thus, in order to be no less effective than the Federal requirements, the Missouri program must require an underdrain system for coal mine waste refuse piles whenever the disposal area contains springs, natural or manmade watercourses, or wet weather seeps. The Missouri program does contain similar requirements for surface mining at 10 CSR 40-3.060(1)(M) and for underground mining at 10 CSR 40-3.220(1)(N). These provisions of the Missouri program specifically apply to the disposal of excess spoil, but are made applicable to the disposal of coal processing waste by cross-references at 10 CSR 40-3.080(4)(B) (surface mining) and at 10 CSR 40-3.230(4)(B) (underground mining). Therefore, under the Missouri program an underdrain system is always required if the disposal area contains springs, natural or manmade watercourses or wet weather seeps. In other words, under such conditions, it would be impossible for an operator to make a satisfactory demonstration that a subdrainage system was not necessary. Accordingly, the Director finds that Missouri's proposed amendments at 10 CSR 40-3.080(3)(A) and 10 CSR 3.230(3)(A) do not render the Missouri program less effective than the Federal requirements and is approving the proposed changes.

16. Noncoal Waste Disposal Requirements

At 10 CSR 40-3.080(8)(B), Missouri is proposing revisions to its rule for disposal of noncoal waste. These would require: (1) Such waste disposal to be in accordance with Revised Statutes of Missouri (RSMo) 260.200 through 260.430 and other Federal, State, and local law applicable to such disposal; (2) disposal of noncoal waste in the permit area shall be so designated in the permit; (3) these sites shall be designed and constructed with appropriate water barriers on the bottom and sides; (4) waste shall be routinely compacted and covered to prevent combustion and wind borne waste; (5) upon completion, a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized and revegetated in accordance with 10 CSR 40-3.270 (Revegetation requirements for underground operations); and (5) the operations shall be conducted in accordance with all local, State, and Federal requirements.

The counterpart Federal regulations at 30 CFR 816.89(b) place the same substantive requirements but in addition require that disposal sites in the permit area be designed and constructed to

ensure that leachate and drainage from the noncoal mine waste area do not degrade surface or underground water. Missouri's proposed rule would require sites to be designed with appropriate water barriers on the bottom and sides of the designated sites. "Appropriate water barriers" would not necessarily ensure that water is not degraded. However, at 10 CSR 40-3.080(8)(A), the Missouri rule requires that placement and storage (of noncoal waste) shall ensure that leachate and surface run off do not degrade surface water or ground water. Therefore, the combined Missouri rule requirements will provide for the same protection to surface and underground water as required by the Federal regulations.

The Missouri rule also requires waste disposal to be in accordance with applicable requirements of RSMo 260.200 through 260.430. These State statutes provide requirements for solid waste management.

The Director finds that Missouri's proposed rule at 10 CSR 40-3.080(8)(B), that provides requirements for noncoal waste disposal are no less effective than the Federal regulation requirements at 30 CFR 816.89(b) and is approving the change.

With this rule notice, the Director is notifying Missouri of a citation error and the need to correct this error. The Missouri rule references 10 CSR 40-3.270 (Revegetation requirements for underground operations) as the revegetation standard to be met. The citation should read 10 CSR 40-3.120 that provides revegetation standards for surface operations.

17. Disposal of Hazardous Noncoal Waste

Missouri proposes at 10 CSR 40-3.080(8)(D) and 40-3.230(8)(D) the requirement that "[a]ny noncoal mine waste defined as 'hazardous' under Section 3001 of the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580, as amended) and 40 CFR part 261 shall be handled in accordance with the requirements of subtitle C of RCRA and any implementing regulations." Missouri's proposed requirement is identical to that of the corresponding Federal regulation adopted on September 26, 1983 (48 FR 43994, 44006), at 30 CFR 816.89(d) and 817.89(d). However, these Federal regulations were suspended on November 20, 1986 (51 FR 41952, 41962), to implement the decision of the U.S. District Court for the District of Columbia in *In re: Permanent Surface Min. Regulation Litigation* 620 F. Supp. 1519, 1538 (D.D.C. 1985). The court remanded these rules because OSM failed to comply with the public notice and public comment requirements of the Administrative Procedures Act in promulgation of these Federal regulations.

OSM subsequently deleted 30 CFR 816.89(d) and 817.89(d) (56 FR 65612, 65635-65636, December 17, 1991). In deleting these rules, OSM reasoned that Congress had assigned permitting, inspection, and enforcement responsibilities under RCRA to the EPA and that SMCRA did not require OSM or the State regulatory authorities to assume such responsibilities (56 FR 65612, 65623, December 17, 1991). It was further reasoned that Congress would not appropriate funds to OSM or State regulatory authorities for this task (*Id.*). With the deletion of this requirement, OSM stated that it would continue "consistent with its jurisdiction under the Act, to coordinate its regulatory program with EPA to facilitate the implementation of RCRA regulations." (56 FR 65612, 65624, December 17, 1991). However, OSM's action does not prohibit or prevent a State regulatory authority from choosing to assume such responsibilities in coordination with EPA. Under 30 CFR 730.11(b) States are allowed to enact provisions for which no corresponding provisions are contained in the Federal regulations or SMCRA.

Because there is no Federal counterpart to the proposed 10 CSR 40-3.080(8)(D) and 40-3.230(8)(D), OSM evaluated Missouri's proposal based upon its consistency with section 515(b)(14) of SMCRA. Section 515(b)(14) of SMCRA generally requires that all debris, acid-forming materials, toxic materials, or materials constituting a fire hazard are to be treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters. Because Missouri's proposed regulations provide for the handling and disposal of "hazardous" noncoal mine wastes in a manner designed to prevent contamination of ground or surface waters, i.e., pursuant to the provision of subtitle C of RCRA, the Director finds that Missouri's proposed regulations are not inconsistent with section 515(b)(14) of SMCRA and is approving the proposed regulations.

18. Protection of Air Resources

At 10 CSR 40-3.090 and 3.240 of their performance standards, Missouri proposes to delete specific requirements for the protection of air resources and add in their place "The surface coal mining and reclamation operations shall comply with all applicable State and Federal air pollution control laws."

The Federal regulations at 30 CFR 816.95 and 817.95 provide:

> (a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

The Director finds that the State's proposed rule deletion and addition is not inconsistent with the requirements of counterpart Federal regulations at 30 CFR 816.95 and 817.95 and is approving the proposed changes. However, Missouri is required to further amend its program to provide performance standards that address air quality in a manner no less effective than the Federal regulation requirements.

19. Range or Pasture Land Revegetation Requirements

At 10 CSR 40-3.120(5) and 3.270(5), Missouri proposes to amend its regulations dealing with revegetation requirements for grazing for the land uses of range land and pasture land. Those regulations presently require that, where the approved postmining land use is range or pasture land, the reclaimed land must be used for livestock grazing at a grazing capacity approved in the permit and plan approximately equal to that for similar nonmined lands, for at least 2 full years of liability required under subsection (6)(B) of this rule. As amended, the regulations would no longer require that the land always be used for livestock grazing. Instead, under the amended regulations, the reclaimed land could be "* * * used in another manner, as approved, which will determine the productive capacity approved in the permit and plan approximately equal to that for similar nonmined lands."

The Federal regulations at 30 CFR 816.116(b)(1) and 817.116(b)(1) require "For areas developed for use as grazing land and pasture land the ground cover and production of the living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority".

Missouri's existing rule language at 10 CSR 40-3.120(5) and 3.270(5) is substantively the same as a suspended and removed Federal regulation 30 CFR 816.115 and 817.115 (August 4, 1980, 45 FR 51549), that limited an operator, who proposed range or pasture land as postmining land use, to actually use the land for grazing during the last 2 years of bond liability in order to obtain bond release with no other option available to meet revegetation success standards. The current Federal regulations were promulgated on September 2, 1983. In

that rulemaking preamble (48 FR 40140, 40148), OSM stated "Use of a reference area or other appropriate standard is also possible. OSM's adoption of this position is not meant to preclude States from either allowing or requiring grazing of reclaimed pasture and range land." Since Missouri's proposed rule would allow for actual grazing or other options for the operator to meet revegetation success standards, its rule is no less effective than the Federal regulation requirements.

Missouri's proposed rule would further allow the land uses of range and pasture to be "* * * used in another manner which will determine productive capacity approved in the permit and plan approximately equal to that for similar nonmined lands." In the September 2, 1983, preamble and in response to a comment concerning range land productivity, the point was made that productivity should consider the pounds of beef (or equivalent) that may be produced per animal unit of area. Further, equal quantities of forage are not always a true reflection of range or grazing land productivity. Measures of revegetation success should take into account the nutritional value of the forage when determining whether productivity has been restored (48 FR 40140, 40148, September 2, 1983). Therefore, Missouri's proposed requirement that would allow productive capacity to be determination in another manner, is not inconsistent with the Federal regulation requirements.

At 10 CSR 40–3.120(5) and 3.270(5) Missouri uses the term "range land" as a type of land use. However, Missouri does not define range land and is proposing to delete their definition for grazing land. The Federal regulations do not define "range land" as a land use category. The Federal definition of "grazing land" is, however, intended to encompass range land use (see 44 FR 14933, March 13, 1979). In deleting its term "grazing land," Missouri has removed a comparable relationship to the Federal regulation for "range land" land use consideration. Additionally Missouri is proposing to amend its definition for pasture land use at 10 CSR 40–8.010(1)(A)51.B to:

> land used primarily for the long term production of adapted, domesticated, forage plants to be grazed by livestock or cut and cured for livestock feed. Land used for facilities in support of pasture land or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

As proposed, the definition of pasture land will be the only land use definition in which the term grazing is incorporated in the Missouri program. Since Missouri does not define range land use, it is unclear what this use would involve as well as what revegetation success standards would apply. Missouri must either define this term or remove reference to it throughout its program.

Based on the discussion above, the Director finds Missouri's proposed language at 10 CSR 40–3.120(5) and 3.270(5) is no less effective than the Federal regulations requirements at 30 CFR 816.116(b)(1) and 817.116(b)(1) and is approving the proposed change. However, Missouri is required to amend its program to either remove or define the term "range land use."

20. Phase III Bond Liability Release Guidelines

In this proposed amendment Missouri submitted Phase III Liability Release Guidelines for the following land uses: prime farmland, cropland, pasture land, woodland, wildlife habitat, industrial/commercial, residential, and recreational. The guideline documents are intended to supplement Missouri's surface and underground revegetation requirements at 10 CSR 40–3.120 and 3.270 and meet the Federal regulation requirements at 30 CFR 816.116(a) (1) & (2) and 817.116(a) (1) & (2).

A review of the guideline documents by OSM identified numerous issues that were identified in OSM's February 20, 1991, letter to the State (Administrative Record No. MO–530). As discussed in this letter, the proposed guideline documents are less effective than the Federal program requirements. The Director is not approving the guideline documents for reasons stated in OSM's February 20, 1991, letter, and is retaining a required program amendment to provide for revegetation success guidelines that was placed on the Missouri program at 30 CFR 925.16(a) in a June 5, 1990, rulemaking action (55 FR 22907).

21. Specific Standards for Postmining Land Uses

At 10 CSR 40–3.120(6)(B)2.A through H and 3.270(6)(B)2.A through H, the State proposes for each category of land use that applicable revegetation success measurements shall be performed in accordance with the criteria contained in the Phase III Liability Release Guidelines adopted by the Land Reclamation Commission in June, 1990. As stated in Finding No. 20, the revegetation success policy documents (guideline documents) proposed are less effective than the Federal program. The Director therefore, is not approving the proposed reference to the policy documents since they are not being approved and are found to be less effective than the Federal program.

22. Vegetation Ground Cover at 70-Percent

At 10 CSR 40–3.120(6)(B)2.A, D, and G and 40–3.270(6)(B)2.A, D, and G, the State proposes for areas to be developed for woodland, wildlife habitat, or recreation land use, a ground cover success standard of 70-percent density. Additionally, Missouri's approved regulations at 10 CSR 40–3.120(6)(B)3. and 3.270(6)(D) require that vegetative ground cover shall not be less than that required to achieve the approved postmining land use. The Federal regulations at 30 CFR 816.116(b)(3)(iii) and 817.116(b)(3)(iii) require that "Vegetative ground cover shall not be less than that required to achieve the approved postmining land use." While Missouri's proposed vegetative ground cover standard of 70-percent density may be acceptable, it has not demonstrated that this standard will in all cases achieve the approved post mining land use as required by the referenced Federal regulations and counterpart State rules.

The Director cannot determine if Missouri's proposed standard for ground cover meeting a 70-percent density, is consistent with and no less effective than its standards at 10 CSR 40–3.120(6)(B)3 and 3.270(6)(D) and the Federal requirements and therefore is not approving the provision. Missouri is required to substantiate its basis for its 70-percent density standard or otherwise amend its program to be no less effective than the Federal regulation requirements of 30 CFR 816.116(b)(3) and 817.116(b)(3) in regards to setting standards for success.

23. Specific Standards for Industrial/Commercial and Residential Land Uses

At 10 CSR 40–3.120(6)(B)2.B and 10 CSR 40–3.270(6)(B)2.B, the State proposes to require that "In areas to be developed for industrial/commercial land use less than two (2) years after regrading is completed, the ground cover shall not be less than required to control erosion. If the area is not developed for industrial/commercial use within two (2) years of regrading, ground cover must have a density of seventy percent (70%), at a ninety (90%) statistical confidence level and not be less than that required to control erosion." Additionally the proposed rule references Phase III release guidelines for industrial/commercial land uses.

At 10 CSR 40–3.120(6)(B)2.H and 10 CSR 40–3.270(6)(B) 2.H, the State

proposes to require that "For areas to be developed for residential land use less than 2 years after regrading is completed, the vegetative ground cover shall not be less than required to control erosion. If the area is not developed for residential use within 2 years of regrading, ground cover must be equal to a density of 70-percent, at a 90-percent statistical confidence level." Additionally the above proposed rule references Phase III release guidelines for public services land use.

The Federal regulations at 30 CFR 816.116(b)(4) and 817.116(b)(4) require "For areas to be developed for industrial, commercial, or residential use less than 2 years after regrading is completed, the vegetative ground cover shall not be less than that required to control erosion."

Missouri's proposed rules at 10 CSR 40-3.120(6)(B)2.B and 10 CSR 40-3.270(6)(B)2.B require that at a minimum the vegetative ground cover shall not be less than that required to control erosion regardless of whether the area will be developed for industrial/commercial land use within the 2 years after regrading. Missouri's proposed rules at 10 CSR 40-3.120(6)(B)2.H and 10 CSR 40-3.270(6)(B)2.H require that at a minimum the vegetative ground cover shall not be less than that required to control erosion if the area will be developed for residential land use within 2 years after regrading. If the area will not be so developed within 2 years after regrading, however, Missouri's proposed rule would impose a 70-percent ground cover density test.

The Director finds the proposed rules, to the extent that they require ground cover to control erosion in areas to be developed in less than 2 years for industrial, commercial, and residential land uses, are no less effective than the Federal regulation requirements. Also, the requirement to control erosion for industrial/commercial land uses even if the land is not so developed upon 2 years after regrading provides additional clarification that the erosion control standard continues to apply should these uses take longer than 2 years to be developed. The Director is approving these proposed rule changes. However, the 70-percent ground cover requirement is less effective than the Federal requirements (see finding 22), also, the Phase III guideline document referred to in the proposed rules has not been approved (see Finding 20).

24. Standards of Success for Woodland, Wildlife Habitat, and Recreational Land Uses

At 10 CSR 40-3.120(6)(B)2.A, D, and G and 40-3.270(6)(B)2.A, D, and G, Missouri proposes success standards for woodland, wildlife, and recreational land uses. In general, the State would require that success in revegetation shall be determined on the basis of ground cover and tree and shrub count, or stocking, or in the case of wildlife habitat, half-shrub stocking. The success standard for ground cover would be acceptable if a ground cover density of 70-percent is achieved for wildlife and recreational land uses. The success standard for tree and shrub stocking rate shall be determined on a specific permit basis with consultation and approval of the Missouri Department of Conservation.

Missouri's proposed rules lack counterpart requirements to the Federal regulations at 30 CFR 816.116(b)(3) (i) and (iii) and 817.816(b)(3) (i) and (iii) that provide for minimum stocking and planting arrangements to be specified on the basis of local and regional conditions and that vegetative ground cover not be less than that required to achieve the approved postmining land use. However, at 10 CSR 40-3.120(7) (C)2. and (C)3.C. and at 3.270(7) (C)2. and (C)3.C., are standards for tree and shrub stocking for woodland, wildlife, and recreational land uses, where the above Federal regulation requirements are provided. Therefore, Missouri's proposed rules that provide standards for success for woodland, wildlife, and recreational land uses when viewed in combination with its tree and shrub stocking standards, provide requirements that are no less effective than the Federal regulations at 30 CFR 816.116(b)(3) and 817.116(b)(3).

Missouri's proposed rules set a ground cover standard of 70-percent density and tree or shrub stocking for wildlife and recreational land uses. The 70-percent ground cover standard has previously been found to be less effective than the Federal regulation requirements.

The Director is approving Missouri's proposed changes at 10 CSR 40-3.120(6) (B)2.A, D, and G and 40-3.270(6) (B)2.A, D, and G, with the exception of the 70-percent ground cover standard for the reasons discussed at Finding 22 of this notice.

25. Specific Revegetation Standards for Pasture Land Use

At 10 CSR 40-3.120(6)(B)2.E and 40-3.270(6)(B)2.E, the State proposes that "Ground cover and production shall be considered acceptable if they are at least ninety percent (90%) of the approved success standard * * *. The success standard for ground cover shall be ninety percent (90%) density."

The Federal regulations at 30 CFR 816.116 and 817.116 require:

(a) Success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of Section 816.111.

(1) For areas developed for use as grazing land or pasture land, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority.

The State has not shown that the proposed vegetative ground cover density standard of 90-percent will in all cases achieve the postmining land use and that ground cover success will be judged on the extent of cover compared to the cover occurring in natural vegetation of the area. Therefore, the Director finds that the proposed State standard for pasture is less effective than the Federal regulations and is not approving the proposed change. Missouri is required to substantiate its basis for the 90-percent cover standard or otherwise amend its program to be no less effective than the Federal regulation requirements at 30 CFR 816.116 (a) and (b) and 817.116(a) and (b) when setting success standards.

26. Tree and Shrub Stocking for Woodland, Wildlife Habitat, and Recreation Land Uses

a. Minimum Stocking and Planting Arrangements

At 10 CSR 40-3.120(7) (C)2. and 3-270(7) (C)2., Missouri requires that minimum stocking and planting arrangements shall be based on local and regional conditions and on recommendations from the Missouri Department of Conservation (MDOC). It proposes to modify this rule by removing "and on recommendations" and in place require "after consultation and approval" by MDOC.

The Federal regulations at 30 CFR 816.116(b)(3)(i) and 817.116(b)(3)(i) require that minimum stocking and planting arrangements be established after consultation with and approval by the State agencies responsible for administration of forestry and wildlife programs. Therefore, Missouri's proposed modification is no less effective than the Federal program requirements. However, Missouri's current rule also requires that in establishing the stocking density for trees, shrubs, half-shrubs, and ground cover, the revegetated area shall approximate the stocking and ground cover on the reference area and that the

stocking of live woody plants shall be equal to or greater than 90-percent of the stocking of woody plants of the same life form on the reference area. The use of reference areas with regard to tree and shrub stocking standards is not prohibited by the Federal regulations so long as the reference area reflects the stocking and planting arrangements established in consultation with and approved by appropriate State agencies. Since Missouri does require approval by the MDOC, the Director is approving the State's use of reference areas to establish stocking of trees, shrubs, half-shrubs, and woody plants for woodland, wildlife habitat, and recreational land uses.

b. Revegetation Success for Bond Release

At 10 CSR 40–3.120(7)(C)3.A. and 3.270(7)(C)3.A., Missouri currently requires that the revegetation standard for woody plants on the revegetated site be equal to or greater than 90-percent of the stocking of live woody plants of the same life form of the approved reference area with 80-percent statistical confidence. Missouri proposes to revise its rule to change from an 80-percent statistical confidence to a 90-percent statistical confidence and add the requirement that at the time of bond release, at least 80-percent of the trees and shrubs used to determine success shall have been in place for 60-percent of the applicable minimum period. The Federal regulations at 30 CFR 816.116(b)(3)(ii) and 817.116(b)(3)(ii), also require that 80-percent of the trees and shrubs used to determine success to be in place 60-percent of the applicable minimum period. Missouri's proposed requirements are no less effective than the Federal requirements for bond release and the Director is approving the proposed change.

27. Removal of Sedimentation Ponds and Diversions

At 10 CSR 40–3.120(8)(A)4 and 3.270(8)(A)4, Missouri proposes to modify its regulations that address reclamation of sediment ponds and diversions. As amended, the regulations require, among other things, that sediment ponds and diversions that are no longer needed for control of sediment shall be graded, topsoiled, and seeded within 18 months after approval of the phase II liability release of "all disturbed areas within the watershed they serve."

The Federal regulations at 30 CFR 816.46(b)(5) and 817.46(b)(5) require "Siltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than 2 years after the last augmented seeding." The Federal regulation at 30 CFR 800.40(c)(2) requires at the completion of phase II "No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release is applicable are contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements set by section 515(b)(10) of the Act and by subchapter K of this chapter." Federal regulations at 30 CFR 816.43(a)(3) and 817.43(a)(3) require "Temporary diversions shall be removed when no longer needed to achieve the purpose for which they were authorized. The land shall be restored in accordance with this part. Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as necessary, to prevent overtopping or failure of the facilities." Federal regulations at 30 CFR 816.56 and 817.56 address rehabilitation of sedimentation ponds, diversions, impoundments, and treatment facilities before abandoning a permit or seeking bond release.

The Federal regulations do not provide for the specific time frame requirement of 18 months for removal and reclamation of sediment ponds and diversions upon approval of phase II bond liability release, as proposed by Missouri. However, since Missouri's approved program contains similar requirements to the above cited Federal regulations, and since those counterpart regulations must be met for "all disturbed areas within the watershed they serve" before the removal of siltation structures could take place, the Director finds that Missouri's proposed modification adds clarity to the administration of its program and is not inconsistent with the Federal program requirements and is approving the proposed change.

28. Extension for Meeting Revegetation Success

At 10 CSR 40–3.120(8)(A)9 and 3.270(8)(A)9, Missouri proposes to add the requirement that, if ground cover and tree and shrub density revegetation success is not demonstrated by the end of the 5 year responsibility period, then the period shall be extended year by year until the revegetation success standards are met. The Federal regulations at 30 CFR 816.116(c)(2) and 817.116(c)(2) are silent on the extension of the responsibility period in order to allow an operator to prove meeting revegetation success. However, the Federal regulations do set a revegetation success responsibility period of not less than 5 full years after any augmentative procedure except for a husbandry practice that is approved by the regulatory authority and OSM. The Missouri rules at 10 CSR 40–3.120(6)(B)1 and 3.270(6)(B)1. also provide these same requirements. Thus, under the Missouri program, an operator who engages in augmentative practices must restart the full 5 year responsibility period and cannot take advantage of the year-by-year extension provision. The Director, therefore, finds that Missouri's proposed rule is not inconsistent with and no less effective than the Federal program requirements and is approving the proposed change.

29. Postmining Land Use on Previously Mined Land

At 10 CSR 40–3.130(2)(A) and 3.300(2)(A), Missouri requires that the postmining land use for land previously mined and not reclaimed be judged on the basis of the uses which it was capable of supporting prior to any mining or a higher or better use that can be achieved. The State proposes to change the phrase "a higher or better" use to "the highest and best" use. It also proposes to add the requirement that the highest and best use must be compatible with the surrounding area and "does not require the disturbance of areas previously unaffected by mining."

The Federal regulations at 30 CFR 816.133(b) and 817.133(b) requires that postmining land use for previously mined land not reclaimed be judged on the basis of the land use that existed prior to mining. If the land cannot be reclaimed to the use that existed prior to mining, then the postmining land use would be judged on the basis of the highest and best use that can be achieved which is compatible with the surrounding area and does not require the disturbance of areas previously unaffected by mining. The Missouri rule differs from the Federal requirement in that it would: (1) Base postmining land use on the uses the land was capable of supporting prior to any mining rather than a single use that existed prior to mining and (2) allow the option of providing uses it was capable of supporting or the highest and best use that can be achieved, whereas the Federal regulations do not allow highest and best use that can be achieved unless it is first established that the existing use prior to mining cannot be achieved.

Missouri's requirement to base the postmining use on the uses the land was capable of supporting prior to mining, in

effect poses the same standard as required on land that has not been previously mined. Its option "or the highest and best use that can be achieved" will assure that postmining land use on previously mined land that has not been reclaimed will be optimized to the extent possible.

The Director finds Missouri's proposed rules at 10 CSR 40–3.130(2)(A) and 3.300(2)(A) are no less effective than the Federal regulation requirements at 30 CFR 816.133(b) and 817.133(b) and is approving the changes.

30. Public Facilities Land Use

At 10 CSR 40–3.130(3)(C) and 3.300(3)(C), Missouri proposes to amend its requirements regarding the approval of alternative postmining land uses. Specifically, Missouri proposes to change the requirement regarding public facilities. As amended, the regulations at 10 CSR 40–3.130(3)(C) and 3.300(3)(C) require that "for public facilities, the operator demonstrates a reasonable likelihood of sustaining higher or better use." The Federal regulations at 30 CFR 816.133 and 817.133 do not provide for this specific requirement regarding public facilities. However, at 816.133(c)(1) and 817.133(c) (1), the Federal regulations do require that "[t]here is a reasonable likelihood for achievement of" a proposed alternative postmining land use before it can be approved. The Federal requirement applies to all alternative postmining land uses and is not limited to public facilities. The Missouri program contains a similar requirement at 10 CSR 40–3.130(3)(B) and 3.300(3)(B). Those provisions require, among other things, that specific plans must be prepared and submitted to the director of the Missouri program that show the feasibility of the proposed alternative postmining land use. Since other areas of Missouri's regulations at 10 CSR 40–3.130 and 3.300 require similar criteria to those set forth in the Federal regulations, the proposed provision does not render the Missouri program less effective than the Federal regulation requirements. The Director is approving Missouri's proposed change.

31. Commitment to Cropland Use

At 10 CSR 40–3.130(3)(I) and 40–3.300(3)(I), Missouri proposes to amend its requirements regarding approval of an alternative postmining land use where the proposal is to change a premining land use of range, fish and wildlife habitat, forest land, hayland or pasture to a postmining land use of cropland. Specifically, Missouri proposes to delete the need for a written commitment by the operator, landowner, or land manager to provide sufficient crop management after release of performance bonds to assure that the postmining cropland land use remains practical and reasonable.

The Federal regulations at 30 CFR 816.133(c) and 817.133(c) require consultation with the landowner or land management agency having jurisdiction over the lands before approval by the regulatory authority of an alternative postmining land use. Missouri's removal of the language "that the proposed postmining cropland land use remains practical and reasonable" corresponds to 30 CFR 816.133(c)(3)(i) and 817.133(c)(3)(i) "the use will not be impracticable and unreasonable." Missouri's program provides for such provision at 10 CSR 40–3.130(3) and 40–3.300(3), thus the criteria for alternative land uses at 30 CFR 816.133(c) and 817.133(c) must be met. Additionally, at Section 515(b)(2) of SMCRA, is a requirement that the regulatory authority issue a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan. The Missouri program also has this requirement at 10 CSR 40–6.070(8)(L). Thus, deletion for the need of a written commitment by the operator, landowner, or land manager to provide sufficient crop management after the release of performance bond, does not hinder Missouri's ability to make written findings for long term intensive agricultural postmining land use in accordance with 10 CSR 40–6.070(8)(L).

Since Missouri's regulations at 10 CSR 40–3.130, 40–3.300, and 40–6.070(8)(L) require additional justification similar to the Federal requirements for the alternative land use, as a cropland land use, the Director finds that Missouri's proposed deletion does not render its program any less effective than the Federal program requirements and is approving the deletion.

32. Roads—Class 1—General

At 10 CSR 40–3.140(1)(A), Missouri proposes to add requirements for its class I roads to control " * * * or prevent erosion; siltation; the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed Class I road surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed Class I road surfaces in accordance with current, prudent engineering practices; and water pollution and damage to public or private property." The Federal regulations at 30 CFR 816.150(b)(1) provide for the same requirements with one exception. The Federal regulations require control and prevention of air pollution attendant to erosion from not only road dust but from dust occurring on all exposed surfaces. The proposed State rule requires control only on exposed road surfaces for Class I roads and is therefore more limiting and may not include all other surfaces exposed in connection with construction, use, reconstruction, maintenance, or reclamation of the road.

The Director finds the proposed State regulation is no less effective than the Federal regulations with the exception that it limits "dust control" to only "exposed road surfaces." The Director is approving Missouri's proposed rule but is requiring the State to further amend its rule to require that dust control include "other exposed surfaces."

33. Covering Coal and Acid- and Toxic-Forming Materials

At 10 CSR 40–3.260(3)(A)1, the State proposes to require that "[e]xposed coal seams, acid- and toxic-forming materials and combustible materials exposed, used, or produced during mining shall be adequately covered with nontoxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with 10 CSR 40–3.040, to prevent sustained combustion and to minimize adverse effects on plant growth and the approved post-mining land use." The counterpart Federal regulation at 30 CFR 817.71(e)(5) provides for substantively similar requirements. It is noted however, that the State has incorrectly cited its own surface mining regulations. The citation given as 10 CSR 40–3.040 should be 10 CSR 40–3.200 in order to apply to the underground mining requirements for protection of the hydrologic balance.

The Director finds that the incorrect cross-reference does not render the proposed rule less effective than the Federal regulations and is approving it. However, with this rule notice, the Director is notifying Missouri of the reference error at 10 CSR 40–3.260(3)(A)1 and the need to correct the citation error from 10 CSR 40–3.040 to 10 CSR 40–3.200.

34. Prime Farmland Reference Crop Selection

At 10 CSR 40–4.030(7)(B)6, Missouri proposes to delete existing language that addresses prime farmland crop reference selection and replace it with:

The reference crop on which restoration of soil productivity is proven shall be selected from the crops most commonly produced on the surrounding prime farmland. Where row

crops are the dominant crops grown on prime farmland in the area, the row crop requiring the greatest rooting depth shall be chosen as one of the reference crops for one of the (3) three years. If hay is the most commonly grown crop, then the second most commonly grown crop will be used. In the other two (2) years, other commonly grown crops on prime farmland within the county will be used."

The counterpart Federal regulations at 30 CFR 823.15(b) (3) and (6) provide for the same general requirements. However, the Federal regulations do not require substitution of the second most commonly grown crop for hay. Nor do the Federal regulations provide that the crop with the greatest rooting depth need only be used for 1 year of the 3 year productivity test. The May 12, 1983, preamble to the Federal regulations on prime farmland (48 FR 21446, 21459 and 21460) clarified that the use of hay crops in rotation with row crops could be used for proving soil productivity and therefore more than one reference row crop or hay crop could be used for the 3 year proof period. Based on the above, the Director finds that Missouri's proposed revision of its rule is no less effective than the Federal regulation requirements and is approving the proposed change.

35. Definition of "Valid Existing Rights"

At 10 CSR 40–5.010(1)(A), Missouri proposes to modify its definition of "valid existing rights" (VER). At subsection (1)(A)1, the definition now reads

(A) [VER] means—

1. Except for haul roads,

A. Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which authorizes the applicant to produce coal by a surface coal mining operation; and

B. The person proposing to conduct surface coal mining on such lands either—

(I) Had been validly issued on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or * * *.

At subsection (1)(A)1.A., the State proposes to delete the phrase "which authorizes the applicant to produce coal by a surface coal mining operation" and in its place add "legally binding under Missouri statutes and Missouri case law entitling one to mine coal in this state."

Additionally, at subsection (1)(A)1.B.(I), Missouri proposes to revise the provision to read:

On or before August 3, 1977, had been validly issued or made a good faith effort to obtain all state and federal permits necessary to conduct such operations on those lands; or * * *.

OSM first defined VER in its original promulgation of permanent program regulations on March 13, 1979. See 44 FR 14991–14996, 15342. The existing Missouri definition for VER is virtually identical to OSM's original definition for the term. OSM's original definition for VER was judicially challenged and was subsequently remanded by the United States District Court for the District of Columbia. See In Re: Permanent Surface Mining Regulation Litigation, 14 ERC 1083, 1090–1092 (D.D.C. 1980). The court indicated that "a good faith attempt to obtain all permits before the August 3, 1977, cut-off date should suffice for meeting the all permits test." *Id.* at 1091. To comply with the court's 1980 opinion, OSM suspended the definition of VER only insofar as it required all permits to have been obtained prior to August 3, 1977, in order to establish VER (45 FR 51547, 51548, August 4, 1980). The 1980 suspension notice stated that, pending further rulemaking, OSM would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.

Thereafter, on September 14, 1983, OSM promulgated a new definition for VER, which relied upon a general "takings" standard (48 FR 41312). The 1983 VER definition, however, was also remanded by the United States District Court for the District of Columbia. See In Re: Permanent Surface Mining Regulation Litigation, 22 ERC 1557 (D.D.C. 1985). The court found that the promulgation of the 1983 VER definition violated requirements of the Administrative Procedure Act, 5 U.S.C. 553–706, and remanded the definition to the Secretary for proper notice and comment. *Id.* at 1564.

On July 18, 1991, OSM published notice of a proposed rulemaking to define VER (56 FR 33152). To date, however, OSM has not promulgated a new VER definition. Thus, in order to make a determination of whether the proposed Missouri definition of VER is legally sufficient, OSM must compare the proposed Missouri definition with SMCRA's provisions for VER. Section 522(e) of SMCRA prohibits or limits surface coal mining operations on or near certain private, Federal and other public lands, subject to VER and except for those operations which existed on August 3, 1977. SMCRA does not define "VER," but the legislative history indicates that the VER provision was included to avoid takings of property without just compensation in violation of the Fifth Amendment of the United States Constitution. As outlined above, OSM has promulgated two different definitions for VER, neither of which survived judicial challenge.

Missouri's proposed definition is very similar to OSM's 1979 definition, as modified by the United States District Court for the District of Columbia. That is, under the Missouri definition, as revised, VER is determined, not upon a general "takings" test, but upon a more mechanical test which considers whether the applicant had property rights in existence on August 3, 1977, and additionally, considers whether the applicant had obtained all permits necessary to conduct surface coal mining operations on the lands. The proposed Missouri definition, as revised, allows an applicant to meet the "all permits" test if the applicant had made a good faith effort to obtain all necessary permits prior to August 3, 1977. Thus, the proposed Missouri definition is consistent with the 1980 court opinion. Accordingly, the Director finds that the proposed Missouri definition is not inconsistent with SMCRA, as interpreted by the United States District Court for the District of Columbia. The Director is approving the proposed definition of VER. Once OSM finally promulgates a new VER definition, if necessary, it will notify Missouri of any required amendments to the Missouri program in accordance with 30 CFR part 732.

36. Definition of "Public Road" for Areas Unsuitable for Mining

At 10 CSR 40–5.010(1)(J), Missouri proposes to define a public road to mean "any thoroughfare open to the public which has been, and is being used by the public for vehicular travel; which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction and which meets road construction standards for other public roads of the same classification in the local jurisdiction."

Missouri's definition of a public road is similar to the Federal definition at 30 CFR 761.5 with one exception. The Federal definition additionally contains the provision "for which there is substantial (more than incidental) public use." Missouri's lack of this requirement will result in the potential for more roads being designated as public roads than might have been under the Federal definition.

The Federal regulation at 30 CFR 730.11(b) provides that any State law or regulation that allows for more stringent land use and environmental controls shall not be construed to be inconsistent with SMCRA. Therefore, the Director

finds that Missouri's proposed amendment is not inconsistent with the Federal program and is approving Missouri's proposed change.

37. Identification of Interests: Violation Information Format

At 10 CSR 40–6.030(1)(I) and 40–6.100(1)(I), Missouri proposes to require that ownership and control and violation information be submitted in a format prescribed by the director of the Missouri Land Reclamation Commission. The Federal regulation at 30 CFR 778.13(j) require that a permit applicant submit the information in a format prescribed by OSM. As discussed in the preamble (54 FR 8982, 8985, March 2, 1989), a format prescribed by OSM is necessary to insure data accuracy and consistency on a nationwide basis, for OSM's "Applicant Violator System." The Director finds that the proposed State rule at 10 CSR 40–6.030(1)(I) and 6.100(1)(I) would allow a State format that is less effective than the Federal requirements and is not approving the proposed regulation. Missouri is required to amend its program to be no less effective than Federal requirements.

38. Compliance Information

At 10 CSR 40–6.030(2)(C) and 6.100(2)(C), Missouri requires an operator to list violations of any law, rule of the United States or of any State law, rule enacted pursuant to Federal law, rule, or any provision of the act pertaining to air or water environmental protection.

The counterpart Federal regulation at 30 CFR 778.14(c), requires a similar listing of violations with one exception. The Federal regulations include any violation of SMCRA, regardless of whether the violation pertains to air or water environmental protection. Missouri retains the phrase "or of any provision of the act" immediately before the phrase "pertaining to air or water environmental protection" (see emphasis above). At 10 CSR 40–6.010(1)(A)3, Missouri defines "Act" to mean SMCRA. The Director notes that the term Act, as used in 30 CFR 778.14(c) and section 510(c) of SMCRA includes SMCRA, its implementing Federal regulations, and all State and Federal programs approved under SMCRA. See 48 FR 44389, September 28, 1983. Thus, the Director interprets Missouri's use of the term Act at proposed 10 CSR 40–6.030(2)(C) and 6.100(2)(C) to have the same meaning. Missouri's proposed rule appears to limit any violation of SMCRA to those pertaining to air or water quality environmental protection.

The Missouri regulation is more limiting than the Federal regulations with regard to violations that need to be listed and therefore, the Director is not approving it. Missouri is required to amend its regulation in a manner that is no less effective than the Federal regulation requirement.

39. Certification of Roads

At 10 CSR 40–6.050(17)(B) and 6.120(15)(B), Missouri proposes to require that Class I and II road plans and drawings be certified by a qualified registered professional engineer or a qualified registered professional land surveyor. The Federal regulations at 30 CFR 780.37(b) and 784.24(b) provide for the same general requirement. However, before the Director can approve certification by a land surveyor, Missouri must submit proof of the ability for a land surveyor to carry out such design activity under State law, 53 FR 45190, 45196 (November 8, 1988). The Director is approving Missouri's proposed rule as no less effective than the Federal requirements except for the provisions that allows land surveyors to also prepare and certify plans and drawings.

40. Prime Farmland

At 10 CSR 40–6.060(4)(E)5, Missouri proposes to add a requirement that "The aggregate total prime farmland acreage has not decreased from that which existed prior to mining." The Federal regulations at 30 CFR 785.17(e)(5) contains this same requirement, but additionally requires that "Water bodies, if any, to be constructed during mining and reclamation operations must be located within the postreclamation nonprime farmland portions of the permit area. The creation of any such water bodies must be approved by the regulatory authority and the consent of all affected property owners within the permit must be obtained."

At 10 CSR 40–4.030, the Missouri rule provides requirements for "Operations on Prime Farmland." Specifically, (4)(A) of that rule requires approval of water bodies by the Missouri Land Reclamation Commission and the consent of all affected property owners within the permit area. The rule also requires that the water bodies will not result in an aggregate loss of prime farmland. Therefore, the Missouri rules, in combination, are no less effective than requirements of the Federal regulation and the Director is approving the proposed change at 10 CSR 40–6.060(4)(E)5.

41. Definition of Irreparable Damage

At 10 CSR 40–6.070(1)(B), Missouri proposes to modify its definition of "irreparable damage to the environment." That term is now defined as "any damage to the environment that cannot be or has not been corrected by actions of the applicant." Missouri proposes to amend the definition by deleting the phrase "or has not been."

The Federal regulation definition of the same term at 30 CFR 701.5 does not contain the phrase "or has not been" and provides for essentially the same requirements with the exception that the Federal definition limits consideration of damage to the environment to damage that is in violation of the Act, the regulatory program, or this chapter. Since Missouri's definition does not limit the consideration of environmental damage to only those incidents that are in violation of their Act or regulatory program, the State is more inclusive in what it would consider needs to be addressed as a violation. The Director therefore finds that Missouri's definition is not inconsistent with and no less effective than the Federal requirement and is approving Missouri's proposed change.

42. Review of Violations in Permit Applications

At 10 CSR 40–6.070(7)(C) and (7)(C)2., Missouri proposes to add new requirements that address the counterpart Federal regulation requirements for the review of violations prior to issuing a permit at 30 CFR 773.15 (b)(1) and (b)(1)(ii). The language proposed by Missouri is substantively the same as the Federal language including its requirement at (7)(C) that states "[I]n the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to 10 CSR 40–8.030(7) or under a federal or state program has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation, * * *" and at (7)(C)2. that states "* * * and is presently pursuing in good faith, a direct administrative or judicial appeal to contest the validity of the current violation." The presumption that a notice of violation is being abated was an issue in *National Wildlife Federation* v. *Lujan*, Civ. Nos. 88–3117, *et seq.* (consolidated, D.D.C. filed October 27, 1988). During that proceeding, the Secretary of the Interior expressed the intention to reconsider the issue of whether, in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of

violation has been or is being corrected, as set forth in the Federal regulation (Memorandum of Points and Authorities In Support of the Federal Defendants' Cross-Motion For Summary Judgment and In Opposition to Plaintiffs' Motions For Summary Judgment, pp. 89–90). The Director is approving Missouri's proposed rule at 10 CSR 40–6.070(7)(C) and (7)(C)2., however, pending final resolution of the reconsideration currently being pursued by the Secretary regarding the Federal regulation at 30 CFR 773.15(b)(1), the Director defers action on that portion of Missouri's proposed regulation at 10 CSR 40–6.070(7)(C) that addresses the presumption discussed above.

43. Improvidently Issued Permits

At 10 CSR 40–6.070(11) (A) and (B), Missouri proposes to add regulations that address improvidently issued permits. The proposed requirements are substantively the same as the Federal regulation requirements at 30 CFR 773.20 and 773.21 with one exception. Missouri proposes to add a regulation at subsection (11) (A) 1 to require that "[w]here the director improvidently issued a surface coal mining and reclamation permit, he or she shall review the circumstances under which the permit was issued * * *" The Federal regulation at 30 CFR 773.20(a) requires the regulatory authority to review the circumstances under which a permit was issued whenever the regulatory authority "has reason to believe that it improvidently issued a surface coal mining and reclamation permit." The "reason to believe" standard does not require review of all permits on a regular basis but only a particular permit if there is reason to believe it was improvidently issued, as outlined in the April 28, 1989, Federal Register (54 FR 18437, 18439). The State must conduct the applicable review whenever it has "reason to believe," or it discovers, that a permit has been improvidently issued.

The Director finds that the proposed regulations at 10 CSR 40–6.070(11) (A) and (B), are no less effective than the Federal counterpart regulations at 30 CFR 773.20 and 773.21 and is approving the proposed changes. However, Missouri is required to further amend 10 CSR 40–6.070(11)(A) to incorporate the "reason to believe" standard as the triggering event which requires the regulatory authority to review the circumstances under which a permit was issued.

44. Fish and Wildlife Information—Underground Mining

At 10 CSR 40–6.110(11)(A) and 6.120(12)(A), Missouri proposes to add the requirements that fish and wildlife information and the enhancement plan will be consistent with the Endangered Species Act of 1973 as amended as well as the Missouri statute at RSMo section 444.855.2(17), that requires control or prevention of damage to fish and wildlife in access road locations, and the Missouri rule at 10 CSR 40–3.040(17), that addresses sedimentation pond postmining rehabilitation; and 10 CSR 40–3.100, that provides performance standards and enhancement for fish and wildlife.

The Federal regulation at 30 CFR 784.21(a) also requires that these same general considerations be afforded. However, the Federal regulation additionally requires identification of those species or habitats protected by similar State statutes. In this same rulemaking effort Missouri is proposing to add at 10 CSR 40–6.100(11)(E)1. (fish and wildlife resource information requirements), the requirement that "* * * site specific resources contain those species or habitats protected by Missouri as listed in the current publication of Rare and Endangered Species of Missouri * * *." Additionally, the fish and wildlife plan requirements at 10 CSR 40–6.120 (12)(C), references the need to consider information obtained per 10 CSR 40–6.110(11) as well as the Missouri Natural Features Inventory, therefore, appropriate consideration should be afforded to species or habitats protected by State statutes.

The Director finds that Missouri's proposed changes are no less effective than the Federal program requirements and is approving the proposed change. Also with this rule notice the Director is notifying Missouri of the apparent reference error to 10 CSR 40–3.040(17), that addresses sedimentation pond rehabilitation, while the correct reference would appear to be 10 CSR 40–3.040(18) that addresses stream buffer zone requirements.

45. Self-bond Financial Information

At 10 CSR 40–7.011(5)(D)2.C. (II) and (III) Missouri proposes to change its requirement of current assets to current liabilities ratio's for self-bond tangible net worth and fixed assets from "one to two (1:2 times)" to "1.2 times (1.2:1)" and greater. The Federal regulations at 30 CFR 800.23(b)(3) (ii) and (iii) requires the same identical ratio.

The Director is approving Missouri's proposed change as being no less effective than the Federal requirements. The change also satisfies, in part, a required program amendment placed on Missouri's program at 30 CFR 925.16(g)(16) in a May 8, 1991, rulemaking action (56 FR 21281). That required amendment will be modified to reflect the above change.

46. Self-bond Indemnity Agreements

At 10 CSR 40–7.011(5)(D)5. A., B., and C., Missouri proposes to add language to its self-bond indemnity agreement requirements. Specifically at (5)(D)5.A., the requirement that the indemnity agreement shall be executed by all persons and parties who are bound by it, including the "corporate guarantor," has been changed to read a "parent corporate guarantor." This language change makes the State rule at 10 CSR 40–7.011(5)(D)5.A. identical to the counterpart Federal regulation at 30 CFR 800.23(e)(1).

The same State rule subpart continues with the requirement that if the applicant is a partnership, joint venture, or syndicate the agreement shall bind such partner or party who has a beneficial interest directly or indirectly in the applicant. Missouri proposes to change the word such to the. Federal regulations at 30 CFR 800.23(e)(3) contains identical language except the word each partner or party is used instead of such or the.

At (5)(D)5.B. Missouri then requires that "corporations applying for a self-bond *or* corporations guaranteeing a permit's self-bond shall submit an indemnity agreement * * *" (emphasis added). Federal counterpart regulations at 800.23(e)(2) require that corporations applying for a self-bond *and* parent and nonparent corporations guaranteeing an applicants self-bond shall both submit an indemnity agreement. The combination of Missouri's proposed change at (5)(D)5.A. and existing rule at (5)(D)5.B., appear to provide a potential conflict in the State requirements as to who needs to submit an indemnity agreement. The State rules do not specifically insure corporations applying for a self-bond *and* parent and non-parent corporations guaranteeing an applicant's self-bond will both submit an indemnity agreement, as is required by the Federal regulations.

Missouri also proposes changes at (5)(D)5. B. and C. that would require: an affidavit be submitted with the indemnity agreement attesting to its validity under applicable Federal and State laws; that the applicant, parent, or nonparent corporate guarantor be required to complete the approved reclamation plan or pay the regulatory

authority to complete the reclamation plan; and that the indemnity agreement shall operate as a judgment when under forfeiture.

The above added requirements to the Missouri program satisfy, in part, a required program amendment that was placed on the Missouri program at 30 CFR 925.16(g)(18) in a May 8, 1991, rulemaking action (56 FR 21299). The Director is approving the changes proposed by Missouri with the exception of, who is required to execute and submit an indemnity agreement, as discussed above. Missouri is required to amend its rule to provide for no less effective requirements than the Federal regulations at 30 CFR 800.23(e). The required program amendment at 30 CFR 925.16(g)(18) will be modified to reflect this decision.

47. Bond Requirements

At 10 CSR 40–7.011(5)(D)8, Missouri proposes to add the requirement that "immediate compliance with 10 CSR 40–3.150(4)" be taken when a cessation order is issued for failure to replace a self-bond in the event the criteria for self-bonding under the Missouri program are no longer satisfied due to a change in the financial conditions of the permittee or a third party guarantor. The State regulation at 10 CSR 40–3.150(4) requires that persons who cease operations reclaim all affected areas in accordance with the approved permit and plan.

The Federal regulations at 30 CFR 800.23(g) provide that if, at any time during the period when a self-bond is posted, the financial conditions of the applicant, parent or nonparent corporate guarantor change so that the criteria for self-bonding are no longer satisfied, the permittee must notify the regulatory authority immediately. In addition, the permittee must post an alternate form of bond in the same amount as the self-bond within 90 days. Finally, 30 CFR 800.23(g) provides that, if the permittee fails to post an alternate form of bond within 90 days, then the provisions of 30 CFR 800.16(e) shall apply. The Federal regulations at 30 CFR 800.16(e), in turn, require, among other things, that mining activities cease and that reclamation activities begin immediately, if an adequate replacement bond is not posted within 90 days.

The proposed State provision is substantively similar to the Federal provisions, with one exception. The Federal regulations at 30 CFR 800.16(e)(2) specifically provide that "[m]ining operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted." The Director finds that Missouri's proposed change at 10 CSR 40–7.011(5)(D)8 is no less effective than the Federal regulation requirements since reclamation must begin immediately upon the issuance of a cessation order and is approving the proposed change. However, the Director is requiring Missouri to further amend 10 CSR 40–7.011(5)(D)8 to include the requirement that, once a cessation order has been issued under the regulations, mining operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted.

48. Duration of Phase III Bond Liability

The State proposes at 10 CSR 40–7.021(1)(B)2 (previously subsection (1)(B)(3)), to require that the permittee may, on areas under Phase III liability or the 5 year responsibility period, use certain normal husbandry practices without causing the Phase III liability period or the 5 year responsibility period to be extended, if the permittee can demonstrate that: (1) Discontinuance of these measures after the liability period expires will not reduce the probability of permanent revegetation success; (2) the practices are normal husbandry practices within the region on unmined lands having land uses similar to the approved postmining land use of the area; and (3) the practices are necessary to prevent exploitation, destruction, or neglect of the resource and to maintain the prescribed level of use or productivity.

The State proposal goes on to specify certain practices that are deemed "normal husbandry practices." They include: application of pesticides; application of soil amendments equal to, or less than that recommended by the high management yield goals of the U.S. Soil Conservation Service, U.S.D.A.; subsoiling which occurs less than 2 feet below the surface and which does not remove the vegetation from the surface; burning; overseeding to maintain the approved composition of the stand; and tree planting and tree pruning. In addition, the State proposal provides that the repair of rill and gullies shall not cause the Phase III liability period to be extended when rill and gullies develop after the initiation of Phase III liability period and when the repair is restricted to the filling, grading and reseeding of the eroded portion of the area.

The Federal regulations at 30 CFR 816.116(c)(4) and 817.116(c)(4) provide that the regulatory authority may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from the Director in accordance with 30 CFR 732.17. The preamble for these Federal regulations (53 FR 34636, 34641 (September 7, 1988) provides that OSM will consider, on a practice-by-practice basis, the administrative record supporting each practice proposed by the regulatory authority as normal husbandry practices.

In the present amendment, Missouri has specified certain practices that it considers to be normal husbandry practices, but has not provided any supporting evidence to substantiate the use of each practice on a "practice-by-practice" basis. The regulatory authority is expected to demonstrate: (1) That the practice is the usual or expected state, form, amount, or degree of management performed habitually or customarily to prevent exploitation, destruction, or neglect of the resource and maintain a prescribed level of use or productivity of similar unmined lands; and (2) that the proposed practice is not an augmentative practice prohibited by section 515(b)(20) of SMCRA (53 FR 34636, 34641, September 7, 1988). Missouri has not made the required demonstration with regard to any of the specific practices, including the repair of rills and gullies, proposed in this amendment as normal husbandry practices.

The Director finds the proposed rules to be less effective than the Federal program and is not approving them. Missouri is required to demonstrate that each practice proposed, including rill and gully repair, is a normal husbandry practice and obtain OSM's approval before it can allow such practice to occur without restarting the liability period.

49. Phase I Bond Release Qualification

At 10 CSR 40–7.021(2)(A), Missouri proposes to add the requirement that "drainage control" must be completed, along with backfilling and grading, topsoiling, and initial seeding of the disturbed area, for an area to qualify for Phase I bond release. The Federal regulations at 30 CFR 800.40(c)(1) also requires, among other things, that drainage control be in place prior to Phase I bond release. The Director is therefore approving the proposed change. In a May 8, 1991, rulemaking action (56 FR 21281, 21294), the Director deferred a decision regarding Missouri's lack of drainage control requirement for its Phase I bond release. The Director now finds that with the addition of the requirement for drainage control, Missouri has satisfied the concern expressed in that rulemaking action.

50. Criteria and Schedule for Release of Reclamation Liability

At 10 CSR 40–7.021(2)(B)1, Missouri proposes to delete the provision that would allow an alternative erosion control practice as approved by the State director. Missouri also proposes to add a requirement that no further augmentation of the vegetation is necessary before an area qualifies for release of Phase II liability. Thus, as amended, 10 CSR 40–7.021(2)(B)1 would provide as follows:

An area shall qualify for release of Phase II liability when—

1. A permanent vegetative cover sufficient to control erosion is in place and no further augmentation of the vegetation is necessary * * *

The Federal regulations at 30 CFR 800.40(c)(2) do not allow for an alternative erosion control practice, instead they require that no bond shall be released so long as the lands to which the release would be applicable are contributing suspended solids to stream flow or runoff outside the permit area in excess of that required by the Act. Missouri's deletion of the alternative erosion control practice removes a discretionary provision not allowable under the Federal regulation.

Additionally the Federal regulations at 30 CFR 816.116(c)(1) and 817.116(c)(1) allow the period of extended responsibility for successful revegetation to begin after the last year of augmented seeding, fertilization, irrigation, or other work. This is the equivalent of the phase II bond release requirement. Therefore, the State's proposed language as a requirement for phase II bond release that "* * * no further augmentation of the vegetation is necessary," is not inconsistent with the Federal program requirements.

The Director is therefore approving the proposed deletion and added language changes to the Missouri regulation.

51. Termination of Jurisdiction

At 10 CSR 40–7.021(2)(B) 5 and 6, Missouri proposes to add new regulations that would provide when the State could terminate jurisdiction over a reclaimed site. The proposed language is substantively the same as the counterpart Federal regulation at 30 CFR 700.11(d).

The U.S. District Court for the District of Columbia found that the Federal regulations at 30 CFR 700.11(d) were contrary to sections 521 (a)(1) and (a)(2) of SMCRA (*National Wildlife Federation* v. *Lujan*, 31 ERC 2034 D.D.C. 1990). More specifically, the court interpreted sections 521 (a)(1) and (a)(2) as imposing an ongoing duty upon the Secretary of the Interior to correct violations of SMCRA. Accordingly, the court remanded the Federal regulations at 30 CFR 700.11(d) to the Secretary to be withdrawn or revised.

In response to the court's decision, OSM suspended the above Federal regulation on June 3, 1991 (56 FR 25036). This decision was appealed and the suspended rule was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *National Wildlife Federation* v. *Lujan*, 950 F.2d. 765 (D.C. Cir. 1991). The reinstatement of this rule was published in the Federal Register on April 10, 1992, and was effective on May 11, 1992 (57 FR 12461, 12463).

Missouri's rules proposed at 10 CSR 40–7.021(2)(B) 5. and 6. are substantively the same as the reinstated Federal rule. The Director therefore finds Missouri's proposed rules to be no less effective than the Federal rule at 30 CFR 700.11(d) and is approving them. However, Missouri has located this language under the phase II bond release requirements. The location of this proposed language leads to possible misinterpretation of the requirements for a phase II bond release and when termination of jurisdiction including written determinations are relevant. Therefore, the Director is requiring Missouri to relocate this language to an appropriate location in its regulations to clarify the intent of this language.

52. Bond Forfeiture

The proposed State rule at 10 CSR 40–7.031(3)(B), concerning bond forfeiture, contains requirements similar to the counterpart Federal regulations at 30 CFR 800.50(a)(2), with the exception that 30 CFR 800.50(a)(2)(ii) requires that, "except where the regulatory authority may approve partial release authorized under 30 CFR 800.40, no surety liability shall be released until successful completion of all reclamation under the terms of the permit including the applicable liability periods of 30 CFR 800.13."

The Director finds the proposed State rule to be no less effective than the Federal regulation and is approving the proposed changes. However, Missouri is required to further amend its regulation to provide for the requirements of 30 CFR 800.50(a)(2)(ii).

53. Definition "Prime Farmland"

At 10 CSR 40–8.010(1)(A)51.C, the State proposes to include the following definition of prime farmland as a category of land use: "Prime farmland means an area which has been historically used for crop production, as defined previously, and which has prime farmland soils as defined by the United States Department of Agriculture, Soil Conservation Service in 7 CFR part 657."

The State's definition is similar to the Federal definition of prime farmland at 30 CFR 701.5. At 10 CSR 40–8.010(1)(A)43, Missouri also defines "Historically used for cropland" in a manner similar to the Federal definition. The combination of the 2 definitions are no less effective than the Federal requirements. The Director is approving Missouri's proposed definition.

54. Definition of "Mine Plan Area"

At 10 CSR 40–8.010(1)(A)53, Missouri proposes to modify its definition of "mine plan area" to mean "the same as a permit area." In In re: Permanent Surface Mining Regulation Litigation, 14 ERC 1097, 1083, (D.D.C. 1980) the definition of "mine plan area" was remanded and use of the term suspended in the Federal regulations at parts 779, 780, 783, and 784. In a subsequent rulemaking action (August 4, 1980 (45 FR 51547, 51550)), OSM suspended the definition of the term "mine plan area" at 30 CFR 701.5 and clarified that the term "mine plan area" as used in parts 789, 780, 783, and 784 will be interpreted to mean "permit area." Although, the term mine plan area is no longer defined in the Federal regulations, the Director finds that Missouri's proposed definition is not inconsistent with the Federal program requirements and is approving the change.

55. Definition of "Dry Bulk Density"

At 10 CSR 40–8.010(1)(A)54., Missouri proposes to delete its definition of dry bulk density that is identical to the Federal regulation definition of "moist bulk density." The Federal regulations do not define dry bulk density and the moist bulk density term is no longer used in the Federal regulation. This term was used originally at 30 CFR 823.14(c) as a requirement to be met in soil replacement for prime farmland soils. In a May 12, 1983, rulemaking (48 FR 21446, 21457) the issue of soil compaction and use of bulk density for measurement of the soil compaction was discussed. It was concluded that the Soil Conservation Service (SCS) within each State will determine what constitutes proper compaction and whether or not bulk density will be the measure of soil density. In doing so, the term moist bulk density was removed from the regulations and instead, soil compaction and densities were used. The Federal definition of moist bulk density however, was retained in the Federal regulations at 30 CFR 701.5.

In view of the above, the Director finds that Missouri's deletion of the definition of dry bulk density at 10 CSR 40-8.010(1)(A)54. that is defined the same as the Federal term moist bulk density, does not render its program to be any less effective than the Federal program since moist bulk density is no longer specifically required in the prime farmland replacement criteria or anywhere else in the Federal regulations.

56. Definition of "Previously Mined Area"

At 10 CSR 40-8.010(1)(A)71, Missouri proposes to modify a previously proposed definition of previously mined area by deleting the phrase "surface coal mining law" and in its place adding "Act" so it now reads "land previously mined or disturbed to facilitate mining on which there were no surface coal mining operations subject to the standards of the Act."

The Federal regulations at 30 CFR 701.5 define previously mined areas in a similar manner. However, in the case of *National Wildlife Federation* v. *Lujan*, 733 F. Supp. 419 (D.D.C. 1990) the court remanded the definition of "previously mined area" to the Secretary as being inconsistent with SMCRA to the extent that it would (1) preclude the possibility that the date used to determine "previously" could be other than August 3, 1977; and (2) preclude the possibility that sites, once mined and fully reclaimed under State laws preceding SMCRA, could be subsequently remined and reclaimed to a lower standard. As discussed at length in a previous rulemaking action of this proposed rule (55 FR 45603, 45605, October 30, 1990), OSM has not suspended the definition. OSM may not, because of the court's remand, use the existing Federal definition in evaluating the sufficiency of Missouri's definition, but instead must base its evaluation upon consistency with the court's decision. As found before, the Director finds Missouri's proposed definition to be inconsistent with SMCRA as interpreted by the court, and is not approving it to the extent that it (1) provides or could be interpreted as providing that the reference date for "previously mined" is any date other than August 3, 1977, or (2) allow or could be interpreted as allowing lands which have once been fully and satisfactorily reclaimed to be remined and then only partially reclaimed.

The Director will pursuant to 30 CFR 732.17(d), notify Missouri of any regulatory changes needed for its rule at 10 CSR 40-8.010(1)(A)71. to make its program no less effective than the Federal program after OSM promulgates a new definition.

57. Inspection of Abandoned Sites

At 10 CSR 40-8.030(1) (F) and (G), Missouri proposes new regulations that would address inspection of abandoned mine sites. The counterpart Federal regulations are at 30 CFR 840.11 (g) and (h).

On August 30, 1990, in *National Wildlife Federation* v. *Lujan*, 31 ERC 2034, 21 ELR 20125 (D.D.C. 1990), the U.S. District Court for the District of Columbia found that the Federal regulations at 30 CFR 840.11 (g) and (h) conflict with the plain language of section 517(c) of SMCRA that provides for no exceptions to the requirement to conduct an average of one partial inspection per month and one complete inspection per calendar quarter for each surface coal mining and reclamation operation. Accordingly the court remanded the Federal regulations at 30 CFR 840.11 (g) and (h) to the Secretary to be withdrawn or revised.

In the June 3, 1991, Federal Register (56 FR 25036), OSM suspended the Federal regulations at 30 CFR 840.11 (g) and (h) to the extent that the definition of abandoned sites relate to inspection frequencies at those sites.

On December 10, 1991, the U.S. Court of Appeals upheld the district court's decision on frequency of inspections *National Wildlife Federation* v. *Lujan*, 950 F.2d. 765, 771 (D.C. Cir. 1991). In that action, the Secretary agreed that a minimum number of inspections was required by section 517(c) of SMCRA and expressed a desire to redefine "abandoned sites" to include only those sites where a permit has either expired or been revoked. No rulemaking action has been initiated on this desire.

Accordingly, OSM evaluated Missouri's proposed rules against the appropriate provisions of SMCRA as interpreted by the court. Based upon the court's finding that the Federal regulations at 30 CFR 840.11 (g) and (h) are inconsistent with section 517(c) of SMCRA, the Director finds that the Missouri's proposed rules at 10 CSR 40-8.030(1) (F) and (G), that are substantively identical to the Federal regulations, are less stringent than section 517(c) of SMCRA to the extent that they would limit required inspection frequency as discussed in the courts opinion above. Therefore the Director is not approving Missouri's proposed rule to the extent that they would afford an interpretation for providing less frequent inspections than required by section 517(c) of SMCRA. Missouri is required to remove its regulations at 10 CSR 40-8.030(1) (F) and (G) from its program.

58. Enforcement of Notices of Violation

Missouri proposes to revise its regulation at 10 CSR 40-8.030(7)(A), by specifically providing that the commission or the State director may modify, terminate, or vacate a notice of violation (NOV) for good cause and may extend the time for abatement of an NOV if the failure to abate within the time previously set was not caused by a lack of diligence.

The State proposal thus consists of two parts. First, the amendment specifically allows the commission or the State director to modify, terminate, or vacate an NOV "for good cause." The Federal regulations at 30 CFR 843.12 also allow for the modification, termination, or vacation of NOV's, but the Federal regulations set certain limitations upon the regulatory authority's discretion. For instance, with regard to the termination of NOV's, 30 CFR 843.12(e) requires an authorized representative of the Secretary to terminate an NOV by written notice to the permittee when the authorized representative determines that all violations listed in the NOV have been abated. Also, with regard to the vacation of NOV's, 30 CFR 843.18 provides, in part, that no cessation order or NOV may be vacated because of the inability to comply.

The Missouri program contains counterpart regulations to both 30 CFR 843.12(e) [10 CSR 40-8.030(7)(E)] and 30 CFR 843.18 [10 CSR 40-8.030(12)]. Thus, the State regulatory authority's discretion to modify, terminate, or vacate NOV's is subject to limitations similar to and no less effective than those of the Federal regulations.

The second part of the State proposal allows the commission or the State director to extend the time for abatement of an NOV if the failure to abate within the time previously set was not caused by a lack of diligence on the part of the person to whom it was issued. The Federal regulations at 30 CFR 843.12(c) allow an authorized representative of the Secretary to extend the time for abatement of an NOV under similar circumstances as those outlined in the State proposal. In addition, however, the Federal regulations, set specific limits on the availability and length of such extensions. The Missouri program provides for the same requirements and limitations at 10 CSR 40-8.030(7)(C). Therefore, to the extent the proposed regulation provides for allowing extensions of time to abate a NOV, it is duplicative of previously approved portions of the Missouri program.

However, the Director finds that the duplicative nature of this part of the proposal does not render the amendment less effective than the Federal regulations and is approving it. The Director notes that any extensions of time for abatement of an NOV granted by the commission or State director must comply with 10 CSR 40–8.030(7)(C).

The Director finds that the State's proposed rule at 10 CSR 8.030(7)(A) in combination with its other approved regulations is no less effective than the Federal requirements and is approving the proposed change.

59. Assessment of Separate Violations for Each Day

At 10 CSR 40–8.040(5)(B)3, the State proposes to limit the assessment of civil penalties by requiring that a penalty for the failure to abate a violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30 day period, the commission or the State director shall take appropriate action pursuant to RSMo 444.870.5 and .6 and 444.885.1 (4) and (5), RSMo (Supp. 1986) within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

The State's proposed revision is the same as the Federal counterpart regulation at 30 CFR 845.15(b)(2) except that the State has not correctly cited its statutes in relation to the corresponding provisions of SMCRA at section 521(a)(4) dealing with patterns of violation and unwarranted failure to comply and section 521(c) requesting the Attorney General to institute a civil action of relief. The comparable State citations should be 444.885.3 and 444.885.5, respectively.

The Director finds that the incorrect cross-references do not render the proposed State rule less effective than SMCRA and the Federal regulations and therefore, he is approving the proposed change. However, with this rule notice, the Director is notifying Missouri of the reference error at 10 CSR 40–3.260(3)(A)1, and the need to correct the citations of 444.885.1(4) to 444.885.3 and 444.885.1(5) to 444.885.5.

60. Procedures for Settlement Agreement Disapproval or Nonpayment

At 10 CSR 40–8.040(8)(K), the State proposes to require that if a settlement agreement is disapproved, or if the payment is not made within 30 days, the State director shall within 30 days refer the agreement to the Commission to enforce the agreement or rescind it and affirm, raise, lower, or vacate the penalty. The Federal regulations at 30 CFR 845.18(d)(2) provide that if full payment of the amount specified in the settlement agreement is not received by the office within 30 days after the date of signing, the Office may enforce or rescind the agreement and proceed according to paragraph (b)(3)(ii) within 30 days from the date of rescission. Pursuant to 30 CFR 845.18(b)(3)(ii), the conference officer is required to affirm, raise, lower, or vacate the penalty.

The proposed Missouri regulation differs from the Federal regulations in that the State would require the settlement agreement be sent back to the commission within 30 days if the commission did not approve the initial agreement, as well as if the settlement agreement were not paid. In addition, the State does not specify that the payment must be received within 30 days after the date the settlement agreement is signed, or that the act of the commission to affirm, raise, lower, or vacate the penalty must be within 30 days from the date of the rescission.

Missouri's process does afford that the same considerations are given regarding treatment of the settlement agreement and action if the payment is not received. The Director is, therefore, approving Missouri's proposed changes to its regulation at 10 CSR 40–8.040(8)(K) as being no less effective than the Federal regulation requirements at 30 CFR 845.18(d)(2). However, the Director is requiring Missouri to further amend their regulations to specify that the payment must be received within 30 days from the date the settlement agreement is signed and that the action of the commission to affirm, raise, lower, or vacate the penalty must be taken within 30 days from the date of rescission.

61. Exemption for Coal Extraction Incidental to the Extraction of Other Minerals

Missouri proposes new language at 10 CSR 8.070(2) regarding applicability and exemptions for extraction of coal incidental to the extraction of other minerals.

a. Reporting of Cumulative Production

At 10 CSR 40–8.070(2)(C)1.A.II, Missouri provides dates for required initiation of and continuance of annual reporting of cumulative production as follows:

(a) For mining areas where coal or other minerals were extracted prior to November 1, 1990, and every October 31 thereafter: or

(b) For mining areas where extraction of coal or other minerals commenced on or after November 1, 1990, the last day of the calendar quarter during which coal extraction commenced and each anniversary of that day thereafter:

The counterpart Federal regulations at 30 CFR 702.5(a)(2) require the dates of coal extraction prior to or after April 1, 1990, and every March 31, 1990, respectively. OSM recognizes that the effective dates for the above reporting requirements will vary from the Federal regulation dates depending upon when individual States receive approval of their rules. The Federal preamble (54 FR 52092, 52094, December 20, 1989), clarifies that the rules are not intended retroactively to bring under the Act activities that occurred prior to the effective date of this rule or the effective date of counterpart provisions of the State regulatory programs. Such activities would not qualify for an exemption under the standards of this rule even if they did qualify under previous standards. Such operations would legitimately have relied upon standards in place to qualify for the exemption.

Even though the proposed State rules were promulgated by Missouri on September 27, 1990, the Federal regulation at 30 CFR 732.17(g) provides that any changes to a State program are not enforceable by that State until approved by the Director. Therefore, the Director is not approving the initial and subsequent annual reporting dates proposed by Missouri at 10 CSR 40–8.070(2)(C)1.A.II and is requiring Missouri to amend its program to provide appropriate dates that provide reporting no earlier than the date this amendment is published in the **Federal Register** as a final rule.

b. Direct Enforcement

At 10 CSR 40–8.070(2)(C)9.F (I), (II), and (III), the State proposes to require: (1) In subsection (I), in part, that an operator shall not be cited for "violations of the commission" which occurred prior to the revocation of the exemption; (2) in subsection (II), in part, that an operator shall be subject to direct enforcement action for violations of the commission which occur during the period of such activities; and (3) in subsection (III), in part, that an operator shall comply with the reclamation standards of the commission with regard to conditions, areas, and activities existing at the time of revocation or denial.

The State's proposed regulations are similar to the Federal regulations at 30 CFR 702.17(d) (1), (2), and (3) with the exception that the Federal regulations also require that the operator be cited for violations of; subject to direct enforcement actions for violations of;

and comply with the reclamation standards of the regulatory program. Missouri would limit the above to their commission and thus not assure that all violations or reclamation standards of the Missouri program would be considered. The Director finds that to this extent the State's proposed rule is less effective than the Federal regulations, and is requiring Missouri to further amend its program to be no less effective than the Federal program requirements.

However, the Director is approving the remainder of Missouri's proposed rule at 10 CSR 8.070(2) with the following required editorial corrections. The first paragraph of 10 CSR 40-8.070(2)(C) refers to the "exemption contained in 444.815.6(3) * * *." the correct citation should read 444.815.6(4). At 10 CSR 40-8.070(2) (C)9.B Missouri has proposed language "this part or counterpart provisions of the state regulatory program." This part should be "this subsection" and the counterpart provisions should be "counter subsection provisions."

62. Provisions of the State Regulatory Program Affirmatively Disapproved to Comply With the Order of the District Court

In the Federal Register notice announcing the Department of the Interior's approval of Missouri's original program, the Secretary, at 30 CFR 925.10(b), affirmatively disapproved provisions of Missouri's program that, incorporated, suspended, or remanded Federal regulations (45 FR 77027, November 21, 1980). The affirmative disapprovals were based upon an order of the U.S. District Court for the District of Columbia that the Secretary "affirmatively disapprove * * * those segments of a State program that incorporate a suspended or remanded regulation" (In re: Permanent Surface Mining Regulation Litigation, 19 ERC 1477, 1500 (D.D.C. 1980).

On August 15, 1980, however, the court partly stayed its May 16, 1980, order and allowed the Secretary to approve State program provisions similar to remanded or suspended Federal regulations when the State adopted such provisions in a rulemaking or legislative proceeding that occurred before the enactment of SMCRA or after the date of the District Court decision (May 16, 1980), since such State rules clearly were not based solely upon the suspended or remanded Federal regulations. In addition, the court stated that the Secretary need not affirmatively disapprove provisions based upon suspended or remanded Federal regulations if a responsible State official requested the Secretary to approve them.

a. Affirmatively Disapproved Items in This Amendment

The Director finds the affirmatively disapproved items addressed in this proposed amendment, at 30 CFR 925.10(b) (1), (2), (3), (6), (8), (9), (11), (13), (14), (15), (16), (18), (19), (20), (24), (25), (28), (31), (32), and (33) are no longer necessary and he is removing them as follows:

(1) At 10 CSR 40-5.010(1)(A)1.B.(I), the definition of "valid existing rights," to the extent it does not allow recognition of such rights an operator may claim by having made a good faith effort to obtain all permits before 8/3/77 as stipulated by the courts decision (Refer to Finding number 35 of this rulemaking action).

(2) At 10 CSR 40-8.010(1)(A)47 (later recodified to (A)53.), the definition of "mine plan area," and the use of the term in Section 10 CSR 40-6.040 and 6.050 to the extent of the court's order regarding requirements of information outside the permit area (Refer to Finding number 54 of this rulemaking action).

(3) At 10 CSR 40-6.040(11) and 10 CSR 40-4.050(7), requiring a permit application to contain a study of fish and wildlife and to include a fish and wildlife reclamation plan (Refer to Finding number 2 of this rulemaking action).

(6) At 10 CSR 40-3.120(5), to the extent it requires an operator who proposes range or pasture as the postmining land use to actually use the land for grazing for the last 2 years of bond liability (Refer to Finding number 19 of this rulemaking action).

(8) At 10 CSR 40-3.120(6)(B), to the extent that it states that an operator's responsibility for successful revegetation is not commenced until the vegetation reaches 90-percent of the natural cover in the area (Refer to Findings number 19 through 31 of this rulemaking action).

(9) At 10 CSR 40-3.130 (3)(D) and (3) (I), to the extent it requires an operator to provide "letters of commitment" for proposed land use changes or for proposed cropland use (Refer to finding number 31 of this rulemaking action).

(11) At 10 CSR 40-3.040(2)(A) 1 and 7, to the extent they apply effluent standards to the reclamation phase of a surface coal mining operation (Refer to Finding number 5 of this rulemaking action).

(13) At 10 CSR 40-3.040(6)(B), concerning sediment storage volume in sediment ponds (Refer to Finding number 2 of this rulemaking action).

(14) At 10 CSR 40-3.040(6)(C), concerning detention time for water in sediment ponds (Refer to Finding number 7 of this rulemaking action).

(15) At 10 CSR 40-3.040(6)(D), to the extent it requires dewatering devices to have a discharge rate to achieve and maintain the theoretical detention time for sediment ponds (Refer to Finding number 8 of this rulemaking action).

(16) At 10 CSR 40-3.040(6)(H), concerning sediment removal from sediment ponds (Refer to Finding number 2 of this rulemaking action).

(18) At 10 CSR 40-3.080(3)(A), concerning coal processing waste banks, to the extent it precludes a possible exemption from the underdrain requirement where the operator can demonstrate that an alternative would ensure structural integrity of the waste bank and protection of water quality (Refer to Finding number 15 of this rulemaking action).

(19) At 10 CSR 40-3.090, concerning air resources protection, to the extent it applies to air pollution not caused by erosion (Refer to Finding number 18 of this rulemaking action).

(20) At 10 CSR 40-3.140(1)-(21), concerning performance standards for three classes of roads (Refer to Finding numbers 2 and 32 of this rulemaking action).

(24) At 10 CSR 40-3.130(2)(A), to the extent it does not allow restoration of lands to the conditions they were capable of supporting prior to any mining (Refer to Finding number 29 of this rulemaking action).

(25) At 10 CSR 40-5.101(2)(C) and 10 CSR 40-5.010(1)(F) [correct citation is 10 CSR 40-5.010(3)(F)1.], to the extent that they prohibit or restrict mining near places only eligible for listing on the National Register of Historic Places, and the words "or a statutory or regulatory responsibility for" in Section 10 CSR 40-5.010(1)(F) are disapproved. Both rules are disapproved to the extent that they apply to privately owned places listed on the National Register of Historic Places in addition to publicly owned places (Refer to Finding number 2 of this rulemaking action).

(28) At 10 CSR 40-3.110(3)(A)1, to the extent it does not provide operators the option of treating acid-forming and toxic-forming material in lieu of covering such materials (Refer to Finding number 2 of this rulemaking action).

(31) At 10 CSR 40-5.010(1)(j), the definition of "public road." (Refer to Finding number 36 of this rulemaking action).

(32) At 10 CSR 40-6.060(4)(A), concerning the prime farmland

grandfather clause (Refer to Finding number 2 of this rulemaking action).

(33) At 10 CSR 40–6.060(1)(B), to the extent that "or has not been" is no longer part of the definition of "irreparable damage to the environment." (Refer to Finding number 41 of this rulemaking action).

b. Affirmatively Disapproved Items in Previous Amendments

The Director also finds that Missouri has adequately addressed in previous submittals, the following affirmatively disapproved items at 30 CFR 925.10(b) (5), (7), (10), (12), (17), (22), (23), (26), (27), (29), (30), and (34) and that they are no longer necessary and he is removing them.

(5) At 10 CSR 40–7.040(4)(B), to the extent it allows the regulatory authority to forfeit and keep the entire amount of a bond where the entire amount is not needed to complete the reclamation.

Missouri addressed this issue in an Amendment submitted April 13, 1983 (Administrative Record No. 253) and approved by OSM on May 8, 1984 (49 FR 19468).

(7) At 10 CSR 40–4.030(1)(C), 10 CSR 40–4.030(5)(B), and 10 CSR 40–4.030(5)(C), to the extent they require an operator on prime farmland to actually return the land to crop production. (The requirement to grow crops was upheld, In re: Permanent Surface Mining Regulation Litigation, 21 ERC 1724, 15 ELR 20481 (D.D.C. October 1, 1984)

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(10) At 10 CSR 40–6.060(4)(B)3 and 10 CSR 40–4.030(4)(C), concerning excessive soil compaction.

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(12) At 10 CSR 40–3.040(2)(B) , relating to effluent standard exemptions during major storm periods.

Missouri addressed this issue in an amendment submitted on February 4, 1987, and approved by OSM on February 26, 1988 (53 FR 5766).

(17) At 10 CSR 40–3.050(4)(F), requiring special approval prior to blasting within 1,000 feet of certain buildings and 500 feet of other facilities and which restricts blasting at distances greater than 300 feet.

Missouri addressed this issue in an amendment submitted on June 22, 1987, and approved by OSM on June 16, 1988 (53 FR 22475).

(22) At 10 CSR 40–6.060(4)(A)8., to the extent that it requires prime farmland reclamation target yields to be based on estimated yields under a high level of management rather than a level of management equivalent to that used on prime farmlands in the surrounding area.

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(23) At 10 CSR 40–8.070(2) (E) 1A and 1B, relating to exemptions for existing structures to the extent that the exemptions are not mandatory after the appropriate findings are made.

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(26) At 10 CSR 40–7.020(2)(E)5.C., to the extent it requires cessation of operations upon the insolvency of a surety.

Missouri addressed this issue in an Amendment submitted on April 13, 1983, (Administrative Record No. 253.) and approved by OSM on May 8, 1984 (49 FR 19468).

(27) At 10 CSR 40–7.040(2)(C), to the extent that it limits bond liability to protection of the hydrologic balance.

Missouri addressed this issue in an Amendment submitted April 13, 1983, (Administrative Record No. 253.) and approved by OSM on May 8, 1984 (49 FR 19468).

(29) At 10 CSR 40–7.010(7)(D), to the extent that the exception the regulatory authority may grant might be from all of Section 216.

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(30) At 10 CSR 40–8.070(2)(B), concerning the 2-acre exemption, insofar as it applies to any operation by the person who affects or intends to affect more than 2-acres of physically unrelated sites within 1-year when the area affected at each site does not exceed 2-acres.

Missouri addressed this issue in an amendment submitted on December 14, and 18, 1987, and approved by OSM on October 31, 1988 (53 FR 43866).

(34) At 10 CSR 40–8.040, to the extent it imposes a civil penalty point system.

Missouri addressed this issue in an amendment submitted on June 22, 1987, and approved by OSM on June 16, 1988 (53 FR 22476).

c. Affirmatively Disapproved Items Remaining

The Director is removing all affirmatively disapproved items at 30 CFR 926.10(b) and as discussed above, except for item (b)(21). This item addresses the definition of "roads" that is used in Sections 10 CSR 40–3.140(1)–(21). Item 925.10(b)(21) will be recodified to item 925.10(b)(1) in this rulemaking action.

IV. Public and Agency Comments

1. Public Comments

OSM solicited public comment and provided opportunity for a public hearing on the proposed amendment. No public comments were received, and since no one requested an opportunity to testify at a public hearing, no hearing was held.

2. Agency Comments

Pursuant to Section 503(b) of SMCRA and 30 CFR 732.17(h)(11), comments were also solicited from various State and Federal agencies with an actual or potential interest in the Missouri program.

State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP) Comments

As required by 30 CFR 732.17(h)(4), OSM provided the proposed amendment to the SHPO and the ACHP for comment. The Missouri Division of Parks, Recreation, and Historic Preservation responded by stating that it had no objection to the proposed amendment (Administrative Record No. MO–523). No Comments were received from the ACHP.

Environmental Protection Agency (EPA) Concurrence

Under 30 CFR 732.17(h)(11), the Director is required to obtain the written concurrence of the Administrator of the EPA with respect to any provision of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The EPA Region VII responded by stating that it had no comment to offer (Administrative Record No. MO–527).

The EPA office in Washington D.C. responded by separate letter dated July 29, 1991 (Administrative Record No. MO–540). In that letter EPA concurred that Missouri's proposed amendments can be implemented consistent with the Clean Water Act (CWA). However, EPA expressed its concern that Missouri's rules should not be interpreted so as to provide full authorization for instream treatment of point source discharge. EPA noted certain situations related to instream treatment that could result in conditions that would not assure compliance with applicable State water quality standards as required by the

CWA. By instream treatment, EPA referred to two activities. The first activity is one in which mine waste is discharged into waters of the United States for the primary purpose of waste disposal but with the effect of fill. The second activity involves instream waste treatment impoundments. These impoundments are built in waters of the United States for the purpose of creating a waste treatment system. Such impoundments may be used for the chemical treatment of mine waste water as well as solids settling. EPA's definition of "waters of the United States" at 40 CFR 122.2 includes not only perennial, but also intermittent and ephemeral streams. EPA noted that the creation of any impoundments or sediment ponds in waters of the United States does not in itself remove those waters from the definition of "waters of the United States" under the CWA. The CWA requires that all discharges or pollutants from point sources into waters of the United States obtain a permit as appropriate under either section 402 or 404 of the CWA. The Director acknowledges that nothing in SMCRA supercedes the requirements of the CWA. The Director's approval of Missouri's proposed rules should not be construed to authorize any actions inconsistent with the CWA.

No other State or Federal agencies offered any comments.

V. Director's Decision

Based on the above findings, the Director is approving the proposed Amendment submitted by Missouri on October 10, 1990, with the exception of those provisions found to be inconsistent with SMCRA or the Federal regulations and identified in the codified portion of this notice under 30 CFR 925.15(o).

The Director is not approving certain provisions of the Missouri amendment, as codified at 30 CFR 925.15(o), for reason set forth in findings: 20, concerning Phase III bond liability release guidelines; 21, concerning reference of the revegetation success policy/guidelines in its rules; 22, concerning the 70-percent ground cover density standard; 25, concerning pasture land use revegetation success standards; 37, concerning the required format for submitting ownership and control information; 38, concerning violations of SMCRA to be listed by an applicant; 39, concerning certification of roads by land surveyors; 46, concerning parties that are required to execute an indemnity agreement; 48, concerning normal husbandry practices; 56, concerning the definition of "previously mined area"; 57, concerning inspection of abandoned sites; and 61(a), concerning the effective dates for reporting of cumulative production reports. The Director is requiring Missouri to further amend its regulations as discussed in Findings: 6, concerning an engineer certification of design criteria set by the regulatory authority; 9, concerning sediment removal from sedimentation ponds; 10, concerning 2 year removal of sedimentation structures; 13, concerning dam and embankment certification report content; 18, concerning air quality performance standards; 19, concerning range land use; 32, concerning the control of air pollution for Class I roads; 43, concerning "reason to believe" for improvidently issued permits; 47, concerning resumption of mining operations after the issuance of a cessation order; 51, concerning termination of jurisdiction; 52, concerning the release of surety bond liability; 60, concerning settlement agreements; and 61(b), concerning direct enforcement of exempt operations. The Director is deferring action at finding 42, concerning the presumption regarding abatement of notices of violation.

The Federal regulations at 30 CFR part 925 codifying decisions concerning the Missouri program are amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency between State and Federal standards is required by SMCRA.

VI. Effects of the Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary of the Interior. The Federal regulations at 30 CFR 732.17(a) require that any alteration of an approved State program must be submitted to the Director as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved State programs. Thus, any changes to an approved program are not enforceable by the State until approved by the Director. In his oversight of the Missouri program, the Director will recognize only statutes, regulations, and other materials approved by him, together with any consistent implementing policies, directives, and other materials, and will require the enforcement by Missouri of only such provisions.

VII. Procedural Determinations

Compliance With Executive Order No. 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions related to approval or conditional approval of State regulatory programs, actions, and program amendments. Accordingly, preparation of a Regulatory Impact Analysis is not necessary and OMB regulatory review is not required.

Compliance with Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsection (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the requirements of 30 CFR parts 730, 731, and 732 have been met.

Compliance with the National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA [30 U.S.C. 1292(d)] provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3507 *et seq.*

Compliance with the Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal

which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 925

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 21, 1992.

Raymond L. Lowrie,

Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 925—MISSOURI

1. The authority citation for part 925 continues to read as follows:

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

2. Section 925.10 is revised to read as follows:

§ 925.10 State program approval.

(a) The Missouri State program submitted on February 1, 1980, and as amended and clarified on May 14, 1980, was conditionally approved effective November 21, 1980. Copies of the approved program as amended are available for review at:

Missouri Department of Natural Resources, Land Reclamation Program, 205 Jefferson Street, P.O. Box 176, Jefferson City, Missouri 65102.

Office of Surface Mining, Kansas City Field Office, 934 Wyandotte Street, room 500, Kansas City, Missouri 64105.

(b) In accordance with the May 16, 1980, opinion of the U.S. District Court for the District of Columbia, the Secretary affirmatively disapproves the following provision contained in the Missouri program. The provision is affirmatively disapproved to the extent indicated.

(1) Section 10 CSR 40–8.010–75 the definition of "roads" that is used in sections 10 CSR 40–3.140(1)–(21).

3. Section 925.15 is amended by adding paragraph (p) to read as follows:

§ 925.15 Approval of regulatory program amendments.

* * * * *

(p) With the exceptions of 10 CSR 40–3.120(6)(B)2. A. through H. and 3.270(6)(B)2. A. through H., concerning the ability to enforce the Guidelines for Phase III liability release; 10 CSR 40–3.120(6)(B)2. A, D, G, and 3.270(6)(B)2. A, D, G, concerning the 70-percent ground cover density criteria; 10 CSR 40–3.120(6)(B)2.E and 3.270(6)(B)2.E, concerning the 90-percent vegetative ground cover for pasture land use; 10 CSR 40–6.030(1)(I) and 6.100(1)(I), concerning the format for submitting ownership and control information; 10 CSR 40–6.030(2)(C) and 6.100(2)(C), concerning the listing of violations under SMCRA by the applicant; 10 CSR 40–6.050(17)(B) and 6.120(15)(B), concerning certification by land surveyors; 10 CSR 40–7.021(1)(B)2, concerning extension of Phase III liability for normal husbandry practices and repair of rills and gullies; 10 CSR 40–8.010(1)(A)71., concerning the definition of "previously mined area;" 10 CSR 40–8.030(1) (F) and (G), concerning inspection of abandoned sites; 10 CSR 40–8.070(2)(C)1.A.II, concerning cumulative production reporting; Permanent program Phase III liability release guidelines; and deferral on a decision for Missouri's rule at 10 CSR 40–6.070 (7)(C) and (7)(C)2., concerning the presumption regarding abatement of notices of violation; the Director is approving the following provisions of the Missouri Code of State Regulations (CSR) as submitted to OSM on October 10, 1990, effective September 29, 1992: 10 CSR 40–3.010(5) and 3.170(5), signs and markers; 10 CSR 40–3.030(1)(C) and 3.190(1)(C), requirements for topsoil removal, storage, and redistribution; 10 CSR 40–3.040(2)(A)1. and 3.200(2)(A)1., requirement to meet total suspended solids; 10 CSR 40–3.040(4)(B)3 and 3.200(4)(B)3, certification of diversion designs; 10 CSR 40–3.040(6) (B), (C), (D), (H), (Q), (T), and 3.200(6) (B), (C), (D), (H), (Q), (T), sedimentation pond design standards; 10 CSR 40–3.040(10) (G), (I) and 3.200(10) (G), (I), certification of dams and embankments; 10 CSR 40–3.050(6)(C) and 3.210(6)(C) blasters certification identification number; 10 CSR 40–3.060(1) (A) , (H), and 3.220(1) (A), (H), disposal and covering excess spoil; 10 CSR 40–3.080(3)(A) and 3.230(3)(A), waste bank drainage systems; 10 CSR 40–3.080(8)(B), disposal of noncoal waste; 10 CSR 40–3.080(8)(D) and 3.230(8)(D), disposal of hazardous noncoal mine waste; 10 CSR 40–3.090 and 3.240, air quality performance standards; 10 CSR 40–3.110(3)(A)1. and 3.260(3)(A)1., covering coal seams, acid- and toxic-forming materials and combustible materials; 10 CSR 40–3.120(1) (D) and (E) and 3.270(1) (D) and (E), quick growing temporary cover and limited exception to cropland postmining land use; 10 CSR 40–3.120(5) and 3.270(5), concerning revegetation success standard for pasture land use; 10 CSR 40–3.120(6)(B)1 and 3.270(6)(B)1, general requirements for ground cover liability; 10 CSR 40–3.120(6)(B)2.(I) and 3.270(6)(B)2.(I), revegetation success standards for previously mined areas; 10 CSR 40–3.120(6)(B)2. A., D., and G. and 3.270(6)(B)2. A., D., and G., revegetation standards for woodland, wildlife habitat, and recreational land uses; 10 CSR 40–3.120(6)(B)2. and 3.270(6)(B)2.B., erosion control for industrial/commercial and residential land uses; 10 CSR 40–3.120(7) (C)2, (C)3.C, and 3.270(7) (C)2, (C)3.C, consultation by MDOC; 10 CSR 40–3.120(7)(C)3.A. and 3.270(7)(C)3.A., tree and shrub revegetation success for bond release; 10 CSR 40–3.120(8)(A)4 and 3.270(8)(A)4, removal of sedimentation ponds; 10 CSR 40–3.120(8)(A) 5, 6, 7, 8, 10 and 3.270(8)(A) 5, 6, 7, 8, 10, revegetation success; 10 CSR 40–3.130(2)(A) and 3.300(2)(A), previously mined land; 10 CSR 40–3.130(3)(C) and 3.300(3)(C), public facilities land use; 10 CSR 40–3.130(3)(I) and 3.300(3)(I), cropland land use; 10 CSR 40–3.140(1)(A) and 3.290(1)(A), dust control provisions for class I roads; 10 CSR 40–3.140 (1)(D)1, (8)(D)1 and 3.290 (1)(D)1, (8)(D)1, certification of class I and II roads; 10 CSR 40–4.140 (3)(D)9, (10)(D)9 and 3.290 (3)(D)9, (10)(D)9, static safety factor; 10 CSR 40–3.140 (6)(D), (13)(D), (20)(D), and 3.290 (6)(D), (13)(D), (20)(D), class I, II, and III road maintenance; 10 CSR 40–3.140 (8)(A), (15)(A) and 3.290 (8)(A), (15)(A), dust control for class II and III roads; 10 CSR 40–3.140 (13)(C), (20)(C) and 3.290 (13)(C), (20)(C), repair of road after catastrophic event; 10 CSR 40–3.250(1)(B), activity likely to jeopardize continuance of endangered or threatened species; 10 CSR 40–3.260(3)(A)1, covering coal and acid-toxic-forming materials of underground mining; 10 CSR 40–4.030(4)(A), creation of water bodies on prime farmland; 10 CSR 40–4.030(7)(B)6, prime farmland crop reference selection; 10 CSR 40–5.010(1)(A), definition of valid existing rights; 10 CSR 40–5.010(1)(J), definition of public road; 10 CSR 40–5.010(2)(C), requirements for areas where mining is prohibited or limited; 10 CSR 40–5.010(3)(F)1., public parks and historic places; 10 CSR 40–6.010(2)(E), definition of owned or controlled; 10 CSR 40–6.020 (2)(B)3, (3)(B)3, (5), exploration map, narrative, and commercial use of coal; 10 CSR 40–6.030(1) (A), (C), (D), (H) and

6.100(1) (A), (C), (D), (H), ownership and control information requirements; 10 CSR 40–6.030(2)(D) and 6.100(2)(D), update and correction of violations; 10 CSR 40–6.040(5)(A) and 6.110(5)(A), description of areal and structural geology; 10 CSR 40–6.040(11) (A), (E), (F) and 6.110(11) (A), (E) and (F), site specific resource information requirements, Endangered Species Act citation and U.S. Fish and Wildlife review opportunity; 10 CSR 40–6.050(7) (A), (B)1., (B)2., (C)1., (C)3. and 6.120(12) (A), (B)1., (C)1., (C)3., threatened and endangered species information requirements; 10 CSR 40–6.050(9)(C)5 and 6.120(5)(C)4, supplemental hydrology information requirements; 10 CSR 40–6.050(11)(C) and 6.120(7)(C), impoundment design compliance; 10 CSR 40–6.050(17)(A) 1 through 9 and (B) and 6.120(17)(A) 1 through 9 and (B), stream fords/crossings and schedule for removal and certification of class I, II, and III roads; 10 CSR 40–6.050(18) and 6.120(16), support facilities; 10 CSR 40–6.060(4)(A), definition of renewal, revision, and single continuous surface coal mining operation; 10 CSR 40–6.060(4)(E)5., water bodies in prime farmland; 10 CSR 40–6.070(1)(B), definition of irreparable damage; 10 CSR 40–6.070(7) (C), (C)2, (F), (G), (8)(I), ownership and control requirements; 10 CSR 40–6.070(8)(L), approval of a long term intensive agricultural land use; 10 CSR 40–6.070 (10)(B)1.A, (10)(E)2, permit approval or denial actions; 10 CSR 40–6.070(11) (A) and (B), improvidently issued permits; 10 CSR 40–6.070(13)(E), follow up information on Cessation Orders; 10 CSR 40–6.110(5) (A) and (B), underground mining information for geology; 10 CSR 40–7.011(3)(C), incremental bonding area size; 10 CSR 40–7.011(4)(E), full-cost bond amounts; 10 CSR 40–7.011(5)(D)2.C. (II) and (III) and (D)2.(I), self-bond financial ratio values and audits; 10 CSR 40–7.011(5)(D)5. A., B., and C., execution of indemnity agreements; 10 CSR 40–7.011(5)(D)8., failure to replace self-bond; 10 CSR 40–7.021(2)(A), Phase I bond release drainage control requirements; 10 CSR 40–7.021(2)(B)1., criteria for Phase II bond release; 10 CSR 40–7.021(2)(B) 5. and 6., termination of jurisdiction; 10 CSR 40–7.031(3)(B), reclamation compliance in surety forfeiture; 10 CSR 40–8.010(1)(A)4, 53, 51.B, C, D, I, J, and 54., definitions of adjacent area, pasture land, prime farmland, woodland, water, undeveloped land, dry bulk density; 10 CSR 40–8.030(6)(G), notification of owners and controllers of cessation orders; 10 CSR 40–8.030(7)(A), modify, terminate, or vacate a notice of violation; 10 CSR 40–8.040(5)(B)3., assessment of separate violation for each day; 10 CSR 40–8.040(8)(A), informal conference time frames; 10 CSR 40–8.040(8)(K), procedures settlement agreement nonpayment; and 10 CSR 40–8.070(2)(C), direct enforcement.

4. Section 925.16 is amended by removing and reserving paragraph (b)(1)–(3), (c), (e), (f)(2)–(5), (n), and (g)(17); revising paragraphs (f)(1), (g)(16), and (g)(18); and adding paragraph (p), to read as follows:

§ 925.16 Required program amendments.

* * * * *

(f)(1) By November 30, 1992 Missouri must revise 10 CSR 40–3.040(4) and 40–3.200(4), to require the certification of any design criteria set by the regulatory authority as required at 30 CFR 816.43(b)(4) and 817.43(b)(4).

* * * * *

(g) * * *

(16) By November 30, 1992 Missouri must revise 10 CSR 40–7.011(5)(D)2.C, to express the ratio of total liabilities to net worth as 2.5 times or less to be no less effective than the Federal regulations at 30 CFR 800.23(b)(3) (ii) and (iii).

* * * * *

(18) By November 30, 1992 Missouri must revise 10 CSR 40–7.011(5)(D)5.A., to add the requirement that the applicant and guarantor must each execute an indemnity agreement.

* * * * *

(p) By November 30, 1992, Missouri shall amend its program as follows:

(1) At 10 CSR 40–3.040(6)(H) and 3.200(6)(H), by requiring that sediment ponds shall be designed, constructed, and maintained to provide sediment removal in a manner no less effective than the Federal regulation requirements at 30 CFR 816.46(c)(iii)(F) and 817.46(c)(iii)(F).

(2) At 10 CSR 40–3.040(6)(U) and 3.200(6)(U) by requiring that siltation structures shall be maintained until removal is authorized by the regulatory authority and in no case shall be removed sooner than 2 years after the last augmented seeding to be no less effective than the Federal regulations at 30 CFR 816.45(b)(5) and 817.46(b)(5).

(3) At 10 CSR 40–3.040(10)(I) and 3.200(10)(I) to require a discussion of the appearance of instability, structural weakness, or other hazardous condition in the certification report for dam and embankments to be no less effective than the Federal regulations at 30 CFR 816.49(a)(10)(iii) and 817.49(a)(10)(iii).

(4) At 10 CSR 40–3.090 and 3.240 by providing performance standards that address air quality in a manner no less effective than the Federal regulations at 30 CFR 816.95(a) and 817.95(a).

(5) At 10 CSR 40–3.120(5) and 3.270(5), by removing or defining the term "range land."

(6) At 10 CSR 40–3.120(6)(B)2.A through H and 3.270(6)(B)2.A through H to remove the reference to Land Reclamation Commission's June 1990 Phase III Liability Release Guidelines.

(7) At 10 CSR 40–3.120(6)(B)2. A, D, G and 3.270(6)(B)2. A, D, G, by providing statistical proof that a vegetative ground cover of 70-percent will achieve the approved woodland, wildlife habitat, and recreational postmining land use or otherwise amend its program to be no less effective than the federal regulations at 30 CFR 16.116(b)(3)(iii) and 817.117(b)(3)(iii).

(8) At 10 CSR 40–3.120(6)(B)2.E and 3.270(6)(B)2.E, by including a requirement that ground cover on the revegetated area be equal to that of a reference area or other success standards approved by the regulatory authority and by providing statistical proof that a vegetative ground cover of 90-percent of 90-percent (81-percent) will in all cases achieve the approved postmining pasture land use, to make this regulation as effective as the Federal regulations at 816.116 (a) and (b) and 817.116 (a) and (b).

(9) At 10 CSR 40–3.140(1)(A), by requiring efforts to control and prevent air pollution attendant to erosion, to include road dust as well as dust occurring on other exposed surfaces to make this regulation no less effective than the Federal regulations at 30 CFR 816.150(b)(1).

(10) At 10 CSR 40–6.030(1)(I) and 6.100(1)(I), to require that a permit applicant submit information in a format prescribed by OSM to make this regulation no less effective than the Federal regulations at 30 CFR 778.13 and 778.14.

(11) At 10 CSR 40–6.030(2)(C) and 6.100(2)(C), to require any violation of SMCRA to be listed by the operator to make this regulation no less effective than the Federal regulation at 30 CFR 778.14(c).

(12) At 10 CSR 40–6.050(17)(B) and 6.120(15)(B), to provide proof that land surveyors are authorized in the State to prepare and certify plans and drawings for road design or delete the provision.

(13) At 10 CSR 40–6.070(11)(A), to require that when the regulatory authority, has reason to believe, that it improvidently issued a surface coal mining and reclamation permit, it shall conduct a review, to make this regulation no less effective than the Federal regulations at 30 CFR 773.20(a).

(14) At 10 CSR 40-7.011(5)D.8. to require that upon issuance of a cessation order, mining operations shall not resume until the regulatory authority has determined that an acceptable bond has been posted as required by the Federal regulations at 30 CFR 800.16(e)(2).

(15) At 10 CSR 40-7.021(1)(B)2. to establish an administrative record for each normal husbandry practice including repair of rills and gullies and submit these to the Director for approval prior to allowing such practices per the requirements of the Federal regulations as 30 CFR 816.116(c)(4) and 817.116(c)(4) or delete the provision.

(16) At 10 CSR 40-7.021(2)(B) 5 and 6 to relocate its requirement that addresses termination of jurisdiction to an appropriate location in its regulation.

(17) At 10 CSR 40-7.031(3)(B). to require that no surety liability be released until successful completion of all reclamation under the permit terms by including liability periods comparable to the Federal regulations at 30 CFR 800.13 to make its regulation no less effective than the Federal regulations at 30 CFR 800.50(a)(2)(ii).

(18) At 10 CSR 40-8.030(1) (F) and (G), to remove limitations regarding the required number of inspections of abandoned mine sites.

(19) At 10 CSR 40-8.040(8)(K) to require that payment of a settlement agreement must be received within 30 days from the date the agreement is signed and that commission action to affirm, raise, lower, or vacate the penalty must be taken within 30 days from the date of the rescission.

(20) At 10 CSR 40-8.070(2)(C)1.A.II, to provide appropriate dates for reporting of cumulative production that are no earlier than the date this amendment is published and per the Federal regulation requirements at 30 CFR 702.5(a)(2).

(21) At 10 CSR 40-8.070(2)(C)9.F. (I), (II), and (III), to require in Missouri's enforcement procedures that an operator be cited for violations of; subject to direct enforcement actions for violations of; and comply with the reclamation standards of the applicable reclamation program to make this regulation no less effective than the Federal regulations at 30 CFR 702(d) (1), (2), and (3).

[FR Doc. 92-23190 Filed 9-28-92; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 520

Foreign Funds Control Regulations

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

ACTION: Final rule; amendments.

SUMMARY: This final rule amends the Foreign Funds Control Regulations (31 CFR part 520, the "FFCR") in recognition of the independence of the Baltic Republics of Estonia, Latvia, and Lithuania, and the diplomatic recognition of their new governments by the United States. The FFCR are amended to remove the World War II restrictions on property of private individuals, partnerships, associations, corporations, and other organizations which on December 7, 1945, were nationals of, or were located in, the Baltic Republics.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Loren L. Dohm, Chief, Blocked Assets Division (tel.: 202/622-2440), or William B. Hoffman, Chief Counsel (tel.: 202/622-2410), Office of Foreign Assets Control, Department of the Treasury, Treasury Annex, Washington, DC 20220.

SUPPLEMENTARY INFORMATION: The FFCR were issued by the Secretary of the Treasury on April 10, 1940, to implement sanctions imposed by the President in Executive Order 8389 to protect the property within U.S. jurisdiction of persons in Nazi-occupied territory.

The property held in the name of persons located in or considered to be nationals of Estonia, Latvia, or Lithuania on December 7, 1945, remained blocked during the period of Soviet occupation. In light of the establishment of democratically-elected governments now controlling the territory of the Baltic Republics, their recognition by the United States, and their recognition as independent states by the Soviet Union, the protective blocking of these non-governmental assets is no longer necessary. This final rule amends the FFCR to terminate that blocking, effective September 29, 1992.

Because the FFCR involves a foreign affairs function, Executive Order 12291 and the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, also does not apply.

List of Subjects in 31 CFR Part 520

Administrative practice and procedure, Banks, Blocking of assets, Currency, Estonia, Foreign investments in United States, Latvia, Lithuania, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, 31 CFR part 520 is amended as follows:

PART 520—FOREIGN FUNDS CONTROL REGULATIONS

1. The authority citation for part 520 continues to read as follows:

Authority: 50 U.S.C. App. 5, as amended; E.O. 8389, 5 FR 1400, as amended by E.O. 8785, 6 FR 2897, E.O. 8832, 6 FR 3715, E.O. 8963, 6 FR 6348, E.O. 8998, 6 FR 6785, and E.O. 9193, 7 FR 5205, 3 CFR, 1938-1943 Comp., p. 1174; E.O. 10348, 17 FR 3769, 3 CFR, 1949-1953 Comp., p. 871; E.O. 11281, 31 FR 7215, 3 CFR, 1966-1970 Comp., p. 546.

Subpart B—General Licenses

2. Paragraph (a)(2) of § 520.101 is removed.

3. Paragraph (a)(3) of § 520.101 is redesignated as paragraph (a)(2), and revised to read as follows:

§ 520.101 General License No. 101.

(a) * * *

* * * * *

(2) Any other partnership, association, corporation, or other organization which was a national of any country designated in paragraph (a)(1) of this section by reason of the interest therein of any such country.

* * * * *

Dated: August 25, 1992.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: August 26, 1992.

Peter K. Nunez,

Assistant Secretary (Enforcement).

[FR Doc. 92-23555 Filed 9-24-92; 12:51 pm]

BILLING CODE 4810-25-M

DEPARTMENT OF DEFENSE

Department of the Air Force

32 CFR Part 861

Department of Defense Commercial Air Carrier Quality and Safety Review Program

AGENCY: Department of the Air Force, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Air Force revised its regulation on DOD quality and safety criteria for air carriers providing or seeking to provide airlift services to the DOD. The revision updates CARB membership by eliminating the appointment or designation of Commercial Airlift Review Board (CARB) members by position. This change permits the Commander, Air Mobility Command, and Commander, Military Traffic Management Command, to appoint three voting members from their respective commands without being limited by specific title or staff position. Reorganization in the Air Force resulted in the redesignation of the Military Airlift Command (MAC) to the Air Mobility Command (AMC) and changed CINCMAC to read Commander, AMC. The DOD Commercial Air Carrier Review Committee is changed to read DOD Commercial Airlift Review Committee to be consistent with other DOD groups in the oversight process, i.e., DOD Commercial Airlift Review Board, DOD Commercial Airlift Review Authority. The definition of temporary nonuse is clarified to be consistent with actual CARB practice.

This revision serves to notify the commercial aviation industry of Commercial Airlift Review Board changes and current practices resulting from DOD reorganization actions. The changes are necessary for the DOD Commercial Airlift Review Board to legally and effectively carry out its aviation safety responsibilities as specified in the National Defense Authorization Act for Fiscal Year 1987. This part is published in its entirety for clarity.

EFFECTIVE DATE: October 1, 1992.

FOR FURTHER INFORMATION CONTACT: Colonel Robert S. Wells, Jr., Director, DOD Air Carrier Survey and Analysis Directorate, DCS/ Operations and Transportation, Headquarters Air Mobility Command (HQ AMC/XOB), Scott AFB IL 62225-5001, telephone (618) 256-4801/4806.

SUPPLEMENTARY INFORMATION: This part is published as a final rule because it implements Public Law 99-661 (FY 87 National Defense Authorization Act, § 1204, Requirements Concerning Transportation of Members of the Armed Forces by Chartered Aircraft) and DOD Directive 4500.53 (Commercial Passenger Airlift Management and Quality Control). Additionally, and as part of the final rule determination, this part is related to public contracts and to provisions for agency management.

The Department of the Air Force has determined that this regulation is not a major rule as defined by Executive Order 12291, is not subject to the relevant provisions of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-611), does not contain reporting or recordkeeping requirements under the criteria of the Paperwork Reduction Act of 1980 (44 U.S.C. 35), and poses no negative environmental impact as defined in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*).

List of Subjects in 32 CFR Part 861

Air carriers, Aviation safety.

Therefore, 32 CFR is amended by revising part 861 to read as follows:

PART 861—DEPARTMENT OF DEFENSE COMMERCIAL AIR CARRIER QUALITY AND SAFETY REVIEW PROGRAM

Sec.
861.1 References.
861.2 Purpose.
861.3 DOD commercial air carrier quality and safety requirements.
861.4 DOD Commercial Airlift Review Board procedures.

Authority: 10 U.S.C. 8013; 10 U.S.C. 2640.

§ 861.1 References.

(a) Section 1204, Public Law 99-661; 10 U.S.C. 2640, Charter Air Transportation of Members of the Armed Forces.

(b) DOD Directive 4500.53, Commercial Passenger Airlift Management and Quality Control.

(c) AMCR 76-8, Contract Airlift Management, Civil Air Carriers.

(d) MTMCR 15-1, Procedure for Disqualifying and Placing Carriers in Nonuse.

§ 861.2 Purpose.

Department of Defense Directive 4500.53, Commercial Passenger Airlift Management and Quality Control, charges the Commander, Air Mobility Command (AMC), with establishing safety standards and criteria for commercial passenger airlift service used by the Department of Defense. It also charges the Commander, AMC, jointly with the Commander, Military Traffic Management Command (MTMC), with establishing the Commercial Airlift Review Board and providing policy guidance and direction for its operation. This part establishes Department of Defense (DOD) quality and safety criteria for commercial air carriers providing or seeking to provide airlift services to the DOD. Included are the operating procedures of the Commercial Airlift Review Board (CARB). The CARB has the authority to suspend air carriers from DOD use or take other action when issues of air safety arise.

§ 861.3 DOD commercial air carrier quality and safety requirements.

(a) DOD, as a customer of airlift services, expects an air carrier or operator soliciting for or doing business with the DOD to engage in quality programs and business practices that not only ensure good service but enhance the safety, operational, and maintenance standards established by the applicable Civil Aviation Agency Regulations (CARs). Accordingly, and as required by U.S. Public Law 99-661, the DOD has established a set of air carrier quality and safety requirements that reflect the type programs and practices the DOD seeks from air carriers or operators airlifting DOD resources.

(b) A DOD survey team will use the following requirements, the specifics of the applicable DOD contract or agreement, the CARs, and the experienced judgment of DOD personnel to evaluate an air carrier's capability to perform for the DOD. The survey will also include, with the carrier's coordination, observation of cockpit crew performance, as well as ramp inspections of selected company aircraft. A satisfactory on-site survey (audit) conducted by DOD personnel is prerequisite to participation in the DOD air transportation program. Surveys are conducted prior to an air carrier's acceptance into the program; thereafter, surveys will be completed on a biennial basis and when otherwise required to validate adherence to DOD quality and safety requirements. DOD personnel will also assess these quality and safety requirements when conducting periodic commercial air carrier table-top performance evaluations.

(c) The size of an air carrier, along with the type and scope of operations, will be considered during the on-site survey. For example, while an air taxi/ FAA Part 135 air carrier may not have a formal flight control function, such as a 24-hour dispatch organization, that same air taxi is expected to demonstrate some kind of effective flight following capability. On the other hand, a major carrier/FAA Part 121 air carrier is expected to have a formal flight control or dispatch function. Both, however, will be evaluated based on the effectiveness and quality of whatever flight following function they do maintain.

(d) The air carrier requirements stated in this part provide the criteria against which would-be DOD air carrier contractors may be subjectively evaluated by the DOD. These requirements are neither all-inclusive nor are they inflexible in nature. They are not replacements for the certification criteria and other

regulations established by civil aviation agencies; rather, these requirements are customer-developed and describe enhanced air carrier activities sought by the DOD.

Note: The term "Civil Aviation Agency (CAA)" is used throughout this part since these requirements are applicable to U.S. and international air carriers doing business with DOD. CAA includes the United States Federal Aviation Administration.

(1) Quality and safety requirements—prior experience. U.S. certified air carriers or operators applying to conduct business for the United States Department of Defense are required to possess 12 months of continuous service equivalent to the service sought by DOD. If the air carrier or operator is applying to airlift passengers on domestic U.S. routes, then the air carrier or operator must have conducted passenger service equivalent to what the DOD is seeking for the 12 continuous months immediately prior to applying for DOD business. In order to provide international passenger airlift for DOD, the same criteria applies. The air carrier must have conducted international passenger operations comparable to the service DOD is seeking for the 12 continuous months immediately prior to applying for business with the Department of Defense. Prior experience must be equivalent in difficulty and complexity in regard to distance, weather systems, international or national procedures, similar aircraft, schedule demands, aircrew experience, and management required.

(2) Quality and safety requirements—air carrier management. Management has clearly defined safety as the number one company priority, and safety is never sacrificed to satisfy passenger concern, convenience, or cost. Policies, procedures, and goals that enhance the CAA's minimum operations and maintenance standards have been established and implemented. A cooperative response to CAA inspections, critiques, or comments is demonstrated. Proper support infrastructure, including facilities, equipment, parts, and qualified personnel, is provided at the certificate holder's primary facility and en route stations. Personnel with aviation credentials and experience fill key management positions. An internal quality audit program or other method capable of identifying in-house deficiencies and measuring the company's compliance with their stated policies and standards has been implemented. Audit results are analyzed in order to determine the cause, not just the symptom, of any deficiency. The result of sound fiscal policy is evident throughout the company.

(3) Quality and safety requirements—operations:

(i) Flight safety. Establish policies that promote flight safety. These policies are infused among all aircrew and operational personnel who translate the policies into practice. New or revised safety-related data are promptly disseminated to affected personnel who understand that deviation from any established safety policy is unacceptable. An audit system that detects unsafe practices is in place and a feedback structure informs management of safety policy results including possible safety problems. Management ensures that corrective actions resolve every unsafe condition.

(ii) Flight operations. Established flight operations policies and procedures are up-to-date, reflect the current scope of operations, and are clearly defined to aviation department employees. These adhered-to procedures are further supported by a flow of current, management-generated safety and operational communications. Managers are in touch with mission requirements, supervise crew selection, and ensure the risk associated with all flight operations is reduced to the lowest acceptable level. Flight crews are free from undue management pressure and are comfortable with exercising their professional judgment during flight activities, even if such actions do not support the flight schedule. Effective lines of communication permit feedback from line crews to operations managers. Personnel records are maintained and reflect such data as experience, qualifications, and medical status.

(iii) Flight crew hiring. Established procedures ensure that applicants are carefully screened, including a review of the individual's health and suitability to perform flight crew duties. Consideration is given to the applicant's total aviation background, appropriate experience, and the individual's potential to perform safely. Freedom from alcohol abuse and illegal drugs is required. If new-hire cockpit crewmembers do not meet industry standards for experience and qualification, then increased training and management attention to properly qualify these personnel are required.

(iv) Aircrew training. Training, including recurrent training, that develops and refines skills designed to eliminate mishaps and improve safety is essential to a quality operation. Crew coordination training that facilitates full cockpit crews training and interacting together using standardized procedures and including the principles of Cockpit Resource Management (CRM) is required. Programs involving the use of simulators or other devices that can provide realistic training scenarios are desired. Captain and first officer training objectives cultivate similar levels of proficiency. Appropriate emergency procedures training (e.g., evacuation procedures) is provided to flight deck and flight attendant personnel as a total crew whenever possible; such training focuses on cockpit and cabin crews functioning as a coordinated team during emergencies Crew training—be it pilot, engineer, or flight attendant—is appropriate to the level of risk and circumstances anticipated for the trainee. Training programs have the flexibility to incorporate and resolve recurring problem areas associated with day-to-day flight operations. Trainers are highly skilled in both subject matter and training techniques. Training received is documented, and that documentation is maintained in a current status.

(v) Captain upgrade training. A selection and training process that considers proven experience, decision making, cockpit resource management, and response to unusual situations, including stress and pressure, is required. Also important is emphasis on captain responsibility and authority.

(vi) Aircrew scheduling. A closely monitored system that evaluates operational risks, experience levels of crewmembers, and ensures the proper pairing of aircrews on all flights is required. New captains are scheduled with highly experienced first officers, and new or low-time first officers are scheduled with experienced captains. Except for aircraft new to the company, captains and first officers assigned to DOD charter passenger missions possess at least 250 hours combined experience in the type aircraft being operated. The scheduling system involves an established flight duty time program for aircrews, including flight attendants, carefully managed so as to ensure proper crew rest and considers quality-of-life factors. Attention is given to the stress on aircrews during strikes, mergers, or periods of labor-management difficulties.

(vii) In-flight performance. Aircrews, including flight attendants, are fit for flight duties and trained to handle normal, abnormal, and emergency situations. They demonstrate crew discipline and a knowledge of aviation rules; use company-developed standardized procedures; adhere to checklists; and emphasize safety, including security considerations,

throughout all preflight, in-flight, and postflight operations. Qualified company personnel evaluate aircrews and analyze results; known performance deficiencies are eliminated. Evaluations ensure aircrews demonstrate aircraft proficiency in accordance with company established standards. Flight crews are able to determine an aircraft's maintenance condition prior to flight and use standardized methods to accurately report aircraft deficiencies to the maintenance activity.

(viii) Operational control/support. Effective mission control includes communications with aircrews and the capability to respond to irregularities or difficulties. Clear written procedures for mission preparation and flight following aircraft and aircrews are provided. There is access to weather, flight planning, and aircraft maintenance data. There are personnel available who are knowledgeable in aircraft performance and mission requirements and that can correctly respond to emergency situations. There is close interface between operations and maintenance, ensuring a mutual awareness of aircraft operational and maintenance status. Procedures to notify DOD in case of an accident or serious incident have been established. Flight crews involved in such accidents or incidents report the situation to company personnel who, in turn, have procedures to evaluate the flight crew's capability to continue the mission. Aircraft involved in accidents or incidents are inspected in accordance with Civil Aviation Regulations and a determination made as to whether or not the aircraft is safe from continued operations.

(ix) DOD charter procedures. Detailed procedures addressing military charter requirements are expected. The level of risk associated with DOD charter missions does not exceed the risk inherent in the carrier's non-DOD daily flight operations. Complete route planning and airport analyses are accomplished, and actual passenger and cargo weights are used in computing aircraft weight and balance.

(4) Quality and safety requirements—maintenance. Maintenance supervisors ensure all personnel understand that in spite of scheduling pressure, peer pressure, supervisory pressure, or other factors, the airplane must be airworthy prior to flight. Passenger and employee safety is a paramount management concern. Quality, completeness, and integrity of work are trademarks of the maintenance manager and maintenance department. Nonconformance to established maintenance practices is not tolerated. Management ensures that contracted maintenance, including repair and overhaul facilities, is performed by maintenance organizations acceptable to the CAA.

(i) Maintenance personnel. Air carriers are expected to hire and train the number of employees required to safely maintain the company aircraft and support the scope of the maintenance operation both at home station (the company's primary facility) and at en route locations. These personnel ensure that all maintenance tasks, including required inspections and airworthiness directives, are performed; that maintenance actions are properly documented; and that the discrepancies identified between inspections are corrected. Mechanics are fit for duty, properly certificated, the company verifies certification, and these personnel possess the knowledge and the necessary aircraft-specific experience to accomplish the maintenance tasks. Noncertified and inexperienced personnel receive proper supervision. Freedom from alcohol abuse and illegal drugs is required.

(ii) Quality assurance (continuing analysis and surveillance program). A system that continuously analyzes the performance and effectiveness of maintenance activities and maintenance inspection programs is required. This system evaluates such functions as reliability reports, audits, component tear-down reports, inspection procedures and results, tool calibration program, real-time aircraft maintenance actions, warranty programs, and other maintenance functions. The extent of this program is directly related to the air carrier's size and scope of operation. The cause of any recurring discrepancy or negative trend is researched and eliminated. Action is taken to prevent recurrence to these discrepancies and preventive actions are monitored to ensure effectiveness. The results of preventive actions are provided to appropriate maintenance technicians.

(iii) Maintenance inspection activity. A process to ensure required aircraft inspections are completed and the results properly documented is required. Also required is a system to evaluate contract vendors, suppliers, and their products. Inspection personnel are identified, trained (initial and recurrent), and provided guidance regarding inspector responsibility and authority. The inspection activity is normally a separate entity within the maintenance department.

(iv) Maintenance training. Training is conducted commensurate with the size and type of maintenance function being performed. Continuing education and progressive experience are provided for all maintenance personnel. Orientation, familiarization, on-the-job, and appropriate recurrent training for all full- and part-time personnel is expected. The use of such training aids as mockups, simulators, and computer-based training enhances maintenance training efforts and is desired. Training documentation is required; it is current, complete, well-maintained, and correctly identifies any special authorizations such as inspection and airworthiness release. Trainers are fully qualified in the subject matter.

(v) Maintenance control. A method to control maintenance activities and track aircraft status is required. Qualified personnel monitor maintenance preplanning, ensure completion of maintenance actions, and track deferred discrepancies. Deferred maintenance actions are identified to supervisory personnel and corrected in accordance with the criteria provided by the manufacturer or regulatory agency. Constant and effective communications between maintenance and flight operations ensure an exchange of critical information.

(vi) Aircraft maintenance program. Aircraft are properly certified and maintained in a manner that ensures they are airworthy and safe. The program includes the use of manufacturer's and CAA information, as well as company policies and procedures. Airworthiness directives are complied with in the prescribed time frame, and service bulletins are evaluated for applicable action. Approved reliability programs are proactive, providing management with visibility on the effectiveness of the maintenance program; attention is given to initial component and older aircraft inspection intervals and to deferred maintenance actions. Special tools and equipment are calibrated.

(vii) Maintenance records. Maintenance actions are well documented and provide a complete record of maintenance accomplished and, for repetitive actions, maintenance required. Such records as aircraft log books and maintenance documentation are legibly prepared, dated, clean, readily identifiable, and maintained in an orderly fashion. Inspection compliance, airworthiness release, and maintenance release records, etc., are complete and signed by approved personnel.

(viii) Aircraft appearance (in-service aircraft). Aircraft exteriors, including all visible surfaces and components, are clean and well maintained. Interiors are also clean and orderly. Required safety

equipment and systems are available and operable.

(ix) Fueling and servicing. Aircraft fuel is free from contamination, and company fuel facilities (farms) are inspected and results documented. Procedures and instructions pertaining to servicing, handling, and storing fuel and oil meet established safety standards. Procedures for monitoring and verifying vendor servicing practices are included in this program.

(x) Maintenance manuals. Company policy manuals and manufacturer's maintenance manuals are current, available, clear, complete, and adhered to by maintenance personnel. These manuals provide maintenance personnel with standardized procedures for maintaining company aircraft. Management policies, lines of authority, and company maintenance procedures are documented in company manuals and kept in a current status.

(xi) Maintenance facilities. Well maintained, clean maintenance facilities adequate for the level of aircraft repair authorized in the company's CAA certificate are expected. Safety equipment is available in hangars, shops, etc., and is serviceable. Shipping, receiving, and stores areas are likewise clean and orderly. Parts are correctly packaged, tagged, segregated, and shelf life properly monitored.

(5) Quality and safety requirements—security. Company personnel are schooled in security responsibilities and practice applicable procedures during ground and in-flight operations. Compliance with provisions of the appropriate standard security program, established by the CAA, is required for all DOD missions.

(6) Quality and safety requirements—specific equipment requirements. Air carriers satisfy DOD equipment and other requirements as specified in Air Mobility Command contracts or Military Traffic Management Command Military Air Transportation Agreements.

§ 861.4 DOD Commercial Airlift Review Board procedures.

(a) This part establishes the procedures to be used by the United States Air Force Air Mobility Command (AMC) and the United States Army Military Traffic Management Command (MTMC) when, in accordance with references § 861.1 (a) through (d):

(1) A commercial air carrier is subject to review or other action by the DOD Commercial Airlift Review Board (hereinafter referred to as the CARB),

(2) A warning, suspension, temporary nonuse, or reinstatement action is taken against a carrier by the CARB, or

(3) Review or other CARB action is escalated to a higher authority.

These procedures apply to all commercial air carriers providing DOD passenger or cargo airlift through charter, individual ticket movements, contracts, or other transportation agreements. They also apply to carriers providing air transportation purchased by DOD individuals for which government reimbursement will be made in whole or in part.

(b) Safety or airworthiness issues, per reference § 861.1(b) must be referred to the CARB. AMC and MTMC may each take independent corrective action in accordance with their respective procedures on standards of service issues when safety and airworthiness issues are not involved. The DOD Air Carrier Survey and Analysis Directorate will be informed of all actions taken independently by AMC or MTMC.

(c) Except as otherwise provided herein, the rights and remedies of the government and commercial air carriers outlined in these procedures are not exclusive and are in addition to any other rights and remedies provided for by law, regulation, contract, or agreement.

(d) *Definitions.* (1) Letter of warning is a notice to a carrier of a failure to satisfy safety or airworthiness requirements which, if not remedied, may result in temporary nonuse or suspension. The issuance of a letter of warning is not a prerequisite to a suspension or other action.

(2) Temporary nonuse is the immediate exclusion of a carrier from any flight activities in the DOD airlift transportation program, pending a decision on suspension, taken under the conditions outlined in paragraph (h)(1) of this section. By mutual agreement of the CARB and the air carrier involved, a suspension hearing or decision may be delayed and the air carrier continued in a temporary nonuse status for an extended period of time.

(3) Suspension is the exclusion of an air carrier from participating in the DOD airlift transportation program. The period of suspension will normally:

(i) Remain in effect until the carrier furnishes satisfactory evidence that the conditions causing the suspension have been remedied or

(ii) Be for a fixed period of time as determined at the discretion of the CARB.

(4) The procedures for commercial airlift safety review include five possible levels with increasing authority:

(i) DOD Air Carrier Survey and Analysis Directorate.

(ii) DOD Commercial Airlift Review Committee.

(iii) DOD Commercial Airlift Review Board.

(iv) Commanders MTMC and AMC.

(v) DOD Commercial Airlift Review Authority.

These levels are described in reference § 861.1(b), with the exception of the DOD Commercial Airlift Review Committee, which is described in reference § 861.1(c). The Committee provides multifunctional review of the efforts of the DOD Air Carrier Survey and Analysis Directorate, including approval or disapproval of carriers initially seeking DOD business, and offers advice to the higher authorities when appropriate.

(e) *Causes and conditions for suspension.* (1) Carrier shall be subject to suspension for good cause, including:

(i) Failing to comply with generally accepted standards of airmanship, training, and maintenance practices and procedures.

(ii) Failing to satisfy DOD quality and safety requirements as described in § 861.3.

(iii) Failing to comply with all provisions of applicable statutes, agreements, and contract terms, as such may affect flight safety, as well as with all applicable Federal Aviation Administration regulations, airworthiness directives, orders, rules, and standards promulgated under the Federal Aviation Act of 1958 as amended.

(iv) Involvement of one of the carrier's aircraft in a serious or fatal accident, incident, or operational occurrence (regardless of whether or not such aircraft is being used in the performance of government procured transportation).

(v) Any other condition which affects the safe operation of the carrier's flights hereunder.

(vi) Compliance with published standards does not, standing alone, constitute compliance with generally accepted standards or airmanship, training, or maintenance practices.

(f) *Reinstatement considerations.* In no event shall reinstatement occur unless and until the carrier shows to the satisfaction of the CARB that deficiencies that led to suspension have been corrected and that actions have been implemented to preclude the recurrence of similar deficiencies.

(g) *CARB membership.*

(1) Six voting members will constitute the CARB; three senior knowledgeable individuals appointed by Commander, AMC, and three similarly appointed by Commander, MTMC. Two of the voting members will be of general/flag officer rank or civilian equivalent; one from HQ AMC and one from HQ MTMC, and will

act as CARB cochairs. Other nonvoting CARB members will be appointed as necessary to facilitate the CARB deliberative process. A nonvoting recorder will also be appointed.

(2) The presiding member at a meeting of the CARB shall be the senior voting member or alternate present. A voting member, who will not be present at any meeting of the CARB, may be represented by a knowledgeable alternate empowered with the voting responsibilities of the voting member. Four voting members present shall constitute a quorum. Decisions shall be by majority vote.

(3) The meeting date, time, and site of the CARB will be determined at the time of the decision to convene the CARB. Teleconferencing, if utilized, will be specified in the notice to the carrier.

(4) Minutes of CARB hearings may be recorded or summarized and will be maintained with all other records pertaining to the CARB proceeding.

(5) The CARB recorder shall ensure that the air carrier and appropriate DOD agencies are notified of the CARB's decision and reasons therefor.

(h) *CARB operating procedures:*

(1) *Temporary nonuse:* (i) In case of a fatal aircraft accident or for other good cause, the two senior members of the CARB (see paragraph (g)(1) of this section) will jointly make an immediate determination whether to place the carrier involved in a temporary nonuse status pending suspension proceedings. Prior notice to the carrier is not required.

(ii) Such determination shall include consideration of the advice of the DOD Commercial Airlift Review Committee, if reasonably available, but will not await such advice.

(iii) The carrier shall be promptly notified of the temporary nonuse determination and the basis therefore.

(iv) Temporary nonuse status terminates automatically if suspension proceedings are not commenced, as set out in paragraph (h)(2)(ii) of this section, within 30 days of inception, unless otherwise agreed to per paragraph (d)(2) of this section.

(2) *Suspension:* (i) On a recommendation of the DOD Air Carrier Survey and Analysis Directorate, the DOD Commercial Airlift Review Committee, or any individual member of the CARB, the CARB shall consider whether or not to suspend a carrier.

(ii) If the CARB determines that suspension may be appropriate, it shall notify the carrier that suspension action is under consideration and of the basis for such consideration and offer the carrier a hearing thereon within 15 days of the date of the notice, or such other period as granted by the CARB, at which the carrier may be present and may offer evidence. The presiding member of the CARB shall establish procedures for such hearing as may be appropriate which shall be as informal as practicable, consistent with administrative due process.

(iii) Types of evidence which may be considered, if appropriate, shall include, but not be limited to, the following:

(A) Information and analysis provided by the DOD Air Carrier Survey and Analysis Directorate.

(B) Carrier's written/oral evidence.

(C) Corrective actions that may have been taken by the carrier to:

(*1*) Correct the specific deficiencies that led the CARB to consider suspension, and

(*2*) Preclude recurring similar deficiencies.

(D) Such other matters as the CARB deems relevant.

(E) The CARB's decisions on the reception or exclusion of evidence shall be final.

(iv) Carriers shall have the burden of proving their suitability to safely perform DOD airlift services by clear and convincing evidence.

(v) After the conclusion of such hearing, or if no hearing is requested and attended by the carrier within the time specified by the CARB, the CARB shall consider the matter and make a final decision whether or not to suspend the carrier or to impose such lesser sanction as is appropriate. The carrier shall be notified of the CARB's decision.

(3) *Reinstatement:* (i) The CARB may consider reinstating a suspended carrier on either CARB motion or carrier motion, unless such carrier has become ineligible in the interim.

(ii) The carrier has the burden of proving by clear and convincing evidence that the reinstatement considerations in paragraph (f) of this section have been satisfied.

(iii) Carrier evidence in support of reinstatement will be provided in a timely manner to the CARB for its review. The CARB may independently corroborate the carrier-provided evidence and may, at its option, convene a hearing and request the participation of the carrier.

(i) *Decision by others.* In the event the CARB is unable to decide an issue properly before it, or if the issue in the judgment of the CARB requires review at a DOD organizational level higher than the CARB, the issue will be referred to the Commander, AMC, and Commander, MTMC, for appropriate disposition. In such event, the decision will be made upon the written record only, no hearing will be held.

(j) *Appeal of a determination.* (1) A carrier placed in suspension may administratively appeal this action to the authorities shown in paragraph (j)(3) of this section. An appeal, if any, must be filed within 15 work days after receipt of the decision of the CARB or Commander, AMC, and Commander, MTMC. The suspension will not be stayed pending appeal unless for good cause, as determined by the CARB. The decision of the appellate authority designated herein is final and is not subject to further administrative review or appeal.

(2) An appeal will be in writing only and carriers shall not be entitled to a de novo hearing before the administrative appellate authorities.

(3) The following administrative appellate authorities will review and make decisions on appeals:

(i) When the decision being appealed was made by the CARB, the appellate authorities are Commander, AMC, and Commander, MTMC. They will jointly decide the appeal.

(ii) When Commander, AMC, and Commander, MTMC, are unable to jointly agree on an appeal, they shall refer the matter to the DOD Commercial Airlift Review Authority (CARA) for its decision.

(iii) When the decision being appealed was made by Commander, AMC, and Commander, MTMC, the appellate authority is the DOD CARA.

Patsy J. Conner,

Air Force Federal Register, Liaison Officer.

[FR Doc. 92-23614 Filed 9-28-92; 8:45 am]

BILLING CODE 3910-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05-92-61]

Special Local Regulations for Marine Events; 2.4 Mile Choptank River Swim, Choptank River Bridge, Choptank River, Cambridge, MD

AGENCY: Coast Guard, DOT.

ACTION: Notice of implementation of special local regulations.

SUMMARY: This notice implements special local regulations for the 3rd Annual 2.4 Mile Choptank River Swim, an annual event to be held on October 10, 1992. These special local regulations are needed to provide for the safety of participants and spectators on the navigable waters during this event. The effect will be to restrict general

navigation in the regulated area for the safety of participants in the swim, and their attending personnel.

EFFECTIVE DATES: The regulations in 33 CFR 100.512 are effective from 6 a.m. to 12:15 p.m., on October 10, 1992.

FOR FURTHER INFORMATION CONTACT: Stephen L. Phillips, Chief, Boating Affairs Branch, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204, or Commander, Coast Guard Group Baltimore (301) 576–2520.

Drafting Information

The drafters of this notice are QM1 Kevin R. Connors, project officer, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and Lieutenant Monica L. Lombardi, project attorney, Fifth Coast Guard District Legal Staff.

Discussion

Fletcher Hanks, Race Director for the 2.4 Mile Choptank River Swim submitted an application to hold this year's swim on October 10, 1992. The event will consist of approximately 400 swimmers racing on a course west of the Choptank River Bridge starting at the Gateway Marina and finishing at Great Marsh Point. Since this is the type of event contemplated by these regulations, and the safety of the participants would be enhanced by the implementation of the special local regulations for this regulated area, the regulations in 33 CFR 100.512 are being implemented.

Dated: September 18, 1992.

W.T. Leland,

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

[FR Doc. 92–23560 Filed 9–28–92; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 100

[CGD 05–92–64]

Special Local Regulations for Marine Events; Riverfest 1992; Cape Fear River, Wilmington, NC

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Special local regulations are being adopted for Riverfest 1992. This special local regulation is necessary to control vessel traffic in the immediate vicinity of this event. The effect will be to restrict general navigation in the regulated area for the safety of spectators and participants.

EFFECTIVE DATE: This regulation is effective from 12:15 p.m. to 4 p.m. October 3, 1992. If inclement weather causes the postponement of the event, the regulation is effective from 12:15 p.m. to 4 p.m., October 4, 1992.

FOR FURTHER INFORMATION CONTACT: Stephen L. Phillips, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204, or Commander, Coast Guard Group Fort Macon Operations (919) 247–4545.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for these regulations and good cause exists for making them effective in less than 30 days from the date of publication. Adherence to normal rulemaking procedures would not have been possible. Specifically, the sponsor's application to hold the event was not received in the district office until September 8, 1992, leaving insufficient time to publish a notice of proposed rulemaking in advance of the event.

Drafting Information: The drafters of this notice are QM1 Kevin R. Connors, project officer, Boating Affairs Branch, Fifth Coast Guard District, and Captain Michael K. Cain, project attorney, Fifth Coast Guard District Legal Staff.

Background and Purpose: Old Wilmington Riverfront Celebration, Inc. submitted an application to hold the Riverfest 1992 riverboat and raft races. As part of the application, the sponsor requested that the Coast Guard provide control of spectator and commercial traffic within the regulated area.

Discussion of Regulations: The event consists of two riverboats and approximately 35 homebuilt, manually powered rafts racing separately on the Cape Fear River, at Wilmington, North Carolina. These regulations are necessary to control spectator craft and provide for the safety of life and property on navigable waters during the event. Since the main shipping channel will not be closed for an extended period of time, commercial traffic should not be severely disrupted.

Regulatory Evaluation: This final rule is not considered major under Executive Order 12291 and is not significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this regulation is expected to be so minimal that a full regulatory evaluation is unnecessary. This regulation will only be in effect for four hours, and the impacts on routine navigation are expected to be minimal.

Small Entities: Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this regulation will have a significant economic impact on a substantial number of small entities. "Small Entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). Since the impact of this rule on non-participating small entities will be minimal, the Coast Guard certifies under 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities.

Federalism Assessment: This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment: This final rule has been thoroughly reviewed by the Coast Guard and determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c of Commandant Instruction M16475.1B. A Categorical Exclusion Determination statement has been prepared and been placed in the rulemaking docket.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

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

PART 100—[AMENDED]

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

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

2. A temporary Section 100.35–T0564 is added to read as follows:

§ 100.35–T0564 Cape Fear River, Wilmington, North Carolina.

(a) *Regulated area.* The waters of the Cape Fear River from shoreline to shoreline bounded to the north by a line drawn from latitude 34°14'22.5" North, longitude 77°57'23.0" West, to latitude 34°14'24" North, longitude 77°57'06.5" West, and to the south by the U.S. Route 74/76 highway bridge, center point latitude 34°13'38.0" North, longitude 77°57'08.5" West.

(b) *Definitions.* Coast Guard Patrol Commander. The Coast Guard Patrol Commander is any commissioned, warrant, or petty officer of the Coast Guard who has been designated by the

Commander, Coast Guard Group Fort Macon to act on his behalf.

(c) *Special local regulations.* (1) Except for participants in Riverfest 1992 and vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area without the permission of the Patrol Commander.

(2) The operator of any vessel in the immediate vicinity of this area shall:

(i) Stop the vessel immediately when directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard ensign.

(3) Vessel operators are advised to remain clear of the advisory area during the effective periods of this regulation.

(d) *Effective dates:* This regulation is effective from 12:15 p.m. to 4:00 p.m. October 3, 1992. If inclement weather causes the postponement of the event, the regulation is effective from 12:15 p.m. to 4 p.m., October 4, 1992.

Dated: September 18, 1992.

W.T. Leland,

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

[FR Doc. 92-23561 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OH28-1-5395; FRL-4514-1]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

SUMMARY: The USEPA announces final disapproval of a revision request to the ozone portion of the Ohio State Implementation Plan (SIP) for the Wright-Patterson Air Force Base (WPAFB) located in Greene County, Ohio. The revision consists of a variance for WPAFB to operate a jet fuel fillstand. The variance would exempt WPAFB from the emission limit requirements contained in the Ohio Administrative Code (OAC) Rule 3745-21-07(E).

Greene County was designated as a nonattainment area of the National Ambient Air Quality Standards (NAAQS) for ozone.[1] Greene County was again designated as a nonattainment area for ozone, and classified as moderate. This designation was published in the November 6, 1991 **Federal Register** (56 FR 56694).

USEPA is disapproving this SIP revision request because: The State did not demonstrate that the relaxation of emission limits contained in OAC Rule 3745-21-07(E) will not interfere with the attainment and maintenance of the ozone standard; reasonable further progress (RFP) toward attainment has not been demonstrated; and a relaxation of SIP requirements, in nonattainment areas, is prohibited by the Clean Air Act Amendments of 1990 without offsetting emission reductions.

EFFECTIVE DATE: This final rulemaking becomes effective October 29, 1992.

ADDRESSES: Copies of the SIP revision request, USEPA's analysis, and public comments are available at the following location for review: (It is recommended that you telephone Richard Schleyer, at (312) 353-5089, before visiting the Region 5 office.) U.S. Environmental Protection Agency, Region 5, Air Enforcement Branch (AE-17J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Richard Schleyer, Air Enforcement Branch, (AE-17J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-5089.

SUPPLEMENTARY INFORMATION:

I. Background

On January 27, 1987, the Ohio Environmental Protection Agency (OEPA) submitted a revision request to the ozone portion of the Ohio SIP for WPAFB. The revision consists of a variance for WPAFB to operate a jet fuel fillstand located in Greene County. The variance would exempt WPAFB from meeting the emission limit requirements contained in OAC Rule 3745-21-07(E).

On December 14, 1988, USEPA published a Notice of Proposed Rulemaking in the **Federal Register** (53 FR 50257) disapproving this SIP revision because the State did not demonstrate that it was technically or economically infeasible to meet the existing SIP limit and that the relaxation from the emission limit requirements contained in OAC Rule 3745-21-07(E) would not jeopardize attainment and maintenance of the ozone standard. Also, the State did not demonstrate that reasonable further progress toward attainment of the standard would be maintained in the area.

II. Current SIP

Under the existing federally approved SIP, the fillstand is regulated under the Ohio Administrative Code (OAC) Rule 3745-21-07(E) which contains the following requirements:

(1) No person shall load in any one day more than forty thousand gallons of any volatile photochemically reactive material into any tank truck, trailer, or railroad tank car from any loading facility unless the loading facility is equipped with a vapor collection and disposal system properly installed, in good working order, in operation, and consisting of one of the following:

(a) An adsorber system or condensation system which processes and recovers at least ninety percent by weight of all vapors and gases from the equipment being controlled; or

(b) A vapor handling system which directs all vapors to a fuel gas system; or

(c) Other equipment or means for purposes of air pollution control as may be acceptable to and approved by the DIRECTOR.

WPAFB applied for a variance to operate a jet fuel fillstand without meeting the emission limit requirements contained in OAC Rule 3745-21-07(E). On October 31, 1980 **Federal Register** (45 FR 72122) and June 29, 1982 **Federal Register** (47 FR 28097), USEPA approved OAC Rule 3745-21-07(E) as meeting the RACT requirements of Part D of the Clean Air Act. This variance would limit annual throughput to 25,000,000 gallons of JP-4 per year.

III. Greene County Attainment Status

Under Section 107(d) of the Clean Air Act, Greene County was designated as a nonattainment area of the NAAQS for ozone.[2] Greene County was again designated as a nonattainment area for ozone, and classified as moderate. This designation was published in the November 6, 1991 **Federal Register** (56 FR 56694).

IV. SIP Revision Policy

The USEPA July 29, 1983, policy memorandum entitled "Source Specific SIP Revisions," from Sheldon Meyers, requires that for a SIP revision to be approvable, the State must demonstrate that the revision will not interfere with the timely attainment and maintenance of the ozone standard and reasonable further progress (RFP) towards attainment. The State has not made such a demonstration.

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[1] See 43 FR 8962 (March 13, 1978); 43 FR 45993 (October 5, 1978); and 49 FR 24124 (June 12, 1984).

[2] See 43 FR 8962 (March 13, 1978); 43 FR 45993 (October 5, 1978); and 49 FR 24124 (June 12, 1984).

V. Comments on Notice of Proposed Rulemaking

On January 12, 1989, and February 9, 1989, USEPA received public comments from the OEPA and the Department of the Air Force (DAF), respectively. USEPA's review of these comments is as follows:

OEPA Comments

1. The ozone SIP for the Dayton area was previously approved by the USEPA based on a modeled demonstration of attainment and the adoption of Reasonably Available Control Technology (RACT) rules for VOC sources in the area. The loading of jet fuel is not a RACT category. The SIP revision amounts to a site-specific RACT determination for a source that does not meet Ohio Administrative Code (OAC) Rule 3745-21-07, which regulates sources of organic materials. As such, the RACT determination exceeds the requirements of the 1972 ozone SIP.

2. Reasonable Further Progress (RFP) has been met. Ohio's April 1988 RFP report shows continued source reductions greatly in excess of the emissions associated with the proposed relaxation.

3. The USEPA has not issued an ozone SIP call for the Dayton area because of the low "design value" ozone level of 0.127 ppm for the 1985-1987 period. This level is less than the USEPA action level of 0.14 ppm.

4. The requested SIP relaxation is not significant, and is less that the 40 tons per year threshold amount required to trigger new source review under Federal regulations for new sources of photochemical oxidants.

5. In 1988, the USEPA proposed to approve a SIP revision for the LTV Steel Corporation in the Chicago area, which is non-attainment for particulate matter. The following statement of the USEPA appeared in the September 1, 1988 **Federal Register** (53 FR 33824): "Since LTV demonstrated that this SIP revision would be RACT, a modeled demonstration of attainment is not required." WPAFB has indicated its intention to provide the USEPA with additional cost documentation that will show that the SIP revision request will indeed constitute RACT for this particular loading rack. If acceptable documentation is submitted, an attainment demonstration for the Dayton area should not be required. In addition, USEPA believes that the information previously submitted demonstrates that the use of control equipment for the loading emissions is economically unreasonable.

USEPA's Response

1. OEPA is correct in stating that the loading of jet fuel is not a "RACT" or Control Techniques Guidelines (CTG) category. As a result, in order for this revision to be approved, it is not necessary for OEPA to demonstrate that it is technically or economically infeasible to meet the existing SIP limit. It is necessary, however, for OEPA to demonstrate that the relaxation will not interfere with the attainment or maintenance of the ozone standard. OEPA has not made such a demonstration.

2. The Dayton area currently has an approved 1979 ozone SIP. Although the approved attainment demonstration for the area predicts that attainment would have occurred by 1982 even with the increase in emissions due to this relaxation, recent air quality data for the Dayton area indicate that the area is still nonattainment for ozone. Therefore, the 1979 demonstration does not appear to be credible and cannot be used as a basis of approving a site-specific relaxation. Additionally, the fact that the increase in emissions is less than the level required to trigger new source review is irrelevant.

3. Finally, the discussion in comment five on the Notice of Proposed Rulemaking published in the September 1, 1988 **Federal Register** (53 FR 33824) for LTV Steel is misleading. A modeled demonstration was not required because the relaxation was for a Total Suspended Particulate (TSP) source. The requirement for an acceptable 1979 TSP SIP was the implementation of RACT, while a 1979 ozone SIP not only had to meet the requirement of implementation of RACT, but also a modeled demonstration of attainment. As a result, it is meaningless to compare the requirements for a site-specific TSP SIP to the requirements for a site-specific ozone SIP relaxation.

DAF Comments

On February 9, 1989, the following comments were submitted by the Department of the Air Force (DAF):

1. A Vapor Control Feasibility Study prepared by Oak Ridge National Laboratory in September, 1986, for the McClellan Air Force Base, California—JP-4 Fuel Storage and Transfer Facilities was submitted by the DAF. This contains cost estimates and cost documentation for carbon adsorption and incineration for JP-4 jet fuel vapor control at the McClellan Air Force Base.

2. Actual facility throughput of JP-4 and VOC emissions are presented in tabular form for a period from 1983 to 1988.

3. As presented in comment two, annual throughput of JP-4 at WPAFB has been decreasing since 1986. The DAF foresees further reductions in the annual throughput of JP-4 through the loading rack in upcoming years. This reduction in throughput is based on the following reasons. WPAFB has a pressurized hydrant refueling system on the east and west ramps. Currently, the west ramp is in operation and in 1988, pumped a total of 2,728,99 gallons of JP-4 through this system. The east ramp is currently not in operation due to a malfunction of differential pressure gauges. Once the east ramp is operational, WPAFB anticipates a total throughput from the hydrant system of 5 million gallons. This will result in a reduced annual throughput of JP-4 through the loading racks by 2 million gallons. In addition, due to a change in aircraft used by the 906 Tactical Fighter Group (to be completed in 1990), a reduction of 3 million gallons of JP-4 through the loading rack will occur annually. Total reduction in JP-4 through the loading rack will decrease by 5 million gallons in 1990, however, reductions will begin (2 million gallons) upon repair of the east ramp hydrant system in 1989.

4. Capital cost, as well as total annual operating costs, based on 1985/1986 data is presented for carbon adsorption and incineration. These costs are then projected for the years 1989 and 1992.

5. Throughout our analysis, we have questioned whether JP-4 is a Volatile Photochemically Reactive Material (VPRM). The definition of a VPRM is "any photochemically reactive material which has a vapor pressure of 1.5 pounds per square inch absolute or greater under actual storage conditions." WPAFB has previously submitted storage temperature data denoting that JP-4 will be VPRM when the temperature reaches 85 °F. That temperature is only reached 3% of the year in the Dayton area. It appears unreasonable that 3% justifies controlling all JP-4 vapors.

6. The conversion of JP-4 to JP-8 in the future will have an impact on cost effectiveness. Should JP-8 be available in 10 years, the capital recovery factor and cost per ton of removal will increase, not to mention rendering the control equipment obsolete.

USEPA's Response

1. As previously stated in USEPA's response to an OEPA comment, the loading of jet fuel is not a category subject to the requirements for RACT. As a result, it is not necessary for OEPA (or WPAFB) to demonstrate that it is

technically or economically infeasible to meet the existing SIP limit. It is necessary, however, for OEPA to demonstrate that the relaxation will not interfere with the attainment or maintenance of the ozone standard. OEPA has not made such a demonstration.

2. JP-4 meets the definition of "Volatile Photochemically Reactive Material" (VPRM) contained in OAC Rule 3745-21-01(C)(7) and as it appears in the Ohio SIP. This definition was approved by the USEPA as published in the October 31, 1980 **Federal Register** (45 FR 72122), and in the June 29, 1982 **Federal Register** (47 FR 28098). Also, the following excerpt was taken from the OEPA "Summary of Final Variance for the Wright-Patterson Air Force Base" which was submitted to the USEPA on January 27, 1987:

JP-4 meets the definition of "volatile photochemically reactive material" (VPRM) under OAC Rule 3745-21-01(C)(7). Technical support provided by WPAFB shows that the storage tank temperature averages 53 °F, and that the true vapor pressure of the JP-4 can equal or exceed 1.5 psia (as required to meet Ohio's definition of VPRM). According to this technical support, when the fuel storage temperature reaches 72 °F (Ohio believes a value of 65 °F from Figure 1 in the Technical Support is more appropriate), the true vapor pressure is 1.5 psia. According to the attached technical support developed by the Dayton Regional Air Pollution Control Agency, there are typically "1.4 days per year" when mean daily temperatures exceed 72 °F. Even though the JP-4 vapor pressure is variable, and conditions do not always allow the JP-4 to meet the definition of a VPRM, the OEPA must define JP-4 as a VPRM. The requirements of OAC Rule 3745-21-07(E)(1) are, therefore, applicable to this source.

3. The problem of concern here is the release of VOC from the JP-4 fuel presently being used, not the future changes to JP-8.

VI. Compliance With the Clean Air Amendments of 1990

This request for a revision to the Ohio SIP for ozone has been reviewed for conformance with the provisions of the 1990 Clean Air Act Amendments (CAAA) enacted on November 15, 1990. It has been determined that the revision does not conform with the General Savings Clause stated in subpart 6, section 193 of the CAAA which prohibits, in nonattainment areas, any relaxation of SIP requirements, without at least equivalent emission reductions. This provision reads as follows:

No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the CAAA of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification ensures equivalent or greater emission reductions of such air pollutant.

For nonattainment areas, the State must demonstrate that the SIP revision provides for offsetting emission reductions. The revision contains no plan for emission offsets or equivalent emission reductions. Therefore, no relaxation from SIP requirements can be approved.

Final Action

USEPA is disapproving this SIP revision request because: (1) The State did not demonstrate that the relaxation from the emission limit requirements contained in OAC Rule 3745-21-07(E) will not interfere with the attainment and maintenance of the ozone standard; (2) RFP towards attainment has not been demonstrated; and (3) a relaxation of SIP requirements, in nonattainment areas, is prohibited by the CAAA of 1990 without offsetting emission reductions.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table Three action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget waived Tables Two and Three SIP revisions (54 FR 222) from the requirements of Section 3 of Executive Order 12291 for a period of 2 years. USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. OMB has agreed to continue the temporary waiver until such time as it rules on USEPA's request.

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 (60 days from the date of publication). 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 52

Air pollution control, Environmental protection, Hydrocarbons, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401-7671q.

Dated: August 19, 1992.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 92-23556 Filed 9-28-92; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 62

[A-1-FRL-4512-2]

Approval and Promulgation of State Air Quality Implementation Plans for Designated Facilities and Pollutants; Rhode Island, Vermont; Negative Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Regulations promulgated under the provisions of Section 111(d) of the Clean Air Act require states to submit plans to EPA to control emissions of designated pollutants from designated facilities. Title 40 of the Code of Federal Regulations § 62.06 provides that when no such designated facilities exist within a state's boundaries, a letter of "negative declaration" may be submitted in lieu of a control plan. The States of Rhode Island and Vermont have submitted negative declarations adequately certifying that certain types of designated facilities are not located within their States. EPA is approving negative declarations of municipal waste combustor emissions from municipal waste combustors submitted by the States of Rhode Island and Vermont.

DATES: This action will become effective on November 30, 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 and Hazardous Materials, Department of Environmental Management, 291 Promenade Street, Providence, RI 02908-5767; and the Air Pollution Control Division, Agency of Natural Resources, Building 3 South, 103 South Main Street, Waterbury, VT 05676.

FOR FURTHER INFORMATION CONTACT: Cheryl A. Aloi, (617) 565-3252.

SUPPLEMENTARY INFORMATION: Pursuant to section 111(d) of the Clean Air Act, EPA promulgated regulations at 40 CFR part 60, subpart B, which require States to submit control plans to control emissions of designated pollutants from designated facilities. In the event that a State does not have a particular designated facility located within its boundaries, EPA requires that a negative declaration be submitted in lieu of a control plan.

On February 11, 1991, EPA established existing municipal waste combustors (MWC) with the capacity to combust greater than 250 tons per day of municipal solid waste (MSW) as designated facilities. EPA specified MWC organics, MWC metals, and MWC gases as designated pollutants by promulgating emission guidelines for existing MWCs as required by 40 CFR part 60, subpart B. See 56 FR 5514 for a complete discussion of the MWC guidelines. Therefore, States are required to submit to EPA either plans to control MWC organics, MWC metals and MWC gases from existing municipal waste combustors in the State, or a letter (negative declaration) certifying that no existing MWCs exist in the State.

On February 5, 1992, the Rhode Island Department of Environmental Management (DEM) submitted a letter certifying that there are no existing municipal waste combustors in the State subject to 40 CFR part 60, subpart B. EPA is codifying this negative declaration at 40 CFR 62.9975.

On September 18, 1991, the Vermont Agency of Natural Resources (ANR) submitted a letter certifying that there are no existing municipal waste combustors in the State subject to 40 CFR part 60, subpart B. EPA is codifying this negative declaration at 40 CFR 62.11450.

EPA is codifying these negative declarations 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 the other notice 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 shall be effective on November 30, 1992.

Final Action

EPA is approving negative declarations of municipal waste combustor emissions from municipal waste combustors submitted by the States of Rhode Island and Vermont.

Under 5 U.S.C. 605(b), I certify that this State implementation plan revision 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).

EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP Revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any State implementation plan. Each request for revision to the State implementation plan 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 November 30, 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) of the Clean Air Act.)

List of Subjects in 40 CFR Part 62

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Municipal waste combustors, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxides.

Dated: September 17, 1992.

Paul G. Keough,

Acting Regional Administrator, Region I

Part 62 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 62 continues to read as follows:

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

2. Subpart OO is amended by adding an undesignated center heading and § 62.9975 as follows:

Subpart OO—Rhode Island

Municipal Waste Combustor Emissions From Existing Municipal Waste Combustors With the Capacity To Combust Greater Than 250 Tons Per Day of Municipal Solid Waste

§ 62.9975 Identification of plan—negative declaration.

On February 5, 1992, the Rhode Island Department of Environmental Management submitted a letter certifying that there are no existing municipal waste combustors in the State subject to the emission guidelines published on February 11, 1991 (56 FR 5514) pursuant to part 60, subpart B of this chapter.

3. Subpart UU is amended by adding an undesignated center heading and § 62.11450 as follows:

Subpart UU—Vermont

Municipal Waste Combustor Emissions From Existing Municipal Waste Combustors With the Capacity To Combust Greater Than 250 Tons Per Day of Municipal Solid Waste

§ 62.11450 Identification of plan—negative declaration.

On September 18, 1992, the Vermont Agency of Natural Resources submitted a letter certifying that there are no existing municipal waste combustors in the State subject to the emission guidelines published on February 11, 1991 (56 FR 5514) pursuant to part 60, subpart B of this chapter.

[FR Doc. 92-23605 Filed 9-28-92; 8:45 am]

BILLING CODE 6560-50-M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-21

[FPMR Amendment D-91]

Change From Standard Level User Charge to Rent, and Change in Guidelines for Determining When an Appeal of the Rent Rate Is Appropriate

AGENCY: Public Buildings Service, GSA.

ACTION: Final rule.

SUMMARY: This regulation updates the FPMR to reflect the change in terminology from Standard Level User Charge (SLUC) to Rent in describing the charges to federal agencies for space and related services. This regulation also changes the guidelines for determining when an appeal of the Rent rate is appropriate, based on specific differences between the GSA rate and comparable commercial rates. SIBAC (Simplified Intragovernmental Billing and Collection) references are replaced by OPAC (On-Line Payment and Collection). Other minor clarifications of existing policies have been included.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Manfred van der Walde, Director, Financial Management Division (202-501-1954).

SUPPLEMENTARY INFORMATION: The General Services Administration has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. Therefore, a Regulatory Impact Analysis has not been prepared. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for, and the consequence of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

Regulatory Flexibility Act

The General Services Administration has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

List of Subjects in 41 CFR Part 101-21

Federal buildings and facilities, Government property and management.

For reasons set forth in the preamble, 41 CFR part 101-21 is amended as follows:

PART 101-21 FEDERAL BUILDINGS FUND

1. The authority citation for part 101-21 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)).

2. The table of contents for part 101-21 is revised as follows:

PART 101-21—FEDERAL BUILDINGS FUND

Sec.
101-21.000 Scope of part.
101-21.001 Authority.
101-21.002 Basic policy.
101-21.003 Definition of terms.
101-21.003-1 Federal Buildings Fund.
101-21.003-2 Rent.
101-21.003-3 Standard levels of service.
101-21.003-4 Special services.
101-21.003-5 Space and services.

Subpart 101-21.1—General

101-21.101 Background.
101-21.102 Applicability.

Subpart 101-21.2—Rent

101-21.200 General.
101-21.201 Determination of Rent.
101-21.202 Joint-use space.
101-21.203 Exceptions.
101-21.204 Exemptions.
101-21.205 Space and services provided by other executive agencies.
101-21.206 Revision of Rent rates.
101-21.207 Annual projections.

Subpart 101-21.3—Standard Levels of Service

101-21.300 General.
101-21.300-1 Flexitime.
101-21.301 Standard services for cleaning, mechanical operation, and maintenance.
101-21.302 Other standard services.
101-21.303 Space exempted from the standard levels of services.

Subpart 101-21.4—Reimbursable Services

101-21.400 Special services.
101-21.402 Services performed by other agencies.

Subpart 101-21.5—Funding Projects

101-21.501 GSA funding responsibility.
101-21.502 Funding responsibilities of other agencies.

Subpart 101-21.6—Billings, Payments, and Related Budgeting Information for Space and Services Furnished by the General Services Administration

101-21.600 Applicability.
101-21.601 Budgeting information for Rent.
101-21.602 Billing procedures for Rent charges.
101-21.602-1 Billing credits.
101-21.603 Budgeting information for reimbursable charges.
101-21.604 Billing procedures for reimbursable charges.
101-21.605 Payment procedures.
101-21.606 Reviews and appeals.

Subparts 101-21.7—101-21.48—[Reserved]

Subpart 101-21.49—Forms

101-21.4900 Scope of subpart.
101-21.4901 GSA forms.
101-21.4901-2957 GSA Form 2957, Reimbursable Work Authorization.

3. Part 101-21 is amended by revising §§ 101-21.000 thru 101-21.003-5 and subparts 101-21.1 thru 101-21.6.

§ 101-21.000 Scope of part.

This part prescribes policies and procedures to be followed for the furnishing of space and services by GSA in Government-owned and -leased buildings.

§ 101-21.001 Authority.

This part implements the applicable provisions of the Public Buildings Amendments of 1988, Public Buildings Amendments of 1972 (86 Stat. 216), the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), the Public Buildings Act of 1959 (73 Stat. 479), and the Reorganization Plan No. 18 of 1950 (40 U.S.C. 490 note).

§ 101-21.002 Basic policy.

(a) GSA will charge for space and services furnished by GSA (unless exempted by the Administrator of General Services) a Rent charge which will approximate commercial charges for comparable space and services. This is accomplished by using an appraisal procedure. The appraisal is based on a fully serviced lease and reflects the standard level of services provided by GSA. Services approximate those provided in the private sector.

(b) GSA may furnish services additional to those included in the Rent on a reimbursable basis.

(c) GSA may furnish alterations on a reimbursable basis in buildings where GSA is responsible for alterations only.

§ 101-21.003 Definition of terms.

The following definitions are established for terms used in Subchapter D of this chapter.

§ 101-21.003-1 Federal Buildings Fund.

Federal Buildings Fund means the fund into which Rent charges and other revenues are deposited, and collections cited in section 210(j) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 490(j)), and from which monies shall be available for expenditures for real property management and related activities in such amounts as are specified in annual appropriation acts without regard to fiscal year limitations.

§ 101-21.003-2 Rent.

Rent means the rate charged for GSA-controlled space. GSA-controlled space is that space assigned to an agency by GSA by authority of the Federal Property and Administrative Services Act of 1949, as amended, or by authority of any other statute. It includes any space for which an agency pays GSA directly. The Rent charge approximates commercial charges for comparable space and services.

§ 101-21.003-3 Standard levels of service.

Standard levels of service means those services provided as part of the Rent charge, depending upon the type of space occupied, and as defined in Subpart 101-21.3 ad 101-20.1 of this part.

§ 101-21.003-4 Special services.

Special services means those services that are not included in the standard level of services but are provided by GSA on a reimbursable basis upon request.

§ 101-21.003-5 Space and services.

Space and services means the combination of space occupied and the related services provided for that space.

Subpart 101-21.1—General

§ 101-21.101 Background.

The principal intent of section 210(d) of the Federal Property and Administrative Services Act of 1949, as amended is to promote greater efficiency and effectiveness in the use and management of Government-owned and -leased space. To this end, the assessment of charges that approximate commercial rates for comparable space and services will stimulate efficient space utilization, induce performance budgeting through the more realistic reporting of program costs, provide the basis for a responsible landlord-tenant relationship between GSA and other agencies, and establish a sound financial structure for the acquisition, construction, repair, alteration, maintenance, protection, and operation of real property.

§ 101-21.102 Applicability.

Rules and regulations in this part 101-21 apply to all agencies assigned space by GSA.

Subpart 101-21.2—Rent

§ 101-21.200 General.

This subpart prescribes the policies and procedures governing the establishment of the Rent charge for space and services provided by GSA.

§ 101-21.201 Determination of rent.

(a) The Rent charge is established by GSA and approved by the Office of Management and Budget. The charge reflects approximate equivalent commercial rates for comparable space and services, and is based on the type, quality, and geographic location of the space provided. Rent charges are based on appraisals performed by professional appraisers every five years and updated in the intervening years by changes in the local Consumer Price Index (CPI). Adjustments for increases or decreases in service and utility costs in the area where the building is located are based on weighted averages of amounts expended by GSA.

(b) Rent charges for GSA-controlled space entering the inventory after budget estimates are provided to customer agencies, are developed by appraisal prior to the assignment of the space. Annual adjustments are made as previously explained in this section.

§ 101-21.202 Joint-use space.

In those buildings where GSA has assignment responsibility and there is joint-use space such as cafeterias, auditoriums, conference rooms, credit unions, visitor parking spaces not specifically assigned, and snack bars, each agency provided access to or use of the facilities occupying the joint-use space will be charged a pro rata share of the space costs based on the percentage of the space assigned.

§ 101-21.203 Exceptions.

In those buildings where GSA is responsible only for alterations, the charges for such alterations will approximate the cost incurred.

§ 101-21.204 Exemptions.

The Administrator of General Services may exempt any occupant from Rent if he determines that application of the charge would be infeasible or impractical. Requests for exemption must be made in writing to the Administrator.

§ 101-21.205 Space and services provided by other executive agencies.

Any executive agency other than GSA that provides to anyone space and services is authorized to charge the occupant for the space and services at rates approved by the Administrator of General Services.

§ 101-21.206 Revision of rent rates.

GSA will review Rent rates annually to insure that they approximate commercial rates. Rates will be revised according to the criteria described in § 101-21.201. GSA will not increase its rates without notification through the Budget Estimate process except in the case of gross errors. Even in this special case, affected agencies are entitled to an opportunity to budget for the increase, if the revised total Rent charge is higher than the amount shown initially in the budget estimate. Eighteen months notice is generally given for an agency to budget for the increased Rent charges.

§ 101-21.207 Annual projections.

Annual projections of space assignments and related services are prescribed to provide occupant agencies with accurate data necessary for budget submission. Procedures for annual projections are described in § 101-21.601.

Subpart 101-21.3—Standard Levels of Service

§ 101-21.300 General.

The levels of service included in Rent approximate those currently furnished in commercial practice. They are based on the effort required to service the occupant agency's space for a 5-day week (Monday to Friday), one-shift regular work schedule. Adequate building start-up services before the occupant agency starts the regular work schedule and shutdown services after the occupant agency ceases the regular work schedule, even though the working hours of the occupant agency may be staggered, will be provided by GSA. Space, automatic elevator systems, lights and small office and business machines may be used on an incidental basis 24 hours a day, 7 days a week without additional payment to GSA where access by the occupant is available without additional cost to GSA.

§ 101-21.300-1 Flexitime.

Occupant agencies who extend their regular work schedule by a system of flexible hours shall reimburse GSA for the actual cost of the additional services required.

§ 101-21.301 Standard services for cleaning, mechanical operation, and maintenance.

Standard services for cleaning, mechanical operation, and maintenance shall be accomplished in accordance with the established GSA standards as cited in Subpart 101-20.1 of part 101.20 of this chapter.

§ 101-21.302 Other standard services.

GSA may provide additional services at appropriate levels and times that the Administrator of General Services determines to be necessary for efficient operations and proper servicing of space

under the assignment responsibility of GSA.

§ 101-21.303 Space exempted from the standard levels of service

The Administrator of General Services may exempt from the standard levels of service space for which, because of its limited square footage or functional use, application of the standard levels of service would be infeasible or impractical.

Subpart 101-21.4 Reimbursable Services.

§ 101-21.401 Special services.

Special services not included in the standard levels of service are provided by GSA on a reimbursable basis. Funds for reimbursable services should be included in occupant agency budget submissions.

§ 101-21.402 Services performed by other agencies.

Agencies occupying space under the assignment responsibility of GSA that perform or contract for services normally provided for in the Rent levied by GSA will be reimbursed by GSA for the actual cost of services performed.The amount of reimbursement will be limited to the cost of the services to GSA if GSA had provided them. Approval to perform or contract for such services must be obtained in advance from the appropriate GSA regional office.

Subpart 101-21.5—Funding Projects.

§ 101-21.501 GSA funding responsibility.

Projects for the construction or alteration of public buildings, or for the alteration of leased buildings, for which GSA is responsible will be financed from the Federal Buildings Fund.

§ 101-21.502 Funding responsibilities of other agencies.

(a) A department or agency may request an appropriation to cover the cost of the construction or acquisition of a facility defined as a public building in § 101-19.003-6 of this chapter when the Administrator of General Services has obtained the authorization therefor and concurs with the request, and approval has been given by the Office of Management and Budget. The construction or acquisition of the facility shall be performed by GSA.

(b) GSA shall, upon the request of a department or agency, construct, alter, or acquire buildings other than public buildings which are normally financed by other agencies upon condition that funds to cover the cost of the work shall be transferred or reimbursement shall be made to GSA.

(c) Each Federal agency shall be responsible for the financing of special use facilities and equipment not contemplated in the approved project.

Subpart 101-21.6 Billings, Payments, and Related Budgeting Information For Space and Services Furnished by the General Services Administration

§ 101-21.600 Applicability.

These rules and regulations apply to GSA and all agencies furnished space and related services by GSA.

§ 101-21.601 Budgeting information for rent.

(a) GSA provides to agencies summary level and detailed documentation in support of budgetary information it submits for the space and related services it furnishes. The documentation identifies organizations and organizational elements by an agency and bureau code numbering system.

(b) Federal agencies that require relocation of other agencies because of expanding space needs are responsible for funding.

(1) Moving, telecommunications, and related costs incurred by GSA in relocating displaced agencies and,

(2) above standard alterations comparable to their previously occupied space on a square foot by square foot basis and,

(3) Rent charges in excess of the amount budgeted by the displaced agency until such time (no more than 18 months) as the agency has had an opportunity to budget for the increase.

§ 101-21.602 Billing procedures for rent charges.

(a) Bills for Rent are normally rendered to the Central Office headquarters of each agency occupying space under the assignment responsibility of GSA. Under the OPAC (On-Line Payment and Collection), formerly SIBAC (Simplified Intragovernmental Billing and Collection) system, payment is to be processed at the level of organization within an agency which relates to a Treasury Department 8-digit station symbol. (Forms with references to SIBAC will continue to be used until stock is depleted.)

(b) Bills for charges applicable to current space assignments are rendered quarterly at the beginning of the quarter. The billing includes adjustments for billing errors and changes in space assignments made prior to or during the previous quarter. Documentation delineating billing errors and changes in space assignments are provided with bills.

(c) Agencies which have been assigned an 8-digit station symbol by the Treasury Department (OPAC agencies) are billed in accordance with the procedures prescribed by the Treasury Fiscal Requirements Manual, Part VI, Chapter 5000. Non-OPAC, designated as BOAC (Billed Office Address Code) agencies, are billed on GSA Form 789, Statement, Voucher, and Schedule of Withdrawals and Credits (referenced in § 101-2.4902-789 of this chapter).

§ 101-21.602-1 Billing credits.

If an error in billing occurs, an adjustment may be requested through the applicable GSA Regional Office by letter, by GSA Form 2972 for OPAC Agencies, or by GSA Form 2992 for BOAC agencies. GSA applies a one year limitation standard to adjustment requests received by letter or by GSA Form 2972 or 2992. Adjustment requests must be received within one year from the date of the Rent bill.

§ 101-21.603 Budgeting information for reimbursable charges.

Concurrently with the Rent listings for the applicable budget year, GSA provides an estimate of increases in the cost of recurring reimbursable services through the budget year based on projections provided by the Office of Management and Budget. These may be used to escalate actual costs from current year or preceding year data. The use of this information is not mandatory.

§ 101-21.604 Billing procedures for reimbursable charges.

(a) Charges for reimbursable services are billed to the level of organization within an agency which relates to a Department of the Treasury assigned 8-digit station symbol (OPAC agencies). This is accomplished under the On-Line Payment and Collection (OPAC) procedure. (See Treasury Fiscal Requirements Manual, Part VI, Chapter 5000.) BOAC (Billed Office Address Code) agencies are charged for reimbursable services by GSA billing directly to the agency paying office cited on the reimbursable work authorization request. (See § 101-21.4901-2957, GSA Form 2957, Reimbursable Work Authorization.)

(b) GSA Form 789, Statement, Voucher, and Schedule of Withdrawals and Credits is used for billing purposes for BOAC agencies. (See illustration at § 101-2.4902-789 of this chapter).

(c) Rates charged for recurring above-standard-level reimbursable services shall be fixed to recover the

approximate cost incurred by GSA in providing such services. Recurring above-standard-level reimbursable services are those recurring services, such as cleaning or utilities, which cannot readily be differentiated from the same type of services included in the standard level.

(d) The following basic types of reimbursable work are also performed by GSA but on an actual cost basis:

(1) Non-recurring services performed above standard levels of service, such as out-of-cycle painting;

(2) Recurring services not included in the standard level for which the actual cost can be readily identified;

(3) Repairs and alterations in buildings not controlled by GSA;

(4) Special space alterations and adjustments performed by GSA in GSA-operated buildings, which are requested and financed by other agencies in accordance with § 101-20.106, Reimbursable services of this chapter; and

(5) Services financed by other agencies but performed by GSA personnel on construction and alteration projects.

(e) GSA Form 2957, Reimbursable Work Authorization, must be completed and approved by GSA and the client agency before reimbursable work is begun. This authorization must describe the work or services ordered and include an estimate of the cost of the work described. Work authorizations must be signed by a responsible official capable of authorizing the obligation and committing the agency to payment of the charges, must contain a citation to the appropriation or funds to be charged, and must have a statement that funds in the amount of the stated estimate are available for immediate obligation for the requested work. GSA will make every effort to obtain approval and certification of additional funds before incurring any obligations in excess of the estimate except when:

(1) Total obligations are incurred against reimbursable work authorizations with a total authorized amount of $1,000 or less in an amount exceeding the authorized amount by up to $100 and;

(2) Total obligations are incurred against reimbursable work authorizations with an authorized amount in excess of $1,000 by up to 10 percent of the amount or $1,000, whichever is less, unless such action would result in the estimated maximum costs exceeding the prospectus limitation for the current fiscal year for which no specific congressional prospectus project approval or certification exempting the funds from section 7 of the Public Buildings Act of 1959, as amended, exists. However, failure of GSA to notify the agency that obligations will exceed the authorized amount, regardless of the dollar amount, does not relieve the agency of paying full actual costs.

(f) Bills for recurring above-standard-level services (identified by prefix "R" in the first position of the work authorization number on GSA Form 2957) are rendered in advance at a fixed-price equal to the estimated amount. This type of work authorization, with the right to cancel (subject to incurred costs and obligations) upon 60 days notice by either party must be completed and forwarded to GSA prior to the commencement of the period for which services are required. With the exception of recurring work authorizations for utilities, which GSA may limit to 3-month periods, each "R" type work authorization must authorize charges for the full period during the fiscal year that the services will be required. These work authorizations must always begin and end within the same fiscal year.

(g) Bills for all other reimbursable services are rendered quarterly in an amount equal to the obligations accumulated for the billing period. A final adjustment to actual cost will be made upon completion of the services.

(h) Agencies shall ensure that bills for special space alteration services ordered by them under provisions of § 101-20.106 shall be rendered by the contractor or lessor directly to the agencies' paying office. The agencies shall be responsible for timely payment and resolving any billing problems regarding orders they place under the contracts or agreements.

§ 101-21.605 Payment procedures.

Payment of billings for space and services to OPAC agencies shall be in accordance with the procedures prescribed by the Treasury Fiscal Requirements Manual, Part VI, Chapter 5000. Billings for space and services to BOAC agencies shall be paid promptly by check or transfer document upon receipt of the billing document, in accordance with the GAO Manual for Guidance of Federal Agencies, title 7, Fiscal Procedures, Ch. 2, Sec. 7.3(b).

§ 101-21.606 Reviews and appeals.

(a) Agencies may at any time request a regional review of the measurement, classification, service levels provided, or charges assessed that pertain to the space assignment without resorting to formal procedures. Such requests do not constitute appeals and should be directed to the appropriate GSA regional office.

(b) Agencies may file formal appeals on the Rent assessed, but only when the charge assessed is in excess of the comparable commercial square foot rates by 20 per cent or one dollar per square foot, whichever is greater, and when the quarterly Rent charge is in excess of the comparable commercial charge for that quality of space by $25,000. Formal appeals should be filed with the appropriate Regional Administrator. To determine if the Rent charge assessed is subject to appeal under this procedure, an agency is required to compare its assigned space with other space in the surrounding community that:

(1) is available in similar size blocks of space in a comparable location,

(2) is the same type of space as defined by GSA,

(3) provides similar service levels as part of the charges,

(4) contains similar contractual terms, conditions, and escalation clauses, and

(5) represents a lease transaction completed at a similar point in time.

Data from at least three comparable locations will be necessary to demonstrate a market trend sufficient to warrant revising a Rent rate. Agencies filing appeals must develop documentation supporting an appeal of the Rent charge assessed using the factors described in this paragraph.

(c) An appeal shall initially be filed by local agency officials with the appropriate GSA regional office and include all pertinent information and documentation supporting the need for the appeal. The GSA regional office will verify the data submitted and perform additional investigation as necessary. The GSA Regional Administrator will determine the validity of the appeal and will notify the appealing agency of his ruling.

(d) A further appeal may be filed by the agency's bureau level officials with the Commissioner, Public Buildings Service, GSA, if an equitable resolution has not been obtained from the initial appeal. The second stage appeal must provide supporting information justifying the continuation of the appeal.

(e) A head of an agency may further appeal to the Administrator of General Services only after the procedure to obtain prior resolution at the first two levels has been followed. Documentation of the procedure followed for prior resolution must accompany an appeal to the Administrator. Decisions made by the Administrator shall be final.

(f) Adjustments to the Rent rates which result from the reviews and appeals procedure will be effective in the quarter in which the agency submitted a properly documented appeal. Adjusted rates remain in effect for the remainder of the fiscal year.

(g) If an agency questions the rate developed for a specific building in the budget estimate, the appropriate GSA Regional Office should be contacted for information on the projected rate.

Note: If an informal resolution is not reached after discussions with the Regional Real Estate personnel, the agency may appeal the rate, provided the criteria for an appeal are met. The appeal may be filed, as outlined in paragraphs (b), (c), (d), and (e) of this section. The appeal documentation must include current-year information for comparable buildings. The Regional Office will provide the current year rate for the building in question.

Dated: August 26, 1992.

Richard G. Austin,

Administrator.

[FR Doc. 92-22847 Filed 9-28-92; 8:45 am]

BILLING CODE 6820-23-M

FEDERAL MARITIME COMMISSION

46 CFR Parts 500, 514, 550, 552, 553, and 555

[Docket No. 92-34]

Domestic Offshore Financial Filing Regulations; Exemption Under Section 35 of the Shipping Act, 1916

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission ("FMC" or "Commission") amends its regulations to remove certain financial filing requirements and auditing procedures for carriers in the domestic offshore trades. The rule also exempts non-vessel-operating common carriers ("NVOCCs") from the provisions of section 3 of the Intercoastal Shipping Act, 1933 ("1933 Act"). These amendments will reduce recordkeeping and other regulatory requirements.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573-0001, (202) 523-5725.

SUPPLEMENTARY INFORMATION: By Notice of Proposed Rulemaking ("NPR") published in the **Federal Register** on June 12, 1992, 57 FR 25005, the Commission proposed to eliminate 46 CFR part 553, which prescribes the form and content of certain financial exhibits and schedules of NVOCCs in the domestic offshore trades and establishes the methodology that the Commission would follow in evaluating proposed rate changes submitted by such NVOCCs subject to the provisions of the 1933 Act, 46 U.S.C. app. 843 *et seq.* This part also provides for the retention and orderly acquisition of the data required for the methodology so established, and specifies that the Commission employ the operating ratio methodology when evaluating proposed rate changes by NVOCCs. Specifically, § 553.4 requires each NVOCC to maintain its records in such a manner as to permit the timely preparation of the exhibits and schedules filed in the event that the Commission institutes an investigation and hearing with respect to proposed rate changes.

Since the Commission has had no reason to institute an investigation and hearing with respect to an NVOCC's proposed rate change in the 14 years since the 1933 Act was amended to require such methodology guidelines, the NPR indicated that part 553 does not appear to be necessary and would seem to impose a recordkeeping burden on NVOCCs that outweighs any identifiable benefits. Accordingly, the Commission proposed to relieve NVOCCs from these recordkeeping requirements by terminating part 553.

As a corollary to removal of these recordkeeping requirements, the Commission also proposed to delete the guidelines for what constitutes a just and reasonable profit for NVOCCs, and exempt NVOCCs from the provisions of section 3 of the 1933 Act, 46 U.S.C. app. 845. Section 3 authorizes the Commission to suspend and investigate new and amended tariff matter filed by carriers, including NVOCCs, in the domestic offshore trades. Strict time limits are placed upon proceedings conducted under this section, and the carrier is required to refund any unsuspended portion of a general increase in rates found unjust and unreasonable. The Commission recognized that section 18 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 817, provides a continuing basis for investigating the reasonableness of NVOCC rates in the domestic offshore trades, without the strict time constraints (and consequent recordkeeping requirements) imposed by section 3 of the 1933 Act.

46 CFR part 555 pertains to audits and auditing procedures in the domestic offshore trades and to those carriers required to file periodic reports with the Commission pursuant to 46 CFR part 552.[1] Part 555 establishes rules governing audits by Commission auditors of the books and records of carriers engaged in the domestic offshore trades of the United States, and those required to file periodic reports with the Commission pursuant to part 552 of this chapter. Section 555.5 provides for the confidentiality of the information obtained by the Commission.

Since the Commission has not conducted any audits under part 555 in the past 15 years, it proposed its removal. The NPR noted that 46 CFR 552.4 provides the Commission with access to all financial documents, records and working papers used by a carrier in preparation of the financial reports and exhibits submitted to the Commission under 46 CFR part 552. Because 46 CFR part 552 does not provide for confidentiality as does 46 CFR part 555, the Commission also proposed to incorporate the confidentiality provisions of § 555.2 into 46 CFR 552.4.

Comments on the proposed rulemaking were filed by American President Lines, Ltd. ("APL"), Sea-Land Service, Inc. ("Sea-Land") and Tropical Shipping and Construction Co., Ltd. ("Tropical").

APL raises no objections to the proposals to eliminate parts 553 and 555, and supports the reincorporation of the confidentiality requirements into § 552.4(c). APL believes that the text of § 552.4(c) would be more accurately accommodated to the context of part 552 by deleting the words "or its duly accredited special agents or auditors as a result of an audit carried out." The carrier also points out the need for a conforming change to 46 CFR § 500.211, which contains a reference to part 555. The Commission concurs and has revised the text of § 552.4(c) accordingly. A conforming change to § 500.211 has been made in the final rule. A technical change also has been made to the authority cited for part 500.

Sea-Land supports the proposed amendments in this rulemaking to eliminate parts 553 and 555, the incorporation of the confidentiality provisions of part 555 into part 552, and the amendment of part 550 to exempt NVOCCs from the requirements of section 3 of the 1933 Act. It argues that the regulations to be eliminated or revised are overly burdensome and unwarranted. Sea-Land believes that the elimination of part 553, and the

[1] Part 552 contains the requirements for financial reports of vessel-operating common carriers ("VOCCs") in the domestic offshore trades.

exemption of NVOCCs from section 3 of the 1933 Act, would not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce. Sea-Land states that these changes would not leave NVOCC rates in the domestic offshore trades unregulated since they continue to be subject to FMC oversight and effective regulation, principally under section 18 of the 1916 Act. It also urges the Commission to amend its regulations pertaining to the financial requirements applicable to VOCCs in the domestic offshore trades.[2]

Tropical's comments concern only the proposal to remove part 553. It does not comment on part 555. Specifically, Tropical opposes the proposals to exempt NVOCCs from compliance with section 3 of the 1933 Act, and to eliminate the need for NVOCCs to retain financial data in a particular format should the Commission institute an investigation and hearing with respect to proposed rate changes by NVOCCs. Tropical suggests that the proposed rulemaking be withdrawn.

Tropical notes the exemption criteria of section 35 of the 1916 Act, [3] and points out that the sole basis provided by the Commission for this proposed exemption is that the FMC has not had reason to institute an investigation and hearing with respect to an NVOCC's proposed rate change in 14 years. Tropical refers to the Petition for Exemption from the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984 (Petition No. P5–91), 26 SRR 240 (1992) ("FIATA Petition"), and notes that the Commission, in finding no evidence to support an exemption there, indicated that it lacked information about the number of NVOCCs operating in specific trades, NVOCC market shares or cargo volumes, or even estimate thereof, and also that it was not aware of the extent to which NVOCCs competed among themselves, or with VOCCs. Tropical argues that if this same information is missing on the domestic offshore trades, the FMC lacks a basis to find that there is no impairment of regulation, no unjust discrimination, and no detriment to commerce. Tropical characterizes the Commission's action as premature, and suggests that a fact-finding would be more appropriate to develop information about NVOCCs operating in the domestic offshore trade to determine whether a section 35 exemption should be warranted.

Tropical also contends that VOCCs and NVOCCs compete for the same cargoes and urges the FMC to avoid altering competitive relationships by subjecting VOCCs—and not NVOCCs—to regulation, thus creating an unlevel playing field and giving NVOCCs an advantage in the marketplace. It stresses that if the domestic offshore trades are to be deregulated, this should be done for all competitors. Tropical reiterates the comments it submitted in Docket No. 91–51, *supra*, suggesting that both VOCCs and NVOCCs be relieved of regulatory burdens in the U.S.-Virgin Islands trade, where foreign competition is the rule.

The Commission does not agree that there is an insufficient factual basis on which to find that this exemption will not substantially impair effective regulation, be unjustly discriminatory or be detrimental to commerce. The purpose of part 553 was to permit the Commission to adjudicate the reasonableness of NVOCC rates under the provisions of section 3 of the 1933 Act, as amended in 1978. The last Commission NVOCC rate investigation was concluded in 1976. Docket No. 76–26, Transconex, Inc. Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade, 16 SRR 1625 (1976). The fact that the Commission has found no reason to investigate the rates of an NVOCC in the domestic offshore trades since prior to 1978 is significant in evaluating the need to continue part 553 and in determining the impact of this exemption upon effective regulation.

Exemption of NVOCCs from the requirements of section 3 of the 1933 Act would not exempt them from the essential requirement to establish, observe and enforce just and reasonable rates. That directive is also found in section 18(a) of the 1916 Act and would continue to apply to NVOCCs. A proceeding under section 18 could be instituted by complaint or on the Commission's own motion, and the NVOCC respondent in such a proceeding could be required to produce financial data in support of its rates. In addition, section 4 of the 1933 Act, 46 U.S.C. app. 845a, would continue to provide a right of reparation to complainants for rates found unjust or unreasonable under section 18. Thus, NVOCCs would remain subject to the most substantive requirement of section 3, i.e., reasonableness of rates.

The concept of an NVOCC was first recognized by the Commission in *Bernhard Ulmann Co.* v. *Puerto Rico Express Co.*, 3 F.M.B. 771 (1952). The status of NVOCCs as common carriers was explored in greater detail in Common Carriers by Water-Status of Express Companies, Truck Lines and Other Non-Vessel Carriers, 5 F.M.B. 245 (1961). Through the first half of the 1970s, the Commission had considerable experience in attempting to adjudicate the reasonableness of NVOCC rates in the domestic offshore trades [4] and, subsequent to 1973, gained further insight into the NVOCC industry as a result of litigation over the so-called "50-mile rules." [5]

In 1980, on the basis of all of this experience, the Commission amended its rules governing financial reports of NVOCCs to delete the requirements to file annual reports and the justification previously submitted with every general rate change. In deleting those requirements, the Commission said:

> Competition among NVOs and competition with vessel operating common carriers offering a less-than containerload service tend to place a ceiling on the rates of an NVO. The freight-all-kinds rate of the underlying carrier generally provides a floor. It is felt that the current reporting requirements are too burdensome in view of these market constraints on the NVO's ability to raise or lower rates at will.[6]

The Commission is unaware of any changes since 1980 which would invalidate this position. This observation that NVOCC rates are constrained by competition and by the shipper-carrier relationship of NVOCCs and VOCCs is reinforced by the fact

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[2] The review of financial reporting requirements for VOCCs is the subject of a separate proceeding, Docket No. 91–51, Financial Reports of Common Carriers by Water in the Domestic Offshore Trades, Advance Notice of Proposed Rulemaking, 46 FR 57298 (Nov. 8, 1991).

[3] Section 35 of the 1916 Act, 46 U.S.C. app. 833a, provides exemption authority as follows: The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of such persons from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

[4] E.g. Docket No. 69–21, Transconex, Inc.-General Increase in Rates in the U.S. South Atlantic/Puerto Rico-Virgin Islands Trade, and Docket No. 69–29, Consolidated Express Inc.-General Increases in Rates in the U.S. North Atlantic/Puerto Rico Trade, 14 F.M.C. 35 (1970); Docket No. 71–86, Twin Express, Inc. General Increases in Rates in the U.S. Atlantic and Puerto Rico Trade, Order of Discontinuance, December 11, 1973 (unreported).

[5] This litigation included several Commission investigations, numerous complaint proceedings, and related actions before the National Labor Relations Board and U.S. courts. See "Fifty Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports, 24 SRR 411 (1987), aff'd sub nom. New York Shipping Association, Inc. v. FMC, 854 F.2d 1338 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 866 (1989).

[6] Docket No. 78–46, Financial Exhibits and Schedules of Non-Vessel Operating Common Carriers in the Domestic Offshore Trades, 19 SRR 1261, 1262 (1980).

that Commission records reflect a total absence of complaints or protests against NVOCC rates in the intervening years.

As noted earlier, NVOCCs will continue to be subject to the requirements of section 18 of the 1916 Act to establish, observe and enforce just and reasonable rates and practices. They will also continue to be governed by the tariff filing and anti-discrimination provisions of the 1916 Act and the 1933 Act. In addition, the rights of shippers to obtain reparation for unreasonable or discriminatory NVOCC rates are not affected by this exemption. Accordingly, the exemption should not impair effective regulation by the Commission.

The exemption will not be unjustly discriminatory. It treats all NVOCCs in the domestic offshore trades equally. While Tropical stresses the competition that exists between NVOCCs and VOCCs, it fails to acknowledge the constraints on price competition that NVOCCs face because of their reliance on VOCCs to carry the cargo that NVOCCs obtain from the shipping public.

The Commission does not believe that this exemption will be detrimental to commerce. In fact, it should have virtually no effect on commerce, because the requirements have not been imposed since 1976. The attempt of Tropical to equate this exemption to that sought by the FIATA Petition is misplaced. There, FIATA sought an exemption from the tariff filing requirements of the Shipping Act of 1984 for all NVOCCs in foreign commerce. The Commission found that proponents had not met their burden of proof with respect to the criteria for exemption under section 16 of the Shipping Act of 1984, 46 U.S.C. app. 1715, and cited factual disputes among the comments, as well as a total absence of other important facts which precluded the necessary findings for an exemption.

In the instant proceeding, there are no factual disputes and no issues raised of shipper discrimination which could result from the exemption of NVOCCs from section 3 of the 1933 Act. The additional facts that Tropical would have the Commission gather by a fact finding investigation prior to proceeding to a final rule are generally irrelevant to this particular exemption.[7] Such an investigation would not be a productive use of Commission resources.

Finally, the Commission disagrees with the assertions of Tropical that this exemption will make the playing field unlevel and give NVOCCs an advantage in the marketplace unless the same exemption is provided VOCCs. The regulatory provisions from which we are exempting NVOCCs have not been used in at least 14 years. Meanwhile, VOCCs have been required to file financial data[8] and their rates have been the subject of protests and formal investigations.[9] Thus, this exemption should not alter the competitive relationship between NVOCCs and VOCCs that has existed since at least 1978.

The Commission is considering amending its financial reporting requirements for VOCCs in a separate proceeding, Docket No. 91–51, *supra*. Issues pertinent to VOCC rate regulation are more appropriately addressed in that proceeding.

For all of these reasons, the Commission rejects the suggestion of Tropical that the proposed rule be withdrawn, and adopts the proposal as a final rule.

After the June 12, 1992, publication of the proposed rule in this proceeding, an interim rule was published on August 12, 1992 (57 FR 36248), in Docket No. 90–23, Tariffs and Service Contracts (46 CFR Part 514), which implements the Commission's Automated Tariff Filing and Information System ("ATFI"). Accordingly, the appropriate provisions of part 514 are also amended herein in a manner similar to the changes to the source part 550.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the rule in terms of that Order and has determined that this rule is not a "major rule" as defined in Executive Order 12291 because it will not result in:

(1) Annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions. This rule will reduce recordkeeping and other regulatory provisions for NVOCCs.

This rule does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as amended.

List of Subjects

46 CFR Part 500

Conflict of interests.

46 CFR Part 514

Barges, Cargo, Cargo vessels, Exports, Fees and user charges, Freight, Harbors, Imports, Maritime carriers, Motor carriers, Ports, Rates and fares, Reporting and recordkeeping requirements, Surety bonds, Trucks, Water carriers, Waterfront facilities, Water transportation.

46 CFR Part 550

Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 552

Maritime carriers, Reporting and recordkeeping requirements, Uniform system of accounts.

46 CFR Part 553

Freight forwarders, Maritime carriers, Reporting and recordkeeping requirements, Uniform system of accounts.

46 CFR Part 555

Confidential business information, Maritime carriers, Uniform system of accounts.

Therefore, pursuant to 5 U.S.C. 552 and 553; 18 U.S.C. 207, 208 and 1905; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814–817, 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, and 1111, chapter IV, of title 46, Code of Federal Regulations, is amended as follows:

[7] For example, Tropical suggests that the FMC determine how many Part IV Freight Forwarders there are in the domestic offshore trades and what volume of cargo they carry. Since 1986, general commodity freight forwarders in these trades have been deregulated: See Surface Freight Forwarder Deregulation Act of 1986 Pub. L. 99–521, 100 stat 2994 (Oct. 22, 1986).

[8] Many smaller VOCCs are not required to file complete financial data by virtue of the waiver provisions of 46 CFR § 552.2(e).

[9] E.g., Docket No. 81–10, Sea-Land Service, Inc. et al., Proposed General Rate Increases in the Puerto Rico and Virgin Islands Trades, 20 SRR 1627 (1981), aff'd sub nom. Puerto Rico Maritime Shipping Authority v. F.M.C., 678 F. 2d 327, 21 SRR 859 (D.C. Cir. 1982) cert. denied 459 U.S. 906 (1982); and Docket 90–09, Matson Navigation Co., Inc. Proposed General Rate Increase of 3.6 Percent Between U.S. Pacific Coast Ports and Hawaii Ports, 25 SRR 1192 (1990), aff'd sub nom. Matson Navigation Co., Inc. v. F.M.C. 959 F. 2d 1039, 26 SRR 283 (D.C. Cir. 1992).

PART 500—EMPLOYEE RESPONSIBILITIES AND CONDUCT

1. The authority citation for part 500 is revised to read as follows:

Authority: 18 U.S.C. 207, 208; 46 U.S.C. app. 1111; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., P. 215; E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Section 500.211 is revised, to read as follows:

§ 500.211 Release of confidential or non-public information.

An employee shall not divulge to any unauthorized person any nonpublic or confidential Commission document or information, including the results of portions of Commission meetings closed to the public pursuant to 46 CFR part 503, subpart H, and comments made, information divulged or memoranda prepared incidental to such closed meetings, except pursuant to the procedures of 5 U.S.C. 552, 552a and 552b and 46 CFR part 503 or as specifically directed by the Commission. Employees are also reminded of the provisions of § 552.4(c) of this chapter, which relate to confidentiality of information obtained in the course of official Commission audits, and which provide for penalties for disclosure of confidential information.

PART 514—TARIFFS AND SERVICE CONTRACTS

1. The authority citation for part 514 continues to read as follows:

Authority: U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814–817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702–1712, 1714–1716, 1718, 1721 and 1722; and sec. 2(b) of Pub. L. 101–92, 103 Stat. 601.

2. Section 514.3 is amended by adding a new paragraph (a)(10) to read as follows:

(a) * * *

§ 514.3 Exemptions and exclusions.

* * * * *

(10) *NVOCCs in domestic offshore commerce.* Non-vessel-operating common carriers ("NVOCCs") providing transportation in domestic offshore commerce are exempt from the provisions of section 3 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 845, and thus, from the suspension provisions of § 514.19(a). The reasonableness of NVOCC rates in domestic offshore commerce may be determined under the provisions of section 18 of the 1916 Act, 46 U.S.C. app. 817.

* * * * *

PART 550—PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE COMMERCE

1. The authority citation for part 550 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 812, 814, 815, 817, 820, 833a, 841a, 843, 844, 845, 845a, 845b, and 847.

2. Section 550.1 is amended by adding a new paragraph (c) to read as follows:

§ 550.1 Exemptions.

* * * * *

(c) Non-vessel-operating common carriers ("NVOCCs") providing transportation in domestic offshore commerce are exempt from the provisions of section 3 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 845, and, thus, from the provisions of § 550.13 of this part. The reasonableness of NVOCC rates in domestic offshore commerce may be determined under the provisions of section 18 of the Shipping Act, 1916, 46 U.S.C. app. 817.

PART 552—FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

1. The authority citation for part 552 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 817(a), 820, 841a, 843, 844, 845, 845a and 847.

2. Section 552.4 is amended by adding a new paragraph (c) to read as follows:

§ 552.4 Access to and audits of records.

* * * * *

(c) All information obtained by the Commission pursuant to the provisions of this part shall be withheld from public disclosure and shall be treated as confidential information in the files of the Commission; except that any confidential information derived from an audit may be utilized by the Commission as the basis for a formal proceeding instituted pursuant to section 22 of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933, and may also be utilized in such a proceeding.

PART 553—FINANCIAL EXHIBITS AND SCHEDULES OF NON-VESSEL-OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE TRADES

1. Part 553 is removed.

PART 555—AUDITS AND AUDITING PROCEDURES IN THE DOMESTIC OFFSHORE TRADES

1. Part 555 is removed.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 92–23234 Filed 9–28–92; 8:45 am]

BILLING CODE 6730–01–M

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46 CFR Part 542

[Docket No. 92–19]

Revision of Financial Responsibility Requirements for Non-Performance of Transportation

AGENCY: Federal Maritime Commission.

ACTION: Final rule; correction.

SUMMARY: The Commission's final rule in this proceeding was published September 14, 1992 (57 FR 41887). The public reporting burden, which was estimated at page 41891, 1st column, line 4, to average "15.15 hours per response" is corrected to read "60.0 hours per response."

EFFECTIVE DATE: October 14, 1992.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, (202) 523–5796.

Joseph C. Polking,

Secretary.

[FR Doc. 92–23531 Filed 9–28–92; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 80

[DA 92–1277]

Maritime Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Order revises the performance standards for Global Maritime Distress and Safety System (GMDSS) radio equipment to reflect the latest international standards. Actual changes to the standards were minor or editorial in nature and should have minimal, if any, affect on subject equipment. It also clarifies the equipment authorization requirements under the GMDSS for existing emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs).

EFFECTIVE DATE: This regulation is effective as of September 29, 1992. The incorporation by reference of IMO

Resolution A.700(17) is approved by the Director of the Federal Register as of September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Kathryn S. Hosford, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, DC 20554; or telephone (202) 632-7197.

SUPPLEMENTARY INFORMATION: The following Order, DA 92-1277, was adopted September 17, 1992, and released September 23, 1992, by delegated authority of the Chief, Private Radio Bureau.

List of Subjects in 47 CFR Part 80

Communications equipment, Incorporation by reference, Marine safety, Ship stations.

In the Matter of; Nonsubstantive and editorial amendments of Part 80, Subpart W of the Commission's Rules regarding the Global Maritime Distress and Safety System (GMDSS); Order

Adopted: September 17, 1992.

Released: September 23, 1992.

By the Chief, Private Radio Bureau.

1. On February 7, 1992, the Commission released a Report and Order that implemented the Global Maritime Distress and Safety System (GMDSS) in the Commission's Rules. Report and Order, PR Docket No. 90-480, FCC 92-19, 7 FCC Rcd 951 (1992), 57 FR 9063 (1992). At the same time, the International Maritime Organization (IMO) was updating the GMDSS performance standards in the Safety of Life at Sea (SOLAS) Convention. Additionally, the performance standards being considered by the Commission simultaneously were being reviewed by the **Federal Register** under special procedures for "incorporation by reference." Minor differences among the various documents resulted.

2. The international standards now have been updated and we have reviewed the status of all performance standards incorporated by reference in the Rules. Actual changes to the standards were minor or editorial in nature and should have minimal affect, if any, on subject equipment. Thus, 47 CFR 80.1101 is updated to be consistent with the latest international standards. For clarity § 80.1101 is revised in its entirety. The notable changes, however, are as follows: IMO Resolution A.700(17) is added to paragraph (c)(4) for MF/HF narrow-band direct-printing (NBDP) radio equipment; IMO Resolution A.698(17) replaces IMO Resolution A.608(15) in paragraph (c)(8) for INMARSAT-A ship earth stations (SESs); and the CCIR Recommendation 493-4 reference in paragraphs (c)(8) and (c)(9) is deleted for INMARSAT SESs.

3. On a related matter, we are also clarifying that emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992 (the effective date of the Report and Order) and meet the GMDSS performance standards are exempt from the GMDSS labeling requirement. They may be added to the list of GMDSS-approved equipment by simply submitting a letter. This provision for 406 MHz EPIRBs was stated in the text of the Report and Order but it was not reflected in the Rules. See Report and Order, footnote 39. Therefore, 47 CFR 80.1103 is amended to clarify this point.

4. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment procedures and the 30 day effective date provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. section 553, need not be complied with. Authority for this action is contained in section 0.331(a)(1) of the Commission's Rules, 47 CFR section 0.331(a)(1).

5. Accordingly, part 80 is amended as set forth in the Amendatory Text effective upon publication in the **Federal Register**.

6. Regarding questions on matters covered in this document, contact Kathryn S. Hosford at 202-632-7197.

Federal Communications Commission.

Ralph A. Haller,

Chief, Private Radio Bureau.

Amendatory Text

Part 80 of Chapter I of title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 80 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.1101 is revised to read as follows:

§ 80.1101 Performance standards.

(a) The abbreviations used in this section are as follows:

(1) International Maritime Organization (IMO).

(2) International Telegraph and Telephone Consultative Committee (CCITT).

(3) International Electrotechnical Commission (IEC).

(4) International Organization for Standardization (ISO).

(5) International Radio Consultative Committee (CCIR).

(b) All equipment specified in this subpart must meet the general requirements for shipboard equipment listed in this paragraph, which are incorporated by reference.

(1) IMO Resolution A.694(17), "General Requirements for Shipborne Radio Equipment Forming Part of the Global Maritime Distress and Safety System (GMDSS) and for Electronic Navigational Aids," adopted 6 November 1991.

(2) CCITT Recommendation E.161, "Arrangement of Figures, Letters and Symbols on Telephones and Other Devices that Can Be Used for Gaining Access to a Telephone Network," 1989.

(3) CCITT Recommendation Q.11, "Numbering Plan for the International Telephone Service," 1989.

(4) IEC Publication 92-101, "Electrical Installations in Ships," Third Edition 1980 with amendments through 1984.

(5) IEC Publication 533, "Electromagnetic Compatibility of Electrical and Electronic Installations in Ships," First Edition 1977.

(6) IEC Publication 945, "Marine Navigational Equipment," First Edition 1988.

(7) ISO Standard 3791, "Office Machines and Data Processing Equipment—Keyboard Layouts for Numeric Applications," First Edition 1976(E).

(c) The equipment specified in this subpart must also conform to the appropriate performance standards listed below which are incorporated by reference.

(1) *NAVTEX receivers*: (i) IMO Resolution A.525(13), "Performance Standards for Narrow-band Direct Printing Telegraph Equipment for the Reception of Navigational and Meteorological Warnings and Urgent Information to Ships," adopted 17 November 1983.

(ii) CCIR Recommendation 540-2, "Operational and Technical Characteristics for an Automated Direct-printing Telegraph System for Promulgation of Navigational and Meteorological Warnings and Urgent Information to Ships," 1990.

(2) *VHF radio equipment*: (i) IMO Resolution A.609(15), "Performance Standards for Shipborne VHF Radio Installations Capable of Voice Communication and Digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendation 493-4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(3) *MF radio equipment*: (i) IMO Resolution A. 610(15), "Performance

Standards for Shipborne MF Radio Installations Capable of Voice Communication and Digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendation 493–4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(4) *MF/HF radio equipment:* (i) IMO Resolution A.613(15), "Performance Standards for Shipborne MF/HF Radio Installations capable of Voice Communication, Narrow-band Direct Printing and digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendations 493–4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(iii) CCIR Recommendation 625–1, "Direct-printing Telegraph Equipment Employing Automatic Identification in the Maritime Mobile Service," 1990. Equipment may conform to CCIR Recommendation 476–4, "Direct-Printing Telegraph Equipment in the Maritime Mobile Service," 1986, in lieu of CCIR Recommendation 625–1, where such equipment was installed on ships prior to February 1, 1993.

(iv) IMO Resolution A.700(17), "Performance Standards for Narrow-band Direct-printing Telegraph Equipment for the Reception of Navigational and Meteorological Warnings and Urgent Information to Ships (MSI) by HF," adopted 6 November 1991.

(5) *406 MHz EPIRBs:* (i) IMO Resolution A.611(15), "Performance Standards for Float-free Satellite Emergency Position-indicating Radio Beacons Operating on 406 MHz," adopted 19 November 1987.

(ii) IMO Resolution A.662(16), "Performance Standards for Float-free Release and Activation Arrangements for Emergency Radio Equipment," adopted 19 October 1989.

(iii) OCIR Recommendation 633–1, "Transmission Characteristics of a Satellite Emergency Position-indicating Radiobeacon (Satellite EPIRB) System Operating Through a Low Polar-orbiting Satellite System in the 406 MHz Band," 1990.

(iv) The 406 MHz EPIRBs must also comply with § 80.1061.

(6) *9 GHz radar transponders:* (i) IMO Resolution A.604(15), "Performance Standards for Survival Craft Radar Transponders for Use in Search and Rescue Operations," adopted 19 November 1987.

(ii) CCIR Recommendation 628–1, Technical Characteristics for Search and Rescue Radar Transponders," 1990.

(7) *Two-way VHF radiotelephone:* IMO Resolution A.605(15), "Performance Standards for Survival Craft Two-way VHF Radiotelephone Apparatus," adopted 19 November 1987.

(8) *INMARSAT–A SES:* IMO Resolution A.698(17), "Performance Standards for Ship Earth Stations Capable of Two-way Communications," adopted 6 November 1991.

(9) INMARSAT–C SES: IMO Resolution A.663(16), "Performance Standards for INMARSAT Standard–C Ship Earth Stations Capable of Transmitting and Receiving Direct-printing Communications," adopted 19 October 1989.

(10) *INMARSAT EGC:* IMO Resolution A.664(16), "Performance Standards for Enhanced Group Call Equipment," adopted 19 October 1989.

(d) The above-referenced documents have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Identification data and place to purchase for each of the above-reference documents are listed as follows:

(1) Copies of IMO Resolutions, the 1974 SOLAS Convention, and the 1983 and 1988 amendments to the 1974 SOLAS Convention can be purchased from Publications, International Maritime Organization, 4 Albert Embankment, London SE1 7SR, United Kingdom.

(i) IMO resolution A.525(13) is contained in the Resolutions and Other Decisions of the Assembly of the International Maritime Organization, 13th Session, 1983, (IMO, London, 1984), Sales Number 073 84.07.E.

(ii) IMO Resolutions A.604(15), A.605(15), A.610(15), A.611(15) and A.613(15) are contained in the Resolutions and Other Decisions of the Assembly of the International Maritime Organization, 15th Session, 1987, (IMO, London, 1988), Sales Number 130 88.03.E.

(iii) IMO Resolutions A.662(16), A.663(16) and A.664(16) are contained in the Resolutions and Other Decisions of the Assembly of the International Maritime Organization, 16th Session, 1989, (IMO, London, 1990), Sales Number 136 90.04.E

(iv) IMO Resolutions A.694(17), A.698(17), and A.700(17) can be ordered from IMO by requesting "A.694, A.698, or A.700(17) from the seventeenth session." IMO Resolutions A.694(17), A.698(17), and A.700(17) will be published in the Resolutions and Other Decisions of the Assembly of the International Maritime Organization, 17th Session, 1991.

(2) CCIR Recommendations, ITU Radio Regulations, and CCITT publications can be purchased from the International Telecommunications Union (ITU), Place des Nations, CH–1211 Geneva 20, Switzerland.

(i) All CCIR Recommendations referenced in this Section are contained in Recommendations of the CCIR, 1990, Volume VIII, (ITU, Geneva, 1990), 92–61–0424104.

(ii) CCITT Recommendation E.161 is contained in CCITT Volume II—Telephone and Network ISDN—Operation, Numbering, Routing and Mobile Service, (ITU, Geneva, 1989), ISBN 92–61–03261–3.

(iii) CCITT Recommendation Q.11 is contained in CCITT Blue Book Volume VI, General Recommendation on Telephone Switching and Signalling, (ITU, Geneva, 1989), ISBN 92–61–03451–9.

(3) IEC Publications can be purchased from the International Electrotechnical Commission, 3 Rue de Varembe, CH–1211 Geneva 20, Switzerland, or from the American National Standards Institute (ANSI), 11 West 42nd Street, New York, NY 10036, telephone (212) 642–4900.

(4) ISO Standards can be purchased from the International Organization for Standardization, 1 Rue de Varembe, CH–1211 Geneva 20, Switzerland, or from the American National Standards Institute (ANSI), 11 West 42nd Street, New York, NY 10036, telephone (212) 642–4900.

(5) Copies of the publications listed in this Section that are incorporated by reference may be inspected at the Federal Communications Commission, 1919 M Street, NW., Dockets Branch (room 239), Washington, DC or at the Office of the Federal Register, 800 North Capital Street, NW., suite 700, Washington DC.

3. Section 80.1103 is amended by revising paragraphs (a) and (e) to read as follows:

§ 80.1103 Equipment authorization.

(a) All equipment specified § 80.1101 must be type accepted in accordance with 47 CFR part 2 specifically for GMDSS use, except for equipment used in the INMARSAT space segment which must be type-approved by INMARSAT and notified in accordance with 47 CFR part 2 specifically for GMDSS use. The technical parameters of the equipment must conform to the performance standards as specified in § 80.1101. For emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992, and meet the requirements of § 80.1101, the manufacturer may attest by letter that the equipment (indicate FCC ID#) meets the requirements of § 80.1101 and

request that it be denoted as approved for GMDSS use.

* * * * *

(e) In addition to the requirements in part 2 of this chapter, equipment specified in § 80.1101 shall be labelled as follows: "This device complies with the GMDSS provisions of part 80 of the FCC Rules." Such a label is not required for emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992.

[FR Doc. 92-23517 Filed 9-28-92; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 591

[Docket 89-5; Notice 12]

RIN 2127-AD00

Importation of Vehicles and Equipment Subject to Federal Safety, Bumper and Theft Prevention Standards

AGENCY: National Highway Traffic Safety Administration, (NHTSA), DOT.

ACTION: Technical amendment; final rule.

SUMMARY: This notice contains a technical amendment of the final rule published on September 29, 1989, which established requirements for the importation of motor vehicles and motor vehicle equipment subject to the Federal motor vehicle safety, bumper, and theft prevention standards. The amendment clarifies that vehicles, other than motorcycles, manufactured on and after January 1, 1968, and motorcycles manufactured on and after January 1, 1969, may be imported without the necessity of conformance to the safety standards if their date of entry is a date that is 25 years or more after their date of manufacture.

EFFECTIVE DATE: The amendment is effective January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Taylor Vinson, Office of Chief Counsel, NHTSA, Washington, DC (202-366-5263).

SUPPLEMENTARY INFORMATION: This notice adopts a technical rule that conforms 49 CFR 591.5(i)(1) to the wording of 15 U.S.C. 1397(i).

Section 108(i) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1397(i)), enacted in 1988 with other amendments pertaining to the importation of motor vehicles, exempts from the necessity of conformance to the Federal motor vehicle safety standards "any motor vehicle that is 25 or more years old." At the time the regulation implementing this exemption became effective, January 31, 1990, the safety standards for vehicles other than motorcycles had been in effect for less than 25 years, specifically, only 22 years, having become effective on January 1, 1968. Motorcycle standards became effective a year later. To avoid confusion concerning the importation of vehicles more than 22 years old, but less than 25 years old, the agency phrased the relevant regulatory language in terms of the dates that the safety standards became effective for motor vehicles. Importation without conformance was allowed upon the declaration that "The vehicle was manufactured before January 1, 1968, or if a motorcycle, before January 1, 1969." (49 CFR 591.5(i)(1), 54 FR 40069).

At that time, the agency noted that, after January 1, 1993, vehicles that were manufactured on or after January 1, 1968, will be relieved of the necessity to conform as they reach 25 years of age. The agency further noted that, during 1992, it would amended paragraph 591.5(i) to implement the 25-year old exclusion effective January 1,1993. NHTSA also noted that there were no comments from the public on this aspect of the importation regulation. Therefore, as it stated on September 29, 1989, the agency is adopting an appropriate amendment to implement this statutory provision.

Because the amendment is technical in nature and has no substantive impact beyond conforming the regulation to the Vehicle Safety Act, and because NHTSA advised the public in 1989 that it would make a conforming amendment in 1992, it is hereby found that notice and public comment thereon are unnecessary. The amendment is effective on January 1, 1993.

List of Subjects in 49 CFR Part 591

Imports, Motor vehicle safety, Motor vehicles.

In consideration of the foregoing part 591 of 49 CFR is amended as follows:

PART 591—[AMENDED]

1. The authority citation for part 591 continues to read as follows:

Authority: Pub. L. 100-562, 15 U.S.C. 1401, 1407; delegation of authority a 49 CFR 1.50 and 501.8.

2. Paragraph 591.5(i)(1) is revised to read as follows:

§ 591.5 Declarations required for importation.

* * * * *

(i)(1) The vehicle is 25 or more years old.

* * * * *

Issued on: September 16, 1992.

Marion C. Blakey,

Acting Administrator.

[FR Doc. 92-23518 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB66

Endangered and Threatened Wildlife and Plants; Endangered Status for Schwalbea Americana (American Chaffseed)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines the plant, *Schwalbea americana* (American chaffseed), a perennial herb of the figwort family (Scrophulariaceae), to be an endangered species pursuant to the Endangered Species Act of 1973 (Act), as amended. Twenty extant populations of *Schwalbea americana* are found in open pine flatwoods, savannas, and other open areas, in moist to dry acidic sandy loams or sandy peat loams in Florida, Georgia, Mississippi, New Jersey, North Carolina, and South Carolina. However, information received since publication of the listing proposal suggests that one of these populations in Florida may have been extirpated by residential development. The species is known historically from Alabama, Connecticut, Delaware, Kentucky, Maryland, Massachusetts, New York, Tennessee, and Virginia. The species is threatened by widespread habitat destruction due to development and from fire suppression, which allows invasion of vegetation that competes with *Schwalbea americana*. This rule implements the protection provided by the Endangered Species Act of 1973, as amended, for *Schwalbea americana*.

EFFECTIVE DATE: October 29, 1992.

ADDRESSES: The complete file for this species is available for inspection, by appointment, during normal business hours at the New Jersey Field Office, U.S. Fish and Wildlife Service, 927 N. Main Street, Bldg. D-1, Pleasantville, New Jersey 08232.

FOR FURTHER INFORMATION CONTACT: Dana M. Peters at the above address (telephone: 609/646-9310).

SUPPLEMENTARY INFORMATION:

Background

Schwalbea americana (American chaffseed), a perennial member of the figwort family (Scrophulariaceae), was described by Linnaeus in *Species Plantarum* in 1753, and named for Christian Georg Schwalbe, an eighteenth century botanical writer. Pennel (1935) recognized a southern and a northern species, *S. australis* and *S. americana* respectively. He distinguished *S. australis* by a pubescence of mostly upcurved hairs and leaves up to 1.5 cm (0.6 inches) wide, and *S. americana* by mostly recurved hairs and narrower leaves up to 1 cm (0.4 inches) wide or less. However, Fernald (1937) found characters of leaves and calyx lobes to vary over the total range so that recognition of two species was unwarranted. Following an examination of herbarium material, Musselman and Mann (1977) concurred that there was little taxonomic merit in recognizing more than a single species. Therefore, for the purposes of listing, *S. americana* and *S. australis* will be considered one species (*S. americana*) and will be referred to as the monotypic genus *Schwalbea*.

Schwalbea is an erect herb with unbranched stems or branched only at the base and grows to a height of 3 to 8 decimeters (12 to 31 inches). It is densely, but minutely hairy throughout, including the flowers. The leaves are alternate, lance-shaped to elliptic, stalkless, 2 to 5 cm (1 to 2 inches) long, and entire; the upper leaves are reduced to narrow bracts. Large, purplish-yellow, tubular flowers borne singly on short stalks in the axils of the uppermost, reduced leaves (bracts) form a many-flowered, spike-like raceme. The showy flowers have a high degree of bilateral symmetry elaborated for pollination by bees (Pennell 1935). The fruit is a long and narrow capsule, enclosed in a loose-fitting sac-like structure that provides the basis for the common name, chaffseed (Musselman and Mann 1978). Flowering occurs from April to June in the South, and from June to mid-July in the North (Johnson 1988). Fruits mature from early summer in the South to October in the North. *Schwalbea* is a hemiparasite, that is, a plant that is partially dependent on its host. Like most hemiparasitic Scrophulariaceae, it is not host specific, and its rarity, therefore, is not due to its preference for a specialized host.

Characteristically, the species occurs in sandy (sandy peat, sandy loam), acidic, seasonally moist to dry soils. It is generally found in habitats described as open, moist pine flatwoods, fire-maintained savannas, ecotonal areas between peaty wetlands and xeric sandy soils, and other open grass-sedge systems. On population, however, occurs in a heavy clay soil in a hayfield. *Schwalbea* is dependent on factors such as fire, mowing, or fluctuating water tables to maintain the crucial open to partly-open conditions that it requires. The species appears to be shade intolerant. Historically, the species existed on savannas and pinelands throughout the coastal plain and on sandstone knobs and plains inland where frequent, naturally occurring fires maintained these sub-climax communities. Under these conditions, herbaceous plants such as *Schwalbea* were favored over trees and shrubs. Most of the surviving populations, and the most vigorous, are in areas that are still subject to frequent fire. These fire-maintained habitats include plantations that are prescribed burned for management of quail and other game species, an army base impact zone that burns regularly because of live artillery shelling, forest management areas that are burned to maintain habitat for wildlife including the red-cockaded woodpecker, and various other private lands that are burned to maintain open fields. Fire may be important to the species in ways that are not yet documented or understood. Two small populations, one in New Jersey (along a roadside in Lebanon State Forests) and one in Mississippi (in a hayfield on the Noxubee National Wildlife Refuge) survive in frequently mowed areas that are not burned.

As indicated by Kral (1983), *Schwalbea* occurs in species-rich plant communities where grasses, sedges, and other colorful savanna dicots are especially numerous. One South Carolina population co-occurs with two other plant species being considered for listing under the Act, *Parnassia caroliniana* and *Eulophia ecristata* (Rawinski and Cassin 1986).

In 1986 the Fish and Wildlife Service (Service) contracted with The Nature Conservancy's Eastern Regional Office to conduct status surveys for *Schwalbea* (Rawinski and Cassin 1986). More recently The Nature Conservancy's New Jersey Field Office prepared an Element Stewardship Abstract for *Schwalbea* (Johnson 1988). Based on these reports and additional input from various sources in the respective States, it is known that the species occurred historically in 15 States including Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maryland, Massachusetts, Mississippi, New Jersey, New York, North Carolina, South Carolina, Tennessee, and Virginia at a total of approximately 78 sites. One historic record from Louisiana is considered erroneous (Annette Parker, Louisiana Heritage Program, *in litt.*, 1986). Today, 20 populations of the species are known, including: one on the Lebanon State Forest in New Jersey (Burlington County), one on Fort Bragg, North Carolina (Hoke County), one on the Noxubee National Wildlife Refuge in Mississippi (Noxubee County), four on the Francis Marion National Forest in South Carolina (Berkeley and Charleston Counties), four on private land in Georgia (Baker and Dougherty Counties), two on private land in Florida (Gadsden and Leon Counties), and seven on private land in South Carolina (Berkeley, Horry, Jasper, Sumter, and Williamsburg Counties). According to a report received since publication of the proposed rule, one of the populations in Florida may have been recently extirpated by residential development (Loran Anderson, The Florida State University, *in litt.*, 1991), thus reducing the number of extant populations to 19. The species is extirpated from Alabama, Connecticut, Delaware, Kentucky, Maryland, Massachusetts, New York, Tennessee, and Virginia, 9 of the 15 states where it was historically reported. This plant, always considered rare, appears to have suffered a drastic decline in populations and range. The one small population in New Jersey is the only population north of North Carolina. Despite intensive searches of historic stations and potentially suitable habitat, this species remains very rare, and many historic populations are confirmed extirpated due to habitat destruction, mostly by development (Rawinski and Cassin 1986).

Federal consideration of this plant for listing began with acceptance by the Service of *Endangered and Threatened Plants of the United States* (Ayensu and DeFilipps 1978) as a listing petition within the context of Section 4 of the Act. This report recommended *Schwalbea americana* for "threatened status." The Service's subsequent actions in relation to the Smithsonian petition are explained in detail in the "Relationship to Petition Requirements" section of the February 21, 1990 (55 FR 6184) comprehensive plant notice of review.

Additional petition findings involving *Schwalbea* were published on January 20, 1984 (49 FR 2485), May 10, 1985 (50

FR 19761), January 9, 1986 (51 FR 996), June 30, 1987 (52 FR 24312), July 7, 1988 (53 FR 25511), December 29, 1988 (53 FR 52746), and April 25, 1990 (55 FR 17475). The Service published the proposed rule for this species on September 11, 1991 (56 FR 46277). That proposal constituted the Service's final finding on the petition, required by the Endangered Species Act.

Summary of Comments and Recommendations

In the September 11, 1991, proposed rule (56 FR 46277) and associated notifications, all interested parties were requested to submit factual reports or information by November 12, 1991, that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices were published in The Horry Independent, The News, Sumter Item, The Albany Herald, The Fayetteville Observer, The Beaufort Gazette, The Macon Beacon, Gadsden County Times, Burlington County Times, and The News and Courier between September 25 and September 27, 1991, which invited general public comment. A total of 15 comments were received. One letter was from a private citizen in South Carolina who requested a public hearing to discuss concerns regarding the proposed listing and its potential curtailment of activities on private land. The Service contacted this citizen and provided further information on the species and on the Endangered Species Act. This citizen considered his concerns adequately addressed by this additional information and subsequently withdrew the request for a public hearing. One letter, from the Tennessee Valley Authority, requested additional locational information on the species, which the Service is addressing. One letter, from Burlington County in New Jersey, offered information on proposed highway improvements near the one extant New Jersey population. The remaining 12 letters, from The Pinelands Commission, U.S. Forest Service, The Florida State University, Florida Office of the Governor, Florida Game and Fresh Water Fish Commission, Florida Department of Agriculture and Consumer Services, Florida Natural Areas Inventory, The New Jersey Department of Environmental Protection and Energy, The Nature Conservancy (Mississippi Office), The Nature Conservancy (Georgia Field Office), the Center for Plant Conservation, and a private botanist known for his knowledge of the species supported the proposal. Comments updating the data presented in the Background of Summary of Factors Affecting the Species are incorporated in those sections of this final rule.

Further information received after the comment period provided reports of two additional locations for the species: one in Florida, and one in Georgia (Wilson Baker, Tall Timbers Research Station, Tallahassee, Florida, pers. comm., 1992). Since other recently received information suggests that another Florida population may have been extirpated, the total number of extant sites is now 19 or 20. Based upon available information on rarity and threats, the Service retains the position that *Schwalbea* is most appropriately designated as "endangered," as it is in danger of extinction in the foreseeable future.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. *et seq.*) and regulations promulgated to implement the listing provisions of the Act (50 CFR Part 424) set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to *Schwalbea americana* L. (American chaffseed) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Schwalbea has been and continues to be endangered by destruction and adverse alteration of its habitat. Since discovery of this species, 60 (three-fourths) of the known populations have been extirpated due to conversion of the habitat to residential and commercial purposes, incompatible agriculture and forestry practices, and succession of the vegetative community due to fire suppression. Sandy pineland communities where the species exists have proven to be especially vulnerable to development because soils are level, deep, and suitable for building sites. Also, many *Schwalbea* populations were or are very near the Atlantic Coast where development pressures are severe (Rawinski and Cassin 1986). Habitat destruction presently taking place on Cape Cod, Massachusetts exemplifies the situation throughout much of the range of *Schwalbea*. None of the 10 historic Massachusetts populations of this plant have been relocated and other potentially suitable habitat is being destroyed at a rapid rate. In Florida, four of the seven historic sites are confirmed extirpated because of habitat destruction (Rawinski and Cassin 1986). In New Jersey, a population was extirpated in 1988 by the construction of a street for new housing (David Snyder, New Jersey Natural Heritage Program, *in litt.*, 1988). Development was a factor in the demise of at least 15 other populations rangewide (Johnson 1988).

Current threats to extant populations include destruction of habitat due to development, agriculture, or forestry practices, succession of vegetation, and improper management that renders the habitat unsuitable. Impending development is an immediate threat to two of the extant populations in South Carolina, and a report received since the publication of the proposed rule states that a population in Florida may have been recently extirpated by residential development. Development or succession of habitat is a potential threat to four other populations on private land. Development adjacent to extant populations may also pose a threat since urbanization generally results in fire suppression and thus possible succession of field habitats. The threats due to fire suppression will be discussed in more detail under Factor E.

B. Overutilization for Commercial, Recreational, Scientific or Educational Purposes

One extant population has been adversely affected due to removal of plants by an employee of a botanical garden for transplanting to the garden. This population was also adversely affected by a local photography club that dug up plants to photograph them under studio conditions, and by careless photographers and onlookers who have trampled the site. Attention due to listing could result in further threats to accessible populations due to collection and trampling from curiosity seekers and vandals.

C. Disease or Predation

Disease and predation have not been documented as factors in the decline of this species.

D. The Inadequacy of Existing Regulatory Mechanisms

In Mississippi, *Schwalbea* is not on an official list and there is no protection for the species.

In Georgia, *Schwalbea* is currently being proposed as endangered on the official State list. If this listing is completed, the species will receive protection under The Georgia Wildflower Preservation Act of 1973.

This Act prohibits digging, removal, or sale of State listed plants from public lands without the approval of the Georgia Department of Natural Resources. However, the four *Schwalbea* populations in Georgia are on private land and would not benefit from the protection of this Act. Three of these populations receive limited protection through voluntary, informal landowner agreements with The Nature Conservancy.

In South Carolina, *Schwalbea* is recognized as "of national concern" by the South Carolina Advisory Committee on rare, threatened, and endangered plants; however, this State offers no legal protection to recognized species.

In Florida, *Schwalbea* is listed as endangered by the State of Florida under the Preservation of Native Flora of Florida Act, Section 581.185–187, Florida Statute. This Act prohibits removal of State-listed plants from public lands or from private lands without written permission of thelandowners.

In North Carolina, *Schwalbea* is officially recognized as endangered. North Carolina General Statute 19–B, 202.12–202.19, provides State listed plants protection from intra-state trade without a permit, provides for monitoring and management of listed populations, and prohibits taking of plants without written permission of landowners.

In New Jersey, *Schwalbea* is listed as endangered on the Endangered Plant Species List authorized by the Endangered Plant Species List Act (N.J.S.A. 7:5C). This list provides recognition to listed plants, but does not provide regulatory protection to the species from collection, habitat loss, or degradation. The population in New Jersey occurs within the Lebanon State Forest and within the Pinelands Reserve. The State Forest does not provide any specific protection to the species. Pursuant to the policy to preserve, protect, and enhance the diversity of plant communities through regulation of development, the Pinelands Protection Act (N.J.S.A. 13:18–1 et seq.) states that no development within the Pinelands Reserve shall be carried out unless it is designed to avoid irreversible adverse impacts to the survival of populations of threatened or endangered plants listed therein. Despite the location of the New Jersey population within the Pinelands Reserve, it is still subject to severe adverse impacts. It is located next to a roadway in an area maintained by the highway department. This type of maintenance is exempt from the aforementioned protection of threatened or endangered species. Current management of this population consists of yearly mowing and is conducted through an informal agreement involving several parties, including the New Jersey Department of Environmental Protection and Energy, a local concerned botanist, a farmer who leases the State land supporting the population, and the Burlington County Highway Department. Protection of the site is inadequate. Vehicles routinely pull off of the road, damaging plants and disturbing the habitat. The New Jersey Office of Natural Lands Management is currently proposing to formalize an agreement with all involved parties to protect and properly manage this population.

Only North Carolina and Florida have legislation protecting *Schwalbea* from taking, and only New Jersey has some protection for the plant's habitat. The primary threat to *Schwalbea* is habitat destruction and lack of habitat management, therefore, existing legislation is inadequate.

E. Other Natural or Manmade Factors Affecting Continued Existence

As mentioned in Factor "A," fire or another suitable form of disturbance, such as well-timed mowing, is essential to maintain the sub-climax community where this species exists. Although corroborating research is lacking, botanists familiar with the species believe that *Schwalbea* may be adapted to a regular fire regime. Historically, naturally-occurring lightning-strike fires throughout *Schwalbea*'s range and more frequent burning, as practiced by pre-European human populations, maintained these conditions. These fires were possibly frequent enough that fuel did not accumulate and, thus, they were generally of low-intensity. Herbaceous species were favored over tree and shrub species and thrived in these conditions. With the general suppression of natural fires in this century, the habitat for this species has been greatly reduced. Without fire, open grass-sedge communities proceed through seral stages and become dominated by trees, shrubs and dense herbaceous growth that overtops *Schwalbea*. The species appears to be shade intolerant. If fire is suppressed for more than three years, the *Schwalbea* population declines as other species shade and out-compete it (Douglas Rayner, Wofford College, pers. comm., 1991). Without naturally occurring fires, management in the form of prescribed burns or mowing may be necessary to maintain the sub-climax community and perpetuate *Schwalbea* populations. However, excessive mowing or disturbance could eliminate populations, and there are questions concerning the optimal timing and frequency of burning or mowing. Further research on the effects of prescribed burning and mowing, and on soil moisture variation is needed to determine the best management techniques that will maintain viable populations of the species Also, research is needed to determine the extent and viability of seed banks for the species at historic locations.

Twelve of the 20 known populations of *Schwalbea* contain fewer than 100 plants with 6 of these populations having less than 20 plants. These isolated and critically small populations are highly vulnerable to extinction. Extreme isolation, whether by geographic distance, ecological factors or reproductive strategy, prevents the influx of new genetic material and can result in a highly inbred population with low viability or fecundity (Chesser 1983). In addition, current knowledge of the species biology and population dynamics is insufficient to assess whether *Schwalbea* could persist following a natural event such as drought or high-intensity fire.

The Service has carefully assessed the best scientific information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Schwalbea americana* as endangered. The species is extirpated from over half of its historic range. Only 20, or possibly 19, populations, approximately one-fourth of the recorded historic populations, are known to persist. Existing populations are threatened by the continuation of fire suppression, development, and potential mismanagement of habitat. Specific habitat requirements and optimum management regimes are unknown; lack of such critical information greatly hampers efforts to protect and perpetuate this species. These factors support listing as an endangered species. Critical habitat is not being designated for reasons discussed in the following section.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate any habitat of a species that is considered critical habitat at the time the species is determined to be endangered or threatened. Designation of critical habitat is not prudent if one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification

of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species (50 CFR 424.12(a)(1)).

The Service finds that designation of critical habitat is not prudent for *Schwalbea americana* at this time because such designation will exacerbate threats from collecting and trampling. As noted under Factor "B", above, collecting and careless trampling by photographers have already adversely affected at least one population. The Act furnishes listed plants with very limited protection from take, prohibiting collection and harm only when plants are located on Federally administered lands or in situations where take is perpetrated in knowing violation of a State law or regulation. Only six *Schwalbea* populations are located on lands under Federal jurisdiction. Most populations are small to moderate in size and, therefore, even occasional collecting and trampling could exert significant adverse impacts on them. Publication of critical habitat descriptions and maps in the **Federal Register** could increase these threats to the survival of the species, overriding any protection that such designation might provide.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such activities are initiated by the Service following listing.

Conservation and management of *Schwalbea* will likely involve a combination of site protection through acquisition or landowner agreements and habitat manipulation to maintain early successional habitats. Listing *Schwalbea americana* will encourage research on critical aspects of its life history and population ecology, and the effects of fire, mowing and soil moisture variation on population establishment and maintenance. This information is necessary to determine the optimal timing and frequency of these management techniques.

The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. If a proposed Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. Federal actions that could impact *Schwalbea* include, but are not limited to, incompatible forestry and wildlife management practices, and construction of access roads to accommodate changes in military bombing practice areas on lands under Federal jurisdiction. The Service will work with the involved agencies to secure protection and proper management of *Schwalbea* while accommodating agency activities to the extent possible.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62 and 17.63 set forth a series of general trade prohibitions and exceptions that apply to all endangered plants. All trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale this species in interstate or foreign commerce, or to remove and reduce to possession the species from areas under Federal jurisdiction. In addition, for listed plants, the 1988 amendments (Pub. L. 100–478) to the Act prohibit the malicious damage or destruction on Federal lands and the removal, cutting, digging up, or damaging or destroying of listed plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered species under certain circumstances. It is anticipated that few trade permits would ever be sought or issued because the species is not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, Rm 432, 4401 N Fairfax Dr., Arlington VA 22203–3507 (703/358–2104).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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Rawinski, T., and J. Cassin. 1986. Final status survey reports for 32 plants. Unpublished report to U.S. Fish and Wildlife Service. Newton Corner, MA. Eastern Heritage Task Force of The Nature Conservancy.

Author

The primary author of this final rule is Dana M. Peters (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Exports, Imports, Reporting and record keeping requirements, and Transportation.

Regulation Promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1543; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat 3500; unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under the family Scrophulariaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
* * *		* * *	*	*		
Scrophulariaceae—Snapdragon family:						
* * *		* * *	*	*		
Schwalbea americana	American chaffseed	U.S.A. (AL, CT, DE, FL, GA, KY, MA, MD, MS, NC, NJ, NY, SC, TN, VA).	E	478	NA	NA
* * *		* * *	*	*		

Dated: August 31, 1992.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 92–23580 Filed 9–28–92; 8:45 am]

BILLING CODE 4310-55-M

Proposed Rules

Federal Register
Vol. 57, No. 189
Tuesday, September 29, 1992

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

Commodity Credit Corporation

7 CFR Part 1413

RIN 0560-AC63

1993 Upland Cotton Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Act of 1949 (1949 Act), as amended, requires the Secretary of Agriculture to implement an acreage reduction program (ARP) for upland cotton which will result in a ratio of carry-over to total disappearance of 30 percent. This proposed rule would amend the regulations to set forth the acreage reduction percentage for the 1993 crop of upland cotton.

DATES: Comments must be received on or before October 14, 1992, in order to be assured of consideration.

ADDRESSES: Comments must be mailed to Deputy Administrator, Policy Analysis, Agricultural Stabilization and Conservation Service (ASCS), U.S. Department of Agriculture (USDA), room 3090-S, P.O. Box 2415, Washington, DC 20013-2415.

FOR FURTHER INFORMATION CONTACT: Minnie Tom H. Meyer, Fibers and Rice Analysis Division, USDA, ASCS, room 3754-S, P.O. Box 2415, Washington, DC 20013-2415 or call 202-720-6734. The Preliminary Regulatory Impact Analysis describing the options considered in developing this proposed rule and the impact of the implementation of each option is available on request from the above-named individual.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and provisions of Departmental Regulation 1512-1 and has been classified as "major." It has been determined that an annual effect on the economy of $100 million or more may result from implementation of the provisions of this proposed rule.

It has been determined that the Regulatory Flexibility Act is not applicable to this proposed rule since the Commodity Credit Corporation is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of these determinations.

It has been determined by an environmental evaluation that this action will not have a significant impact on the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

The title and number of the Federal Assistance Program, as found in the catalog of Federal Domestic Assistance, to which this rule applies are: Cotton Production Stabilization—10.052.

This proposed rule has been reviewed in accordance with Executive Order 12778. The provisions of the proposed rule do not preempt State laws, are not retroactive, and do not involve administrative appeals.

This program/activity is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

The amendments to 7 CFR part 1413 set forth in this proposed rule do not contain information collections that require clearance by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35.

Comments are requested with respect to this proposed rule and such comments shall be considered in developing the final rule.

In accordance with section 103B of the 1949 Act, an acreage reduction program (ARP) is required to be implemented for the 1993 crop of upland cotton if it is determined that the total supply of upland cotton, in the absence of an ARP, will be excessive, taking into account the need for an adequate carry-over to maintain reasonable and stable supplies and prices and to meet a national emergency.

Land diversion payments also may be made to producers of upland cotton, whether or not an ARP for upland cotton is in effect, if needed to assist in adjusting the total national acreage of upland cotton to desirable goals. If, at the time of final announcement of the ARP, the projected carry-over of upland cotton for the crop year is equal to or greater than 8 million bales, a paid land diversion shall be offered to upland cotton producers. A paid land diversion has not been considered because, given the existing supply/use situation, it is not needed.

If an ARP is announced, the reduction shall be achieved by applying a uniform percentage reduction (from 0 to 25 percent) to the upland cotton crop acreage base for the crop for each upland cotton-producing farm. In making such a determination, the number of acres placed into the agricultural resources conservation program established under subtitle D of title XII of the Food Security Act of 1985, as amended, must be taken into consideration.

Producers who knowingly produce upland cotton in excess of the permitted upland cotton acreage for the farm plus any upland cotton acreage planted in accordance with the flexibility provisions are ineligible for upland cotton loans and payments with respect to that farm.

If it is determined that an ARP for the 1993 crop of upland cotton is needed, a preliminary announcement of the ARP uniform percentage requirement (from 0 to 25 percent) must be made not later than November 1 of the calendar year preceding the year in which the crop is harvested. Not later than January 1 of the calendar year in which the crop is harvested, a final announcement of the ARP uniform percentage requirement must be made. Producers in early planting areas may elect to participate in the program on the terms of the ARP first announced for the crop, or as subsequently revised, if the Secretary determines that the procedures may be unfairly disadvantaged by the revision.

The ARP for the 1993 crop of upland cotton must be set at a level that will result in a ratio of carry-over to total disappearance of 30 percent, based on the most recent projection of carry-over and total disappearance at the time of announcement of the ARP. For the purposes of this provision, the term "total disappearance" means all upland cotton utilization, including total domestic, total export, and total residual disappearance.

Based on August 1992 supply/use estimates, ending stocks for the 1993 marketing year under a 5-percent ARP, a 10-percent ARP and a 15-percent ARP are 5.05 million bales, 4.80 million thousand bales and 4.55 million bales, respectively. Such ARP levels would result in ratios of carry-over to total disappearance of 0.309, 0.296 and 0.283, respectively. For the purposes of this proposed rule, these three ARP options will be considered. However, because of changes in the supply/use situation that may develop between now and November 1, the actual announced preliminary ARP may be different from the options discussed in this notice and may include a 0-percent ARP.

The estimated impacts of the ARP options are shown in the following table.

UPLAND COTTON SUPPLY/DEMAND ESTIMATES

Item	Option 1	Option 2	Option 3
ARP (%)	5	10	15
Participation (%)	88	86	84
Planted Acres (thousand)	13,500	13,100	12,700
Production (thousand bales)	17,400	17,000	16,600
Domestic Use (thousand bales)	9,850	9,800	9,750
Exports (thousand bales)	6,500	6,400	6,300
Ending Stocks (thousand bales)	5,050	4,800	4,550
Carry-over/Disappearance	0.309	0.296	0.283
Deficiency Payments ($ million)	1,046	949	854

Accordingly, comments are requested as to the 1993 acreage reduction percentage for upland cotton. The final determination of this percentage will be set forth at 7 CFR part 1413.

List of Subjects in 7 CFR 1413

Cotton, Feed grains, Price support programs, Rice, Wheat.

Accordingly, it is proposed that 7 CFR part 1413 be amended as follows:

PART 1413—FEED GRAIN, RICE, UPLAND AND EXTRA LONG STAPLE COTTON, WHEAT AND RELATED PROGRAMS

1. The authority citation for 7 CFR part 1413 continues to read as follows:

Authority: 7 U.S.C. 1308, 1308a, 1309, 1441–2, 1444–2, 1444f, 1445b–3a, 1461–1469; 15 U.S.C. 714b and 714c.

2. Section 1413.54 is amended by adding paragraph (a)(3)(iii) and revising paragraph (d)(3) as proposed at 57 FR 34090 (August 3, 1992), to read as follows:

§ 1413.54 Acreage reduction program provisions.

(a) * * *

(3) * * *

(iii) 1993 upland cotton shall be within the range of 0 to 25 percent, as determined and announced by CCC;

* * * * *

(d) * * *

(3) Shall not be made available to producers of the 1993 crops of wheat, feed grains, rice and upland cotton.

* * * * *

Signed at Washington, DC on September 24, 1992.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 92–23662 Filed 9–25–92; 10:29 am]

BILLING CODE 3410-05-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92-NM-158-AD]

Airworthiness Directives; de Havilland, Inc., Model DHC-7 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain de Havilland Model DHC-7 series airplanes. This proposal would require an inspection to determine whether rivets securing the upper longeron in each inner nacelle were installed during production, and modification of the upper longerons, if necessary. This proposal is prompted by reports that four rivets securing the upper longeron in each engine inner nacelle may have been omitted inadvertently during production. The actions specified by the proposed AD are intended to prevent reduced structural integrity of the engine nacelles.

DATES: Comments must be received by November 9, 1992.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airport Directorate, ANM-103, Attention: Rules Docket No. 92-NM-158-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays

The service information referenced in the proposed rule may be obtained from de Havilland, Inc., Garratt Boulevard, Downsview, Ontario M3K, 1Y5, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Sol Maroof, Aerospace Engineer, Airframe Branch, ANE-172, FAA, Engine and Propeller Directorate, 181 South Franklin Avenue, room 202, Valley Stream, New York 15581; telephone (516) 791-6220; fax (516) 791-9024.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-158-AD." The postcard will be stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-158-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion: Transport Canada Aviation, which is the airworthiness authority for Canada, recently notified the FAA that an unsafe condition may exist on certain de Havilland Model DHC-7 series airplanes. Transport Canada Aviation advises that the manufacturer has indicated that four rivets securing the upper longeron in each engine inner nacelle may have been omitted inadvertently during production of certain de Havilland Model DHC-7 series airplanes. This condition, if not corrected, could result in reduced structural integrity of the engine nacelles.

De Havilland has issued Service Bulletin 7-54-9, dated February 29, 1980, which describes procedures for inspecting the engine nacelles to determine whether rivets that secure the upper longeron to each engine nacelle have been installed, and modification of the upper longerons (Modification No. 7/1707), if necessary. Modification No. 7/1707 encompasses the installation of four Jo-bolts in drilled holes in each inner nacelle upper longeron. Transport Canada Aviation classified this service bulletin as mandatory and issued Canadian Airworthiness Directive CF-91-10, dated May 10, 1991, in order to assure the continued airworthiness of these airplanes in Canada.

This airplane model is manufactured in Canada and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, Transport Canada Aviation has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada Aviation, revised all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require inspection to detect missing rivets of the upper longeron in each inner nacelle, and modification of the upper longerons, if necessary. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that 4 de Havilland Model DHC-7 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. The cost of parts is expected to be negligible. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $220. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

De Havilland, Inc.: Docket 92-NM-158-AD.

Applicability: Model DHC-7 series airplanes; serial numbers 1 through 7, inclusive, and 9, 10, and 11; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the engine nacelles, accomplish the following:

(a) Within 6 months after the effective date of this AD, conduct an inspection to determine whether rivets that secure the upper longerons in each inner engine nacelle have been installed, in accordance with de Havilland Service Bulletin 7-54-9, dated February 29, 1980.

(1) If any rivets are missing, prior to further flight, accomplish Modification No. 7/1707, in accordance with the service bulletin.

(2) If all rivets are detected, no further action is required by this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office (ACO), ANE-170, FAA, Engine and Propeller Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the New York ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on September 8, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-23565 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 92-AWP-16]

Proposed Enlargement of the Riverside, CA 700 Foot Mean Sea Level (MSL) and Above Transition Area

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes to enlarge the 700 foot MSL and above Riverside transition area. This addition to the transition area would provide controlled airspace for aircraft executing a missed approach for the very high frequency omnidirectional-range B (VOR-B) standard instrument approach procedure (SIAP) to Riverside Muni Airport, CA.

DATES: Comments must be received on or before November 15, 1992.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Attn: Manager, System Management Branch, AWP-530, Docket No. 92-AWP-16, Air Traffic Division, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009.

The official docket may be examined in the Office of the Regional Counsel, Western-Pacific Region, Federal Aviation Administration, room 6W14, 15000 Aviation Boulevard, Lawndale, CA.

An informal docket may be examined during normal business hours at the Office of the Manager, System Management Branch, Air Traffic Division at the above address.

FOR FURTHER INFORMATION CONTACT: Gene Enstad, Airspace Specialist, System Management Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 297-0010.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with the comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 92-AWP-16." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the System Management Branch, Air Traffic Division, at 15000 Aviation Boulevard, Lawndale, California 90261, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with the rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, System Management Branch, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A which describes the application procedures.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to enlarge the Riverside, CA 700 foot MSL and above transition area. This enlargement of the Riverside transition area would contain the holding pattern for aircraft executing the missed approach for the VOR-B SIAP. While most of the missed approach is contained in existing 700 foot MSL and above transition area, an additional area of approximately one mile by five miles is needed at the south end of the missed approach pattern to ensure containment. Transition areas are published in § 71.181 of FAA Handbook 7400.7, effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The transition area listed in this document would be published subsequently in the Handbook.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 10034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Transition areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Administration proposes to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS, JET ROUTES, AND AREA HIGH ROUTES

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991, is amended as follows:

Section 71.181 Designation

* * * * *

AWP CA TA Riverside, CA [Revised]

That airspace extending upward from 700 feet above the surface bounded by a line beginning at lat. 34°10'00"N, long. 117°59'00"W; to lat. 34°10'00"N, long. 117°01'00"W; to lat. 34°00'00"N, long. 117°01'00"W; to lat. 33°42'30"N, long. 116°56'30"W; to lat. 33°38'00"N, long. 117°09'00"W; to lat. 33°43'00"N, long. 117°15'00"W; to lat. 33°43'00"N, long. 117°20'00"W; to lat. 33°42'00"N, long. 117°20'00"W; to lat. 33°42'00"N, long. 117°25'00"W; to lat. 33°39'00"N, long. 117°25'00"W; to lat. 33°39'00"N, long. 117°30'00"W; to lat. 33°46'00"N, long. 117°45'00"W; to lat. 33°56'00"N, long. 117°53'00"W; to lat. 33°56'00"N, long. 117°59'00"W, thence to the point of beginning.

That airspace extending upward from 1,200

feet above the surface bounded by a line beginning at lat. 34°30'00"N, long. 117°43'00"W; thence east along lat. 34°30'00"N, to the southeast boundary of V-21, thence along the southeast boundary of V-21 to long. 116°30'00"W, thence direct to lat. 34°40'30"N, long. 116°29'40"W; to lat. 34°30'00"N, long. 116°26'30"W; to lat. 34°16'00"N, long. 116°18'00"W; to lat. 33°30'00"N, long. 116°18'00"W; to lat. 33°30'00"N, long. 117°30'00"W; to lat. 33°39'00"N, long. 117°30'00"W; to lat. 33°46'00"N, long. 117°45'00"W; to lat. 33°56'00"N, long. 117°53'00"W; to lat. 33°56'00"N, long. 117°59'00"W; to lat. 34°10'00"N, long. 117°59'00"W; to lat. 34°10'00"N, long. 117°43'00"W; thence to the point of beginning.

* * * * *

Issued in Los Angeles, California, on August 20, 1992

Richard R. Lien,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 92-23568 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 90-AEA-03]

Proposed Alteration of Control Zone and Transition Area; Du Bois, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The FAA is proposing to alter the description of the Du Bois, PA, Control Zone and 700 foot Transition Area due to a review of air traffic control procedures in the area. Subsequent to the publication of the original proposal, the Du Bois Nondirectional Radio Beacon (NDB) has failed flight checks. This has resulted in the Du Bois NDB being removed from service permanently. The removal of this equipment and the termination of the proposed instrument approach procedure development necessitates a reduction in the 700 foot Transition Area northeast extension width described in the original proposal. This proposal would modify that amount of controlled airspace deemed necessary by the FAA to contain aircraft operating under instrument flight rules. This notice supersedes the original proposal in airspace docket number 90-AEA-03 which was originally issued on January 25, 1990.

DATES: Comments must be received on or before October 30, 1992.

ADDRESSES: Send comments on the rule in triplicate to: John W. Kies, Acting Manager, System Management Branch, AEA-530, Docket No. 90-AEA-03. F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy Int'l Airport, Jamaica, NY 11430.

The official docket may be examined in the Office of the Assistant Chief Counsel, AEA-7, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430.

An informal docket may also be examined during normal business hours in the System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis L. Brewington, Designated Airspace Specialist, System Management Branch, AEA-530, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-0857.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commentors wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 90-AEA-03". The postcard will be date/time stamped and returned to the commentor. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Assistant Chief Counsel, AEA-7, F.A.A. Eastern Region, Fitzgerald Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise the Control Zone and Transition Area established at Du Bois, PA, due to numerous revisions to air traffic control procedures in the area. The Control Zone and Transition Area descriptions were republished in §§ 71.171 and 71.181 of FAA Handbook 7400.7 effective November 1, 1991, which is incorporated by reference in 14 CFR 71.1. The Control Zone and Transition Area listed in this document would be published subsequently in the Handbook.

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

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones, Transition areas, Incorporation by reference.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. App. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7, Compilation of Regulations, published April 30, 1991, and effective November 1, 1991, is proposed to be amended as follows:

Section 71.171 Designation

* * * * *

AEA PA CZ Du Bois, PA [Revised]

Du Bois-Jefferson County Airport, Du Bois, PA (lat. 41°10'42"N., long. 78°53'56"W.)

Clarion, PA, VORTAC (lat. 41°08'46"N., long. 79°27'30"W.)

Du Bois ILS northeast course OM (lat. 41°13'11"N., long. 78°48'09"W.)

That airspace extending upward from the surface within a 4-mile radius of the Du Bois-Jefferson County Airport and within 2.6 miles each side of the Du Bois-Jefferson County Airport ILS localizer northeast course, extending from the 4-mile radius to 7.4 miles northeast of the OM and within 2.2 miles each side of the Clarion, PA, VORTAC 086° (T) 092° (M) radial, extending from the 4-mile radius zone to 20 miles east of the VORTAC and within 2.2 miles each side of a 242° (T) 248° (M) bearing from a point at lat. 41°10'30"N., long. 78°54'30"W., extending from said point to 4.8 miles southwest of said point.

* * * * *

Section 71.181 Designation

* * * * *

AEA PA TA Du Bois, PA [Revised]

Du Bois-Jefferson County Airport, Du Bois, PA (lat. 41°10'42"N., long. 78°53'56"W.)

Du Bois ILS localizer northeast course (lat. 41°10'28"N., long. 78°54'32"W.)

Du Bois ILS northeast course OM (lat. 41°13'11"N., long. 78°48'09"W.)

That airspace extending upward from 700 feet above the surface within a 8.5-mile radius of the Du Bois-Jefferson County Airport and within 3.1 miles either side of the Du Bois ILS localizer northeast course extending from the 8.5-mile radius to 10 miles northeast of the OM.

* * * * *

Issued in Jamaica, New York, on September 19, 1992.

John S. Walker,

Acting Manager, Air Traffic Division.

[FR Doc. 92-23571 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 10

Temporary Importation Bonds; Anticipatory Breach, Assessment Amounts, Petitions for Relief

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to permit anticipatory breach and provide for early payment of liquidated damages in Temporary Importation Bond cases. It also proposes to amend the Regulations to permit assessment of liquidated damages in excess of double the duties in those cases where the district director requires extra bonding in order to protect the revenue and that the term "duties" for TIB bonding and assessment shall also include any applicable merchandise processing fees or harbor maintenance fees that otherwise would be charged on an entry for consumption. Finally, the document proposes to amend the Regulations to eliminate forwarding of petitions for relief in TIB cases to Customs Headquarters when the bond principal or surety is dissatisfied with the decision on the petition afforded by the district director, and provide for their processing in the same manner as other liquidated damages cases.

DATES: Comments must be received on or before November 30, 1992.

ADDRESSES: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings, 202-927-0870.

SUPPLEMENTARY INFORMATION:

Background

Under the provisions of Chapter 98, Subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS), merchandise may be entered under the terms of a Temporary Importation Bond (TIB) without the payment of duties if the merchandise is entered for a specific purpose enumerated in Subchapter XIII, HTSUS. Per U.S. Note 1 to Subchapter XIII, the merchandise is permitted to remain in the United States for a one-year period subsequent to the date of importation with a maximum of two one-year extensions allowed. Prior to the expiration of the bond period or any properly approved extension thereof, the merchandise must be exported or destroyed under Customs supervision. Failure to export or destroy in a timely manner results in the imposition of liquidated damages against the importer.

Instances arise where, after initiation of a TIB entry, the importer decides that the merchandise will remain in the United States in violation of the terms of the bond. Rather than wait for the one-year period to end and for liquidated damages to be assessed, importers have inquired as to the possibility of early payment of liquidated damages. Customs Regulations currently do not provide for an anticipatory breach of a TIB. Through this document, it is proposed to amend § 10.39 to permit said anticipatory breach and allow the importer to pay the full measure of liquidated damages and thereby close the bond. Through payment of the liquidated damages, the importer will waive his right to receipt of notice of a claim for liquidated damages pursuant to § 172.1(a) and concomitantly waive his right to file a petition for relief.

For TIB entries, the provisions of 10.31(f) require that a bond shall be given containing the conditions set forth in § 113.62 in an amount equal to double the duties which it is estimated would accrue (or such larger amount as the district director shall state in writing to the entrant is necessary to protect the revenue) had all the articles covered by the entry been entered under an ordinary consumption entry or in an amount equal to 110 percent of the duties in the cases of samples used solely for taking orders, motion-picture advertising films and professional equipment and tools of trade. By contrast, under the provisions of 10.39(d)(1), if any article entered under Chapter 98, Subchapter XIII, HTSUS, has not been exported or destroyed in accordance with the regulations within the period of time during which the articles may remain in the Customs territory of the United States under bond (including any lawful extension), the district director shall make a demand in writing under the bond for the payment of liquidated damages equal to double the estimated duties applicable to such entry, unless a lower amount is prescribed by § 10.31(f).

On the one hand, § 10.31(f) empowers the district director to require a bond in excess of double or 110 percent of the duties, but the provisions of § 10.39(d)(1) only permit him to assess liquidated damages at double the estimated duties, 110 percent of the duties or such lower amount as prescribed by § 10.31(f). These regulations can provide anomalous results and inefficient protection of the revenue. Accordingly, this document proposes to amend § 10.39(d)(1) to permit, in the case of breach of a TIB, assessment of liquidated damages in an amount equal to double the estimated duties, 110 percent of the estimated duties or any different amount prescribed by § 10.31(f) rather than only a lower amount.

When a TIB entry is filed, no merchandise processing fees or harbor

maintenance fees are charged to the importer of record. However, section 111 of the Customs and Trade Act of 1990 (Pub. L. 101-382) amended 19 U.S.C. 58c(g) (the statute which requires payment of the merchandise processing fee) to provide that all administrative and enforcement provisions of the Customs laws and regulations, except those relating to drawback, shall apply with respect to any fee prescribed under section 58c(a) (which requires payment of the merchandise processing fee), and with respect to persons liable therefor, as if such fee is a customs duty. Any penalty which is expressed in terms of a relationship to the amount of the duty (e.g., liquidated damages expressed in terms of an amount equal to double the estimated duties due on an entry) shall be assessed as a multiple of the unpaid fee. Accordingly, when calculating the bond amount or the measure of liquidated damages for breach of a TIB, the amount of estimated duties should include duties plus the merchandise processing fees that would have been applicable to the entry had an entry for consumption been filed.

The provisions of the Harbor Maintenance Revenue Act of 1986 (Pub. L. 99-662) impose a harbor maintenance fee on any importers, exporters, and domestic shippers of commercial cargo who use any port. The language of the statute authorizing assessment of the harbor maintenance fee also notes that all customs administrative and enforcement provisions of law and regulation shall apply to the fee as though such was a customs duty. Section 4462(f)(1) of the statute indicates that "any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo."

As with the merchandise processing fee, any harbor maintenance fee which would otherwise be due and owing on an entry for consumption is not paid if a TIB entry is made. As with the merchandise processing fee, the unpaid harbor maintenance fee should be considered as part of the amount equal to estimated duties that would be chargeable had the merchandise which is the subject of the TIB been entered for consumption.

Accordingly, when calculating the bond amount or the measure of liquidated damages for breach of a TIB, the amount of estimated duties due should include duties plus the merchandise processing fees plus the harbor maintenance fees that would have been applicable to the entry had an entry for consumption been filed.

This document proposes to amend § 10.31(f) and § 10.39(d)(1) to provide that the bond amount and the liquidated damages for breach of a TIB will include as appropriate, an amount equal to double or 110 percent of the estimated duties, fees and taxes due if the entry had been filed as a consumption entry.

Under the provisions of § 10.39(e) of the Customs Regulations, if there has been a default with respect to all the articles covered by the bond and a written petition for relief is filed timely, the regulations state that the petition "shall be transmitted to Headquarters, U.S. Customs Service with a full report of the facts, unless it is allowed by the district director in whole or in part in accordance with this regulation, * * *." This language noting referral to Headquarters is unique to TIB cases in which all the articles covered by the bond are in default and the district director allows no mitigation. In order to avoid confusion and simplify the processing of fines, penalties and forfeiture matters, the jurisdictional amount found in § 172.21 should govern review of all petitions. Accordingly, this document proposes to amend § 10.39(e) to remove the reference regarding referral of these petitions to Customs Headquarters.

Comments

Before making a determination in this matter, Customs will consider any written comments timely submitted. Comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, room 2119, Customs Headquarters, 1301 Constitution Avenue NW., Washington, DC.

Regulatory Flexibility Act and Executive Order 12291

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Permitting anticipatory breach of Temporary Importation Bond provisions allows early removal of an otherwise outstanding contingent liability of an importer, while eliminating the requirement that petitions be decided at Customs Headquarters reduces delays in processing, both to the benefit of importers. As noted above, provisions relating to inclusion of the merchandise processing fee and the harbor maintenance fee are dictated by the provisions of the statute, and are not within agency discretion. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604. Because the document does not meet the criteria for a "major rule" as specified in Executive Order 12291, no regulatory impact analysis has been prepared.

List of Subjects in 19 CFR Part 10

Customs duties and inspection, Imports, Surety Bonds.

Proposed Amendments

Accordingly, for the reasons set forth below, it is proposed to amend part 10, Customs Regulations (19 CFR part 10), as follows:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation and relevant specific authority citations for part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

2. It is proposed to amend § 10.31 by revising the first two sentences of paragraph (f) to read as follows:

§ 10.31 Entry; bond.

* * * * *

(f) With the exceptions stated herein, a bond shall be given on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter, in an amount equal to double the duties, including fees, which it is estimated would accrue (or such larger amount as the district director shall state in writing to the entrant is necessary to protect the revenue) had all the articles covered by the entry been entered under an ordinary consumption entry. In the case of samples solely for use in taking orders entered under subheading 9813.00.20, HTSUS, motion-picture advertising films entered under subheading 9813.00.25, HTSUS, and professional equipment, tools of trade and repair components for such equipment or tools entered under subheading 9813.00.50, HTSUS, the bond required to be given shall be in an amount equal to 110 percent of the estimated duties, including fees, determined at the time of entry. * * *

* * * * *

3. It is proposed to amend § 10.39(d)(1) by removing the word "lower" and replacing it with the word "different" in the first sentence, and by adding a new second sentence to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * *

(d)(1) * * * For purposes of this section, the term estimated duties shall include any merchandise processing fees and harbor maintenance fees applicable to such entry. * * *

* * * * *

4. It is proposed to revise the first sentence of § 10.39(e) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * *

(e) If there has been a default with respect to all the articles covered by the bond and a written petition for relief has been timely filed as provided in part 172 of this chapter, it shall be reviewed by the district director if the full amount of the claim does not exceed $100,000 and by the Director, International Trade Compliance Division, Customs Headquarters, if the full amount of the claim exceeds $100,000.

* * * * *

5. It is proposed to amend § 10.39 by redesignating paragraph (g) as paragraph (h) and add a new paragraph (g) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * *

(g) *Anticipatory breach.* If an importer anticipates that the merchandise entered under a Temporary Importation Bond will not be exported or destroyed in accordance with the terms of the bond, the importer may advise the district director in writing before the bond period has expired of the anticipatory breach. At the time of written notification of the breach, the importer shall pay to Customs the full amount of liquidated damages that would be assessed at the time of breach of the bond, and upon such notification and payment the entry will be closed and the bond will be cancelled. By this payment, the importer waives his right to receive a notice of claim for liquidated damages as required by § 172.1(a) of this chapter or to file any petition for relief on the matter.

Michael H. Lane,

Acting Commissioner of Customs.

Approved: September 22, 1992.

Peter K. Nunez,

Assistant Secretary of the Treasury.

[FR Doc. 92-23491 Filed 9-28-92; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 505

The Army Privacy Program

AGENCY: Director of Information Systems for Command, Control, Communications, and Computers (DISC4), DOD.

ACTION: Proposed rule revision.

SUMMARY: The Department of the Army proposes to revise 32 CFR part 505, The Army Privacy Program. This revision will shift responsibilities for Access and Amendment Refusal Authority to conform with the reorganization of the Department of the Army as a result of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, and other organizational realignments. It also establishes policy for the delegation of Access and Amendment Refusal Authority responsibilities, and the disclosure of records for agency use in litigation. It updates responsibilities for the Army Privacy Act Program.

DATES: Comments must be received on or before November 30, 1992.

ADDRESSES: Comments are to be submitted in writing only to: Director of Information Systems for Command, Control, Communications, and Computers, Attn: SAIS-IDP/Mr. Walker, Pentagon, Washington, DC 20310-0107.

FOR FURTHER INFORMATION CONTACT: Mr. William Walker, Office, Director of Information Systems for Command, Control, Communications, and Computers, Washington, DC 20310-0107, telephone (703) 614-3729.

EXECUTIVE ORDER 12291 This proposed revision has been reviewed under Executive Order 12291. This action is nonmajor meaning that the effect on the economy will be less than $100 million.

Regulatory Flexibility Act

This proposed revision has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (USC 601-612). This action will not have any adverse act on small entities. The primary purpose of the proposed rule is to revise the Army Privacy Program. There will not be any adverse effects on small businesses by the adoption of this revision to part 505.

List of Subjects in 32 CFR Part 505

Privacy.

Accordingly, 32 CFR part 505 is amended as follows:

1. The authority citation for part 505 continues to read:

Authority: 5 U.S.C. 51a: DOD Directive 5400.11, June 9, 1982; and DOD Regulation 5400.11R, August 31, 1983.

2. In § 505.1, paragraphs (d)(1) and (2), (g) and (h) are revised to read as follows:

§ 505.1 General information.

* * * * *

(d) * * *

(1) The Director of Information Systems for Command, Control, Communications, and Computers (DISC4) is responsible for issuing policy and guidance for the Army Privacy Program in Consultation with the Army General Counsel.

(2) The Commander, U.S. Army Information Systems Command is responsible for developing policy for and executing the Privacy Act Program under the policy and guidance of the DISC4.

* * * * *

(g) *Access and Amendment Refusal Authority (AARA).* Each Access and Amendment Refusal Authority (AARA) is responsible for action on requests for access to, or amendment of, records referred to them under this part. The officials listed below are the only AARA for records in their authority. Authority may be delegated to an officer or subordinate commander. All delegations must be in writing. If an AARA's delegate denies access or amendment, the delegate must clearly state that he or she is acting on behalf of the AARA and identify the AARA by name and position in the written response to the requester. Denial of access or amendment by an AARA's delegate must have appropriate legal review. Delegations will not be made below the colonel (06) or GS/GM-15 level. Such delegations must not slow Privacy actions. AARAs will send the names, offices, telephone numbers of their delegates to the Director of Information Systems for Command, Control, Communications and Computers, HQDA, ATTN: SAIS-IDP, Washington, DC 20310-0107; and the Department of the Army Privacy Review Board, Crystal Square #1, Suite 201, 1725 Jefferson Davis Highway, Arlington, VA 22202.

(1) The Administrative Assistant to the Secretary of the Army (AASA) for records of the Secretariat and its serviced activities, to include the personnel records maintained by the General Officer Management Office, personnel records pertaining to Senior Executive Service Personnel serviced by the Office of the Secretary of the Army (ASA), and Equal Employment Opportunity (EEO) records from offices serviced by the OSA. The AASA will

also serve as AARA for those records requiring the personal attention of the Secretary of the Army.

(2) The Inspector General (TIG)—for TIG investigative records.

(3) The president or executive secretary of boards, councils, and similar bodies established by DA to consider personnel matters, including the Army Board of Correction of Military Appeals, for records under their purview.

(4) The Deputy Chief of Staff for Personnel (DCSPER)—for records of active and former non-appropriated fund employees (except those in the Army and Air Force Exchange Service, alcohol and drug abuse treatment records, behavioral science records, recruiting, Armed Services vocational Attitude Battery (ASVAB), equal opportunity, Junior Reserve Officers' Training Corps (ROTC), Senior ROTC Instructor, military academy cadet), selection, promotion, and reduction boards; special review boards; professional staff informational records; and entrance processing records (when records pertain to those not entering active duty).

(5) The Deputy Chief of Staff for Operations and Plans (DCSOPS)—for military police records and reports and prisoner confinement and correctional records.

(6) Chief of Engineers (COE)—for records pertaining to civil works (including litigation), military construction, engineer procurement, other engineering matters not under the purview of another AARA, ecology, and contractor qualifications.

(7) The Surgeon General (TSG)—for medical records, except properly part of the Official Personnel Folder (OPM/GOVT-1 systems of records).

(8) Chief of Chaplains (CCH)—for ecclesiastical records.

(9) The Judge Advocate General (TJAG)—for personnel records of the Army National Guard.

(11) Chief, Army Reserve (CAR)—for personnel records of Army retired, separated and reserve military personnel members.

(12) Commander, United States Army Material Command (USAMC)—for records of Army contractor personnel of USAMC.

(13) Commander, United States Army Criminal Investigation Command (USACIDC)—for criminal investigation reports and military police reports included therein.

(14) Commander, United States Total Army Personnel Command (PERSCOM)— for personnel and personnel related records of Army members on active duty and current Federal appropriated fund civilian employees. (Requests from former civilian employees to amend a record in an Office of Personnel Management (OPM) system of records, such as the Official Personnel Folder, should be sent to the Office of Personnel Management, Assistant Director for Workforce Information, Compliance, and Investigations Group, 1900 E Street, NW, Washington, DC 20415-0001).

(15) Commander, United States Army Community and Family Support Center (USACFS)—for records relating to morale, welfare and recreation activities, community life programs, family action programs, retired activities, club management, Army emergency relief, consumer protection, retiree survival benefits, and records dealing with DA relationships and social security, veterans' affairs, United Service Organizations, U.S. Soldiers' and Airmen's Home and American Red Cross.

(16) Commander, United States Army Intelligence and Security Command (INSCOM)—for intelligence, investigative, and security records, foreign scientific and technological information, intelligence training, mapping and geodesy information, ground surveillance records, intelligence threat assessments, and missile intelligence data relating to tactical land warfare systems.

(17) Commander, Army and Air Force Exchange Service (AAFES)—for records pertaining to employees, patrons, and other matters which are the responsibility of the Exchange Service.

(18) Commander, Military traffic Management Command (MTMC)—for transportation records.

(19) Director of Army Safety—for safety records.

(20) Commander, United States Army Information Systems Command (USAISC)—for records which do not fall within the functional area of another AARA.

(h) *DA Privacy Review Board.* The DA Privacy Review Board acts on behalf of the Secretary of the Army in deciding appeals from refusal of the appropriate AARAs to amend records. Board membership is comprised of the AASA, the Commander, USAISC-Pentagon, and TJAG, or their representatives. The AARA may serve as a nonvoting member when the Board considers matters in the AARA's area of functional specialization. The Commander, USAISC-Pentagon chairs the Board and provides the recording secretary.

* * * * *

3. In § 505.3 revise paragraph (b) (10) and (11) to read as follows:

§ 505.3 Disclosure of personal information to other agencies and third parties.

* * * * *

(b) * * *

(10) *Disclosure to the Department of Justice for litigation.* Records may be disclosed as a routine use to any component of the Department of Justice when—

(i) The agency, or any component there, or

(ii) Any employee of the agency in his or her official capacity, or

(iii) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(iv) The United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which it is collected.

(11) *Disclosure for agency use in litigation.* A record may be disclosed in a matter before a court or adjudicative body before which the agency is authorized to appear when—

(i) The agency, or any component there, or

(ii) Any employee of the agency in his or her official capacity, or

(iii) Any employee of the agency in his or her official capacity where the Department of Justice has agreed to represent the employee, or

(iv) The United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that their use of such records is relevant and necessary to the litigation, provided; however, that in each case, the agency determines that disclosure of the records to the court or adjudicative body is a use of the information contained in the records that is compatible with the purpose for which it is collected.

* * * * *

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 92-23545 Filed 9-28-92; 8:45 am]

BILLING CODE 3710-08-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[CFRL-4514-7]

Transfer of Data to Contractors

AGENCY: Environmental Protection Agency.

ACTION: Notice of transfer of data and request for comments.

SUMMARY: The Environmental Protection Agency (EPA) will transfer to its contractor, ICF, Inc., and its subcontractors: A.T. Kearney, Inc.; Booz-Allen & Hamilton, Inc.; DPRA, Inc.; Information Systems Solution International; SAIC, Inc.; and Westat, Inc., information which has been submitted to EPA under the authority of the Resource Conservation and Recovery Act (RCRA) as amended. These firms will support the Office of Solid Waste by providing capacity analyses for the Land Disposal Restriction Phase II Final Rule. ICF, and its subcontractors, will review public comments received from the Land Disposal Restriction Phase II Proposed Rule. Some of the information that ICF will review is contained in Part B permit applications, RCRA Facility Asssessment Reports, including facility file information, photo logs, site inspection reports, RCRA Facility Investigation Reports, and applications for RCRA closure or post-closure permits under 40 CFR parts 264 and 270. ICF, and its subcontractors, will also review responses to RCRA 3007 questionnaires received from facilities that land dispose newly identified organic wastes. Some of the information may have a claim of business confidentiality.

DATE: Transfer of confidential data submitted to EPA will occur no sooner than October 6, 1992.

ADDRESSES: Comments should be sent to Margaret Lee, Document Control Officer, Office of Solid Waste (OS-312), U. S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460. Comments should be identified as "Transfer of Confidential Data.".

FOR FURTHER INFORMATION CONTACT: Margaret Lee, Document Control Officer, Office of Solid Waste (OS-312), U. S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-3410.

SUPPLEMENTARY INFORMATION:

I. Transfer of Data

The Environmental Protection Agency is in the process of analyzing data submitted by the regulated community for the Land Disposal Restriction Phase II Proposed Rule.

Under EPA Contract 68-W2-0008, ICF, and its subcontractors, will assist the Permits and State Programs Division by providing capacity analyses for the Land Disposal Restriction Phase II Final Rule. ICF, and its subcontractors, will review public comments received from the Land Disposal Restriction Phase II Proposed Rule, and will analyze the data submitted by the regulated community. Specific examples of some of the information ICF will review is contained in Part B Permit applications, RCRA Facility Assessment Reports, including facility file information, photo logs and site inspection reports, RCRA Facility Investigation Reports and applications for RCRA closure or post-closure permits under 40 CFR parts 264 and 270. ICF, and its subcontractors, will also review responses to RCRA 3007 questionnaires received from facilities that land dispose newly identified organic waste. The information being transferred to ICF, and its subcontractors, may have been or will be claimed as confidential business information.

In accordance with 40 CFR 2.305(h), EPA has determined that ICF, and its subcontractors, require access to confidential business information submitted to EPA under the authority of RCRA to perform work satisfactorily under the above-noted contract. EPA is issuing this notice to inform all submitters of confidential business information that EPA may transfer to these firms, on a need-to-know basis, CBI collected under the authority of RCRA. Upon completing their review of materials, ICF will return all such materials to EPA.

ICF, and its subcontractors, have been authorized to have access to RCRA CBI under the EPA "Contractor Requirements for the Control and Security of RCRA Confidential Business Information Security Manual". EPA will approve the security plans of the contractors to insure that their facilities comply with security procedures outlined in the security manual prior to RCRA CBI being transferred to the contractors. Personnel from these firms will be required to sign non-disclosure agreements and be briefed on appropriate security procedures before they are permitted access to confidential business information.

Dated: September 18, 1992.

Richard J. Guimand,

Acting Assistant Administrator.

[FR Doc. 92-23603 Filed 9-28-92; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 52

[AZ4-1-5263; FRL-4514-2]

Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision; Maricopa County Bureau of Air Pollution Control

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA is proposing to grant conditional approval to four revised rules controlling volatile organic compounds (VOCs) and one revised rule concerning general provisions and definitions adopted on July 13, 1988 by the Maricopa County Bureau of Air Pollution Control (the Bureau) for inclusion in the Arizona State Implementation Plan (SIP). The Arizona Department of Environmental Quality (DEQ) submitted these revisions to EPA on January 4, 1990. The revisions concern Rule 100, General Provisions and Definitions; Rule 331, Solvent Cleaning; Rule 332, Perchloroethylene Dry Cleaning; Rule 333, Petroleum Solvent Dry Cleaning; and Rule 340, Cutback and Emulsified Asphalt. EPA has evaluated the revisions to these rules and is proposing a conditional approval under section 110(k)(4) of the Clean Air Act, as amended in 1990 (CAA or the Act), because the rules strengthen the SIP and the Bureau has committed to correct certain deficiencies in the rules which have been identified by EPA.

DATES: Comments must be received on or before October 29, 1992.

ADDRESSES: Comments may be mailed to: Daniel A. Meer, Southern California & Arizona Rulemaking Section (A-5-3), Air and Toxics Division, Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Copies of each rule revision and EPA's detailed Technical Support Document for each rule are available for public inspection at EPA's Region 9 office (address above) during normal business hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

Arizona Department of Environmental Quality, Air Quality Planning Office, 2005 N. Central Avenue, Phoenix, AZ 85004.

Maricopa County Bureau of Air Pollution Control, 2406 S. 24th Street, Suite E214, Phoenix, AZ 85034.

FOR FURTHER INFORMATION CONTACT: William E. Davis, Jr., Southern

California & Arizona Rulemaking Section (A-5-3), Air and Toxics Division, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1183.

SUPPLEMENTARY INFORMATION:

Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the Clear Air Act, as amended in 1977 (1977 CAA or pre-amended Act) that included Maricopa County. 43 FR 8964, 40 CFR 81.303. On March 19, 1979, EPA changed the name and modified the geographic boundaries of the ozone nonattainment area of Maricopa County to the Maricopa Association of Government (MAG) Urban Planning Area. 44 FR 16391, 40 CFR 81.303. On February 24, 1984, EPA notified the Governor of Arizona that the Bureau's portion of the Arizona SIP was inadequate to attain and maintain the National Ambient Air Quality Standard (NAAQS) for ozone and requested that the State submit curative SIP revisions to EPA for approval (EPA's SIP-Call, 49 FR 18827, May 3, 1984). On May 26, 1988, EPA again notified the Governor of Arizona that the Bureau's portion of the Arizona SIP was inadequate to meet the ozone NAAQS and requested that deficiencies relating to VOC controls and the application of reasonably available control technology (RACT) in the existing SIP be corrected (EPA's second SIP-Call, 53 FR 34500, September 7, 1988). On November 15, 1990, the Clean Air Act Amendments of 1990 (CAA) were enacted. Public Law 101-594, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas correct their deficient RACT rules and established a deadline of May 15, 1991 for states to submit corrections of those deficiencies.

Section 182(a)(2)(A) applies to areas designated as nonattainment prior to enactment of the amendments and classified as marginal or above as of the date of enactment. It requires such areas to adopt and correct RACT rules pursuant to pre-amended section 172(b) as interpreted in pre-amended guidance.[1] EPA's SIP-Call used that guidance to indicate the necessary corrections for specific nonattainment areas. The MAG Urban Planning Area is classified as a moderate nonattainment area [2]; therefore, this area is subject to the RACT fix-up requirement and the May 15, 1991 deadline. The Bureau adopted the four VOC-controlling rules being proposed for conditional approval in this notice in July of 1988, and the Arizona DEQ, acting as the Governor's designee, submitted them to EPA on January 4, 1990 in response to the SIP-Calls. Although this submittal predates the amendments to the CAA, it also serves as a submittal predates the amendments to the CAA, it also serves as a submittal under section 182(a)(2)(A). At the same time as the state submitted the RACT corrections pursuant to the SIP call, the Arizona DEQ submitted a portion of its VOC rules, which it adopted in July of 1988, pertaining to general provisions and definitions. These new and amended definitions were not specifically a part of the SIP-Call and, therefore, are not part of the RACT fix-up requirement. However, because these definitions are integrally related to the other rules submitted by the State, EPA is proposing to conditionally approve this portion of the submittal in conjunction with the other rules as meeting the general RACT requirement.

The State of Arizona submitted several revised rules to EPA for incorporation into its SIP on January 4, 1990, including the rules proposed for action in this notice. This notice addresses EPA's proposed action for Rule 100, General Provisions and Definitions; Rule 331, Solvent Cleaning; Rule 332, Perchloroethylene Dry Cleaning; Rule 333, Petroleum Solvent Dry Cleaning; and Rule 340, Cutback and Emulsified Asphalt. The submitted rules were found to be complete on May 25, 1990 pursuant to EPA's completeness criteria adopted on February 16, 1990 and set forth in 40 CFR part 51, appendix V [3] and are being proposed for conditional approval.

Rule 100 is a general rule containing definitions that apply to all of the Bureau's rules. Rules 331, 332, 333, and 340 are rules that control volatile organic compounds (VOCs) from the cleaning (degreasing) of parts, from dry cleaning operations using perchloroethylene solvent, from dry cleaning operations using petroleum solvents, and from the use of asphalts, respectively. VOCs contribute to the production of ground level ozone and smog. Rules 331, 332, 333, and 340 were originally adopted as part of Maricopa's effort to achieve the NAAQS for ozone in the MAG Urban Planning Area and have been revised in response to EPA's SIP-Calls.

EPA Evaluation and Proposed Action

The Agency has examined the issue of whether this action should be reviewed only under the provisions of the law as it existed on the date of submittal to EPA (January 4, 1990) and has determined that the Agency must apply the later amendments of the law to the revisions. Therefore, the Agency has reviewed this request for revision of the SIP for conformance with the CAA as amended November 15, 1990.

In determining the approvability of a VOC rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and part D of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). The EPA interpretation of these requirements, which forms the basis for today's action, appears in various EPA policy guidance documents listed in footnote 1. Among those provisions is the requirement that a VOC rule must, at a minimum, provide for the implementation of RACT for stationary sources of VOC emissions. This requirement was carried forth from the pre-amended Act.

For the purpose of assisting state and local agencies in developing RACT rules, EPA prepared a series of Control Techniques Guideline (CTG) documents that, based on the underlying requirements of the Act, specified the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to "fix-up" their RACT rules. See section 182(a)(2)(A). The CTGs that apply to the four RACT rules follow:

Rule No.	CTG title	EPA number
331	Control of Volatile Organic Emissions from Solvent Metal Cleaning.	EPA-450/2-77-022

[1] 1. Among other things, the pre-amendment guidance consists of those portions of the proposed post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044 (November 24, 1987); "Issues Relating to VOC Regulation, Cutpoints, Deficiencies, and Deviations, Clarification to appendix D of November 24, 1987 **Federal Register** Notice (appendix D or the Blue Book) (notice of availability was published in the **Federal Register** on May 25, 1988); and the existing control techniques guidelines (CTGs).

[2] 2. Upon enactment of the CAA, the MAG Urban Planning Area continued as nonattainment for ozone pursuant to section 107(d) and classified as moderate by operation of law pursuant to section 181(a). See 56 FR 56694 (November 6, 1991).

[3] EPA has since adopted completeness criteria pursuant to section 110(k)(1)(A) of the amended Act. See 56 FR 42216 (August 26, 1991).

Rule No.	CTG title	EPA number
332	Control of Volatile Organic Emissions from Perchloroethylene Dry Cleaning Systems.	EPA-450/2-78-050
333	Control of Volatile Organic Compound Emissions from Large Petroleum Dry Cleaners.	EPA/450/3-82-009
340	Control of Volatile Organic Compounds from the Use of Cutback Asphalt.	EPA-450/2-77-037

Further interpretations are found in the Blue Book. In general these guidance documents have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

The rules discussed below are being proposed for conditional approval under section 110(k)(4) of the CAA because they strengthen the SIP and the Bureau has committed to correct the identified appendix D and CTG deficiencies within one year after the date of publication of the Notice of Final Rulemaking.

Rule 100, General Provisions and Definitions

This rule applies to the entire SIP and provides the purpose of the regulations, legal authority and common definitions. The rules does not control VOCs directly but many definitions apply to VOC-controlling rules. The revision is a consolidation of several SIP rules, definitions and provisions. The rule has been strengthened for purposes of VOC emission control by (1) the inclusion of a prohibition against circumvention of the rules, (2) a statement that the lowest emission limit will apply when multiple limits apply, and (3) inclusion of requirements for recordkeeping and record retention. However, there are deficiencies which include unclear definitions and definitions which allow the use of non-EPA approved test methods.

Rule 331, Solvent Cleaning

This rule regulates VOC emissions from the use of solvents for cleaning or degreasing of parts or products. It has several appendix D deficiencies including lack of test methods for determining emission limits or alternate controls. However, the revised rule strengthens the existing SIP because (1) a lower limit has been placed on the cooling capacity of freeboard chillers; (2) a provision, recommended by the CTG, for a vapor level control safety switch on open top vapor degreasers has been added; and (3) regulations for small conveyorized degreasers have been added.

Rule 332, Perchloroethylene Dry Cleaning

This rule provides for the regulation of VOC emissions from dry cleaning operations using perchloroethylene. The proposed rule strengthens the existing SIP because, in contrast to the provisions in the existing SIP, the revised rule requires the control technology specified in the CTG including (1) a requirement to reduce perchloroethylene emission to 100 ppm, and (2) specified operating requirements. However, the rule also allows an alternative, potentially higher, emission level which is a deficiency. Other deficiencies are the lack of certain test methods and recordkeeping.

Rule 333, Petroleum Solvent Dry Cleaning

This rule regulates VOC emissions from dry cleaning operations using non-aqueous solvents other than perchloroethylene. The rule represents a strengthening of the SIP because it is consistent with most CTG provisions, in contrast to the existing SIP. The strengthening provisions include (1) enforceable operating requirements for controls for dryers, filters and recovery units, and (2) deletion of a solvent use cutoff which allows for exemption of certain facilities. The rule is deficient in that not all VOCs are regulated and certain test methods are missing.

Rule 340, Cutback and Emulsified Asphalt

This rule applies to the regulation of VOCs in asphalt materials by limiting the amount of petroleum solvents in the asphalt. This revision represents a strengthening of the SIP because it deletes a provision allowing for a winter season exemption for cutback asphalts. However, the rule is deficient because certain test methods are missing and the recordkeeping provisions do not apply to manufacturers of asphalts for roadways.

EPA has evaluated these five rules for consistency with EPA requirements and has found that the revisions address and correct many deficiencies previously identified by EPA. These corrected deficiencies have resulted in clearer, more enforceable rules.

Although the approval of Maricopa's rules 331, 332, 333 and 340 will strengthen the SIP, these rules still contain deficiencies, identified above for each rule, which were required to be corrected pursuant to section 182(a)(2)(A) of the CAA. In addition, Rule 100 also strengthens the SIP. However, it also contains deficiencies that prevent EPA from determining that it meets RACT as it applies in conjunction with the submitted rules. Details of the evaluation and the deficiencies identified can be found in EPA's Technical Support Document for each rule.

Because of the above deficiencies, EPA cannot grant full approval of these rules under section 110(k)(3) and part D. Also, because the submitted rules are not composed of separable parts which meet all the applicable requirements of the CAA, EPA cannot grant partial approval of the rules under section 110(k)(3). However, EPA may grant a conditional approval under section 110(k)(4) based on a commitment by the Bureau to correct the rules within one year of the finalization of the conditional approval. The Bureau has committed to adopt final rules correcting the deficiencies within the required timeframe. The commitment letter contains a schedule of interim steps (with dates) for each rule. The State of Arizona has submitted the commitment letter to EPA. Therefore, EPA is proposing to give conditional approval to all five rules under section 110(k)(4) of the CAA.

Under section 110(k)(4), the Bureau must adopt the rules for which the State submitted a commitment within one year of EPA's final conditional approval of this action. In addition, the State must submit these rules to EPA within a reasonable time after such adoption. If the Bureau fails to adopt and the State fails to submit the rule revisions to EPA within this time frame, this approval will become a disapproval upon EPA notification of the State by letter. At that time, these rules will no longer be a part of the approved Arizona SIP. EPA subsequently will publish a notice in the notice section of the **Federal Register**. If the Bureau adopts and the State submits these rules to EPA within the applicable time frame, the conditionally approved rules will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal. If EPA disapproves the submittal, the rules on which the conditional approval was based will also be disapproved at that time. If EPA approves the submittal, those newly approved rules will become a part of the SIP and will modify or replace the rules on which the conditional approval is based.

If the conditional approval is converted to a disapproval, the sanctions clock under section 179(a) will begin. Under 179(a)(2), if the Administrator disapproves a submission

under section 110(k) for an area designated nonattainment, based on the submissions's failure to meet one or more of the elements required by the CAA, the Administrator must apply one of the sanctions set forth in section 179(b) unless the deficiency has been corrected within 18 months of such disapproval. Section 179(b) provides two sanctions available to the Administrator: Highway funding and offsets. The 18 month period referred to in section 179(a) will begin at the time EPA issues a finding of disapproval. Moreover, the final disapproval triggers the federal implementation plan (FIP) requirement under section 110(c).

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. section 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. sections 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Conditional approvals of SIP submittals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the federal SIP-approval does not impose any new improvements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S. Ct. 1976); 42 U.S.C. section 7410(a)(2).

This action has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register**, on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request.

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Authority: 42 U.S.C. 7401–7671q.

Dated: August 31, 1992.

John Wise,

Acting Regional Administrator.

[FR Doc. 92–23602 Filed 9–28–92; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 91–68; Notice 02]

RIN 2127–AC64

Planning Document for Rollover Prevention Rulemaking

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces the availability of an agency planning document that describes NHTSA's multi-faceted rulemaking effort and planned and ongoing data analyses and physical research to address the problem of rollover crashes and their resulting injuries and fatalities. The agency seeks comments on the planning document. The comments will be evaluated and incorporated, as appropriate, into the activities planned by the agency.

DATES: Comments must be received no later than November 13, 1992.

ADDRESSES: Interested persons may obtain a copy of the planning document, free of charge, from NHTSA's Docket Section at the address below. All comments should refer to the docket and notice number of this notice and be submitted to: Docket Section, room 5219, 400 Seventh Street SW., Washington, DC 20590. Telephone: 202–366–4949. Docket hours are 9:30 a.m. to 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Neill, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. Telephone: 202–366–5281.

SUPPLEMENTARY INFORMATION: The Intermodal Surface and Transportation Efficiency Act of 1991 requires NHTSA to initiate rulemaking to address the problems of rollover crashes. In response to that mandate, NHTSA published an advance notice of proposed rulemaking on January 3, 1992 (57 FR 242) that summarized the statistics and research on rollover crashes, sought answers to several questions about vehicle stability and rollover crashes, and outlined possible regulatory and other approaches to reduce rollover casualties. These approaches included crash avoidance measures, crashworthiness measures, and public safety education. After reviewing the available data, research reports, and the public comments on the advance notice, the agency has concluded that the reduction of rollover casualties will necessitate a combination of regulatory and consumer information measures. NHTSA has concluded also that additional research and data analyses need to be conducted concerning these measures and has described these efforts in an agency planning document. These activities will enable the agency to assess the appropriate combination of approaches for addressing the injuries and fatalities from rollover crashes.

Issued on September 23, 1992.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 92–23528 Filed 9–24–92; 8:51 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB85

Endangered and Threatened Wildlife and Plants; Proposal To Establish an Experimental Nonessential Population of Whooping Cranes in Florida

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to reintroduce whooping cranes (*Grus americana*) in central Florida in the Kissimmee Prairie area. The

reintroduction is proposed to implement a primary recovery action for a federally listed endangered species, to obtain data for further assessing the suitability of Kissimmee Prairie of south central Florida as whooping crane habitat, and to evaluate the merit of releasing captive-reared whooping cranes, conditioned for wild release, as a technique for establishing a self-sustaining, nonmigratory population. The Service proposes that this reintroduced population be designated a nonessential experimental population according to section 10(j) of the Endangered Species Act of 1973 (ESA), as amended. An experimental population is treated as a threatened species for the purposes of sections 4(d) and 9 of the ESA, which prohibit certain activities involving listed species. Accordingly, a special rule for specifying circumstances under which "taking" of introduced whooping cranes will be allowed is being promulgated in conjunction with the nonessential, experimental population rule. No conflicts are envisioned between the whooping crane's reintroduction and any existing or anticipated Federal agency actions.

DATES: Comments from all interested parties must be received by October 29, 1992.

ADDRESSES: Comments and materials concerning this proposal should be sent to Mr. David J. Wesley, Field Supervisor, at the address listed below. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Service's: Jacksonville Field Office, 3100 University Boulevard, South, Suite 120, Jacksonville, Florida 32216 (Phone: 904/232-2580).

FOR FURTHER INFORMATION CONTACT: (See **ADDRESSES** section above).

SUPPLEMENTARY INFORMATION:

Background

1. Legislative: The ESA amendments of 1982, Public Law No. 97-304, created a new Section 10(j), providing for the designation of specific introduced populations of listed species as "experimental populations." Under previous authorities in the ESA, the Service was permitted to reintroduce populations into unoccupied portions of the historic range of a listed species when it would foster the conservation and recovery of the species. Local opposition to reintroduction efforts, however, stemming from concerns about the restrictions and prohibitions on private and Federal activities contained in sections 7 and 9 of the ESA, severely handicapped the effectiveness of this as a management tool.

Under section 10(j), past and future reintroduced populations established outside the current range, but within the species' historic range, may now be designated, at the discretion of the Service, as "experimental." Such designations will increase the Service's flexibility to manage these reintroduced populations because such experimental populations may be treated as threatened species. The Service has more discretion in devising management programs for threatened species than for endangered species, especially on matters regarding incidental or regulated takings. Moreover, experimental populations found to be "nonessential" to the continued existence of the species in question are to be treated as if they were only proposed for listing for purposes of section 7 of the ESA, except as noted below.

A "nonessential" experimental population is not subject to the formal consultation requirement of section 7(a)(2) of the ESA, except that the full protection of section 7 applies to individuals of the experimental population found on a National Wildlife Refuge or National Park. Section 7(a)(1) of the ESA, requiring Federal agencies to carry out programs to conserve listed species, applies to all experimental populations. Individuals to comprise a designated experimental population can be removed from an existing source or donor population only after determining that such removal is not likely to jeopardize the continued existence of the species; a permit issued in accordance with 50 CFR 17.22 is also required.

2. Biological: The species included in this proposed rule is the whooping crane (*Grus americana*), listed as an endangered species on March 11, 1967 (32 FR 4001). The whooping crane is classified in the family Gruidae, Order Gruiformes. It is the tallest bird in North America; males approach 1.5 m. In captivity adult males average 7.3 kg and females 6.4 kg. Adult plumage is snowy white except for black primaries, black or grayish alulae, sparse black bristly feather on the carmine crown and malar region, and dark gray-black wedge-shaped patch on the nape. The bill is dark olive-gray which becomes lighter during the breeding season. The iris of the eye is yellow; legs and feet are gray-black.

Adults are potentially long-lived. Current estimates suggest a maximum longevity in the wild of 22 to 24 years (Binkley and Miller 1980). Captive individuals are known to have survived 27 to 40 years (McNulty 1966, Moody 1931). Mating is characterized by monogamous life-long pair bonds. Individuals remate following death of their mate. Fertile eggs are occasionally produced at age 3 years but more typically at age 4 (pers. comm., Ernie Kuyt 1991). Experienced pairs may not breed every year, especially when habitat conditions are poor. Whooping cranes ordinarily lay two eggs. They will renest if their first clutch is destroyed or lost before mid-incubation (Erickson and Derrickson 1981, Kuyt 1981).

Although two eggs are laid, whooping cranes infrequently fledge two chicks. Only about one of every four hatched chicks survives to reach the wintering grounds (U.S. Fish and Wildlife Service 1986).

The whooping crane first appeared in fossil records from the early Pleistocene (Allen 1952) and probably was most abundant during that two-million-year epoch. They once occurred from the Arctic Sea to the high plateau of central Mexico, and from Utah east to New Jersey, South Carolina, and Florida (Allen 1952, Nesbitt 1982). In the 19th century, the principal breeding range extended from central Illinois northwest through northern Iowa, western Minnesota, northeastern North Dakota, southern Manitoba, and Saskatchewan to the vicinity of Edmonton, Alberta. A nonmigratory breeding population still existed in southwestern Louisiana in the early 1900's (Allen 1952, Craft 1991).

Through the use of two independent techniques of population estimation, Banks (1978) derived estimates of 500 to 700 whooping cranes in 1870. By 1941, the migratory population contained only 16 individuals. The whooping crane population decline in the 19th and early 20th century was a consequence of hunting and specimen collection, human disturbance, and conversion of the primary nesting habitat to hay, pastureland, and grain production.

Allen (1952) described several historical migration routes. One of the most important led from the principal nesting grounds in Iowa, Illinois, Minnesota, North Dakota, and Manitoba to coastal Louisiana. Another went from Texas and the Rio Grande Delta region of Mexico northward to nesting grounds in North Dakota and the Canadian Provinces. A route through west Texas into Mexico probably followed the route still used by sandhill cranes. These whooping cranes wintered in the interior tablelands of western Texas and the high plateau of central Mexico.

Another migration route crossed the Appalachians to the Atlantic Coast. These birds apparently nested in the

Hudson Bay area of Canada. Coastal areas of New Jersey, South Carolina, and river deltas farther south were the wintering grounds. The latest specimen records or sighting reports for some eastern locations are Alabama, 1899; Arkansas, 1889; Florida, 1927 or 1928; Georgia, 1885; Illinois, 1891; Indiana, 1881; Kentucky, 1886; Manitoba, 1948; Michigan, 1882; Minnesota, 1917; Mississippi, 1902; Missouri, 1884; New Jersey, 1857; Ohio, 1902; Ontario, 1895; South Carolina, 1850; and Wisconsin, 1878; (Allen 1952, Burleigh 1944, Hallman 1965, Sprunt and Chamberlain 1949).

Atlantic coast locations used by whooping cranes include the Cape May area and Beesley's Point at Great Egg Bay in New Jersey; the Waccamaw River in South Carolina; the deltas of the Savannah and Altamaha rivers, and St. Simon's Island in Georgia; and the St. Augustine area of Florida. Gulf coast locations include Mobile Bay, Alabama; Bay St. Louis in Mississippi; and numerous records from southwestern Louisiana, where the last bird was captured in 1949. Coastal Louisiana contained both a nonmigratory flock and wintering migrants (Allen 1952).

"There is evidence to suggest that whooping cranes occurred in Florida, perhaps well into the 20th century" (Nesbitt 1982). Nesbitt described various sighting reports including one by O.E. Baynard, a respected field naturalist, who stated that the last flock of whooping cranes (14 birds) he saw in Florida was in 1911 near Micanopy, southern Alachua County. Two whooping cranes were reported east of the Kissimmee River on 19 January 1936 and a whooping crane was shot (and photographed) north of St. Augustine, St. Johns County, in 1927 or 1928 (Nesbitt 1982).

Records from more interior areas of the Southeast include the Montgomery, Alabama, area; Crocketts Bluff on the White River, and near Corning in Arkansas; in Missouri in Jackson County near Kansas City, near Corning, in Lawrence County southwest of Springfield, in Audrain County, and near St. Louis; and in Kentucky near Louisville and Hickman. It is unknown whether these records represent wintering locations, remnants of a nonmigratory population, or wandering birds.

Whooping cranes currently exist in two wild populations and at three captive locations. The only self-sustaining natural wild population nests in the Northwest Territories and adjacent areas of Alberta, Canada, primarily within the boundaries of Wood Buffalo National Park. These birds winter along the central Texas Gulf of Mexico coast at Aransas National Wildlife Refuge and adjacent areas. This population contained 132 whoopers in December 1991 and 33 pairs nested in 1991. The flock recovered from a population low of 16 birds in 1941. This population is hereafter referred to as the Aransas/Wood Buffalo National Park population (AWP).

The second wild flock consists of 12 individuals reared by wild sandhill cranes (termed cross-fostered because they are foster-reared by another species) in an effort to establish a migratory, self-sustaining population in the Rocky Mountains. The project began in 1975 with the transfer of wild whooping crane eggs from nests in Wood Buffalo National Park to the nests of greater sandhill cranes (*Grus canadensis tabida*) at Grays Lake National Wildlife Refuge in southeastern Idaho. The sandhill cranes became the foster parents to the whooping crane chicks and taught them the migration route which the parents traditionally followed. These birds spend the summer in Idaho, western Wyoming, and southwestern Montana and winter in New Mexico. From 1975 through 1988, 289 eggs were transferred (including 73 eggs from the captive flock at the Patuxent Wildlife Research Center), 210 hatched, and 85 chicks fledged. The population peaked at 33 birds in 1985 and has declined since then to 12 birds.

Dr. Edward O. Garton, biometrician at the University of Idaho, working with Dr. Rod Drewien the leader of the cross-fostering project (Garton et al. 1989), modelled the cross-fostered population to predict when it might become self-sustaining. In the model they assumed: (1) The cross-fostered females would be breeding at the same rate as the females in Canada; and (2) survival of birds in their first year would be similar to that of first year birds in Canada (Garton et al. 1989). Despite these optimistic and unrealized assumptions, with the future transfer of 30 eggs per year, the population would only reach 6 breeding pairs after 50 years. "It is obvious from all scenarios modelled that egg transplants of less than 30 eggs per year will not suffice to establish a self-sustaining population in a reasonable period of time. Natural breeding will be essential to establish a self-sustaining population" (Garton et al. 1989). The Idaho project is being phased out because these birds have never bred (perhaps due to improper sexual imprinting) and the mortality rate in this population has become too high to justify continuing egg transfer for cross-fostering. Fieldwork in the project ended in summer 1991, and during fiscal year 1992 project personnel will concentrate on finishing their final contract report.

The largest captive population of 38 birds greater than 1 year of age, including 8 productive pairs, is located at the Patuxent Wildlife Research Center (Patuxent) near Laurel, Maryland. Another 7 pairs at Patuxent should begin producing eggs in 1 to 5 years. This site is directly administered by the Service. A second captive flock containing 27 birds is maintained at Service cost at International Crane Foundation (ICF), a private foundation, near Baraboo, Wisconsin. The Wisconsin flock contains three experienced breeding pairs and another seven pairs which should enter production over the next one to five years. A subadult pair is maintained at the San Antonio Zoo in San Antonio, Texas. These birds are maintained at the expense of the zoo under supervision of the Service. An additional captive site is now under construction in Calgary, Alberta, Canada at the Calgary Zoo. The Calgary staff received training at ICF and Patuxent in 1991, will acquire avicultural experience with other crane species in 1992, and will receive the first whooping crane eggs or birds in 1993 provided from the Patuxent and ICF flocks and the wild flock in Canada.

Whooping cranes adhere to ancestral breeding areas, migratory routes, and wintering grounds, leaving little possibility of pioneering into new regions. The only self-sustaining wild breeding population can be expected to continue utilizing its current nesting location with little likelihood of expansion except on a local geographic scale. This population remains vulnerable to destruction through a natural catastrophe (hurricane), a red tide outbreak, or contaminant spill, due primarily to its limited wintering distribution along the intracoastal waterway of the Texas coast. The gulf Intracoastal Water Way (GIWW) experiences some of the heaviest barge traffic of any waterway in the world. Much of the shipping tonnage is petrochemical products. An accidental spill could destroy whooping cranes and/or their food resources. With the only breeding wild population so vulnerable, it is urgent that additional wild self-sustaining populations be established as soon as practical

3. Recovery Efforts: The first recovery plan developed by the U.S. Whooping Crane Recovery Team (Team) was approved January 23, 1980. It was revised December 23, 1986. The short-term goal is to downlist the whooping crane from the endangered category to

the threatened category. The criteria for attaining this downlisting goal is achieving a population level of 40 pairs in the AWP and establishing two additional, separate and self-sustaining, populations consisting of 25 nesting pairs each. The recovery plan recommends these goals should be attained for 10 consecutive years before the species is reclassified to threatened. These new populations may be migratory or nonmigratory.

In 1985, the Director-General of the Canadian Wildlife Service and the Director of the U.S. Fish and Wildlife Service signed a memorandum of understanding (MOU) entitled "Conservation of the Whooping Crane Related to Coordinated Management Activities". The MOU was revised and signed in 1990. It discusses disposition of birds and eggs, postmortem analysis, population restoration and objectives, new population site, international management, recovery plans, and consultation and coordination. All captive whooping cranes and their future progeny are jointly owned by the U.S. Fish and Wildlife Service and the Canadian Wildlife Service. Consequently, both nations are involved in recovery decisions.

4. Reintroduction Methodology and Site Selection Process: In early 1984, pursuant to the recovery plan goals and the recommendation of the recovery team, potential whooping crane release areas were selected in the eastern United States. At the time the prognosis was favorable for successfully establishing a western population by use of the cross-fostering technique. Consequently, key considerations in selecting areas to evaluate for the eastern release were (1) large areas of potentially suitable wetland habitat; (2) a health sandhill crane population sufficient to support recovery using the cross-fostering technique; (3) public and State agency support for such recovery effort in the release locale; (4) low-to-moderate levels of avian disease pathogens, environmental contaminants, and power lines; and (5) the potential of the habitats to simultaneously support whooping cranes and sandhill cranes.

The areas selected were the upper peninsula of Michigan and adjacent areas of Ontario, the Okefenokee Swamp in southern Georgia, and three sites in Florida. The Michigan site would potentially support a migratory population. The Georgia and three Florida sites would each support a nonmigratory population. The Michigan/Ontario wetlands are occupied by greater sandhill cranes that winter in Florida and the Okefenokee Swamp of Georgia. The wetlands in Georgia and Florida are occupied by the nonmigratory Florida sandhill crane (*G. c. pratensis*) and in winter by greater sandhill cranes which primarily nest in southern Ontario, Michigan, eastern Minnesota, and Wisconsin. Three-year studies were initiated at each site in October 1984 to evaluate their respective suitabilities.

Results of the studies were presented in written final reports to the U.S. Whooping Crane Recovery Team in fall 1987 (Bennett and Bennett 1987, Bishop 1988, McMillan 1987, Nesbitt 1988) and in verbal reports in February 1988. By 1988, the Team recognized that cross-fostering was not working to establish a migratory population in the West. The possibility of inappropriate sexual imprinting associated with cross-fostering, and the lack of a proven technique for establishing a migratory flock, influenced the team to favor establishing a nonmigratory flock. A ninmigratory population has several features which make it easier to achieve success: (1) Released birds do not face the hazards of migration (over one half of the losses of fledged, cross-fostered birds occurs during migration); and (2) released birds inhabit a more geographically limited area year-round than do migratory cranes, which increases the opportunity for birds to find a compatible mate.

Studies of whooping cranes (Drewien and Bizeau 1977) and greater sandhill cranes (Nesbitt 1988) have shown that migration in these cranes is learned rather than innate behavior. Captive-reared whooping cranes released in Florida are expected to develop a sedentary population.

In summer 1988 the Team selected Kissimmee Prairie as the area most suitable for the next experiment to establish a self-sustaining population. A suitable technique for release of whooping cranes in Kissimmee Prairie is the gentle release of captive-reared birds conditioned for wild release. Cranes are conditioned for wild release by being reared in isolation from humans, by use of nonspecific role models, puppets, and exercised by animal care personnel in bird costumes to avoid imprinting on humans. This technique has been successful in supplementing the population of endangered nonmigratory Mississippi sandhill cranes (*G. c. pulla*) (Zwank and Wilson 1987, Ellis et al. 1992). The term gentle release refers to retaining captive-reared birds in open-topped enclosures (conditioning pens) at the release site as they gradually adjust to their new surroundings. The enclosures contain some natural foods and water. Commercial foods are provided *ad libitum*. While in the conditioning pens, flight is restricted by the use of plastic brailes which preclude full wing extension. After several seeks the brailes are removed and the birds are allowed to fly from the pen. While the birds acclimate to their new freedom, commercial foods are continued in the pens for their use as needed.

The Service proposes to gentle release 9 to 12 juvenile whooping cranes on Kissimmee Prairie. If this proposed rule is made final, release may occur in November 1992. These birds will be captive-reared at Patuxent National Wildlife Research Center in Laurel, Maryland, and the International Crane Foundation in Baraboo, Wisconsin. They will be conditioned for wild release to increase post-release survival and their ability to adjust to wild foods. Birds will be double radio tagged and monitored for 2 years after release to discern movements, habitat use, other behavior, and survival. If results of this initial release are favorable, the releases will be resumed late in 1994 with the goal of releasing 20 birds annually for about 10 years.

The reintroduction is proposed for three purposes: (1) To implement a primary recovery action for a federally listed endangered species; (2) to obtain data for further assessing the suitability of Kissimmee Prairie of south central Florida as whooping crane habitat; and (3) to evaluate the suitability of releasing captive-reared whooping cranes, conditioned for wild release, as a technique for establishing a self-sustaining, nonmigratory population. Information on survival of released birds, movements, behavior, causes of losses, reproductive success, and other data will be gathered throughout the project. Project progress will be evaluated annually.

The likelihood of the releases resulting in a self-sustaining population is believed to be good (60–80%). Whooping cranes historically occurred in Florida and the release area habitat is similar to that which supported nesting whooping cranes in a nonmigratory population in Louisiana into the 1940's. The minimum goal for numbers of cranes to be released annually is based on the research of Griffith *et al.* (1989). As captive production increases, annual release numbers will be increased and, for a long-lived species like the whooping crane, continuing releases for a number of years increases the likelihood of reaching a population level which can sustain stochastic events. The rearing and release techniques have

proven successful in building the wild population of the endangered Mississippi sandhill cranes (*G. c. pulla.*)

Status of Reintroduced Population

The whooping crane population of Florida is proposed to be designated a nonessential experimental population according to the provisions of Section 10(j) of the ESA.

Being authorized for release as an "experimental population" means the reintroduced population will be treated as a threatened species rather than an endangered species. This designation enables the Service to develop special regulations for population management that are less restrictive than the mandatory prohibitions. Such special regulations can provide management flexibility when needed to make a reintroduction compatible with current or planned human activities in the release area. Per Section 4(d) of the ESA, these special regulations must be "necessary and advisable" to provide for the conservation of the whooping crane.

"Nonessential" experimental populations are not essential to the continued existence of the species. For purposes of Section 7 of ESA, they are treated as though they were only proposed for listing, except when occurring in an area of the National Wildlife Refuge System or the National Park System. This experimental population qualifies as being nonessential to the continued existence of the whooping crane because:

1. For the time being, the AWP and the captive populations will be the primary species population. This species has been protected against the threat of extinction from a single catastrophic event by gradual recovery of the AWP and by increase and management of the cranes at three captive sites. Loss of the experimental population will not jeopardize species' survival.

2. For the time being, the primary repository of genetic diversity for the species will be the approximately 200 wild and captive whooping cranes in the locations mentioned in (1) above. The birds selected for reintroduction purposes will be as genetically redundant as possible with the captive population, hence any loss of reintroduced animals in this experiment will not significantly impact the goal of preserving maximum genetic diversity in the species.

3. Any birds lost during the reintroduction attempt can be replaced through captive breeding or by transfer of eggs from the AWP. Eggs have been transferred to captivity from the AWP population for recovery purposes (building the captive flocks and the experimental wild cross-fostered population) since 1967. The AWP has continued to grow during this interval despite the egg transfers. Since 1985, biologists involved in the egg transfer have endeavored to ensure that one viable egg remains in each nest. Such egg switching within the Park provides infertile pairs the opportunity to raise a chick. These egg switches have increased flock growth and the potential for species recovery. In 1991 at least 33 wild pairs nested in Canada, another 7 experienced pairs failed to nest because of poor habitat conditions (drought), and other subadults might have initiated nesting if habitat conditions had been suitable. An increase in the breeding component of the wild flock is expected as soon as the drought ends on the nesting grounds. Within the captive population there also are a number of young pairs (16) expected to enter the breeding component of the population over the next 5 years. Such wild and captive flock increases illustrate the potential of the species to replace individual birds released in the reintroduction effort in Florida.

The hazards and uncertainties of the reintroduction experiment are substantial, but a decision not to attempt to establish a second, wild, self-sustaining population could be equally hazardous to survival of the species in the wild. The present tenuous status of the AWP, which could be annihilated by catastrophic events such as a Gulf coast hurricane or a contaminants spill on the wintering grounds, necessitate management efforts to establish an additional wild population. The Service believes three self-sustaining wild populations should be in existence before the whooping crane can be down listed to threatened status. The nonmigratory Florida population would potentially be the second such population. The site for the third population will be selected at a future date and, in part, will depend on the success of the Florida experiment. If the reintroduction effort at Kissimmee Prairie is successful, the conservation of the species will have been furthered considerably by not only establishing a second self-sustaining population, but by confirming that captive reared birds can be used to establish a nonmigratory wild population.

The area currently supports one of the largest and most consistently productive populations of Florida sandhill cranes in the State. The Florida sandhill crane is currently listed as threatened by the State (Florida Game and Fresh Water Fish Commission 1991). Additionally, the area supports populations of eastern indigo snake (*Drymarchon corais couperi*), bald eagle (*Haliaeetus leucocephalus*), snail kite (*Rostrhamus sociabilis*), red-cockaded woodpecker (*Picoides borealis*), American alligator (*Alligator mississippiensis*), Florida panther (*Felis concolor coryi*), and Florida grasshopper sparrow (*Ammodramus savannarum floridanus*), all of which are federally listed as endangered or threatened species. The whooping crane will be added to the State list of endangered species before the releases are initiated.

Location of Reintroduced Population

The Kissimmee Prairie is 1,200 square kilometers characterized by flat, open expanses of broad palmetto prairie interspersed with shallow wetlands and lakes. On private ranch lands much of the prairie has been converted to improved pasture. Land ownership includes eight large private ranches totaling 82,200 ha and seven public ownerships totaling 104,953 ha. Large private holdings range from 2,700 ha to 42,500 ha. Public lands range from 2,955 ha to 43,300 ha and include Three Lakes Wildlife Management Area (WMA) (22,400 ha), National Audubon Society Kissimmee Prairie Sanctuary (2,955 ha), Kicco WMA (3,100 ha), Bull Creek WMA (8,425 ha), Upper St. John's River WMA (24,800 ha), and Avon Park Bombing Range (43,300 ha).

Seventy percent of the primary proposed release site, Three Lakes WMA, is suitable crane habitat. Twenty-seven percent of this habitat is shallow wetlands characterized by pickerel weed (*Pontederia* spp.), nuphar (*Nuphar luteum*), and maiden cane (*Panicum hemitomon*). Fifty-five percent of the area consists of dry prairie and flatwoods with saw palmetto (*Serenoa repens*), various grasses, and scattered slash pine (*Pinus elliottii*) the characteristic vegetation. Lakes Kissimmee, Marion, and Jackson bound the Three Lakes WMA and each has an extensive wetland edge. Scattered strands of cypress (*Taxodium* spp.) are associated with these and several similar lakes in the area.

The principal private land use is livestock grazing and sod farming. Habitat is maintained in a subclimax state through controlled burning, primarily in winter and early spring. Areas are burned on a 2–3 year rotation. The public lands are managed for wildlife values, water conservation, and to maintain natural habitat conditions. Compared to other proposed release areas in Florida, the Kissimmee Prairie has experienced the least pressures associated with human population

growth over the past 30 years due to its distance from major population centers and the presence of large private and public land holdings.

Management

1. Monitoring

Whooping cranes will be intensively monitored by the Florida Game and Fresh Water Fish Commission (Commission) prior to and after release. The birds will be observed daily while they are in the conditioning pen. During the pre-release conditioning period, at least nine 30-minute time budgets will be collected on each individual (three from dawn to 1000 hours, three from 1000 to 1500 hours, and three from 1600 hours to dusk). Facilities for captive maintenance of the birds will be modeled after facilities at the Service's Patuxent Wildlife Research Center and the International Crane Foundation. They will conform to standards set forth in the Animal Welfare Act and Florida Wildlife Code (Title 39.6 F.A.C.). To further ensure the well-being of birds in captivity and their suitability for release to the wild, facilities will incorporate features of their natural environment (e.g., feeding, loafing, and roosting habitat) to the extent possible. The conditioning pens are similar to those being used successfully to release Mississippi sandhill cranes.

To ensure contact with the released birds, each crane will be equipped with two legband-mounted radio telemetry transmitters. Subsequent to gentle-release, the birds will be monitored daily to assess movements and dispersal from the area of the release pen. Whooping cranes will be checked daily for mortality or indications of disease (listlessness, social exclusion, flightlessness, or obvious weakness, etc.). Social behavior (e.g., pair formation, dominance, cohort loyalty) will also be evaluated.

A voucher blood serum sample will be taken for each bird upon its arrival in Florida. A second sample will be taken just prior to release. Any time a bird is handled after release a blood sample will be taken to monitor disease exposure, physiological condition, etc. One year after release all surviving birds will be captured and an evaluation made of their exposure to disease/parasites through blood, fecal, and other sampling regimens. Monitoring will continue for a second year and exposure to disease/parasites reevaluated at the end of the second year. Healthy birds still in the wild at the end of the second year will remain in the area. Additional releases will begin in 1994, if all conditions appear suitable. If these preliminary results are favorable, the releases will be continued annually beginning in 1994 with the goal of releasing 20 birds per year for about 10 years and then evaluating the success of the recovery effort.

2. Disease/Parasite Considerations

Both sandhill and whooping cranes are known to be vulnerable, in part or all of their natural range, to avian herpes (inclusion body disease), avian cholera, acute and chronic mycotoxicosis, Eastern equine encephalitis (EEE), and avian tuberculosis. Additionally, *Eimeria* spp., *Haemoproteus* spp., *Leucocytozoon* spp., avian pox, lead poisoning, and *Hexamita* sp. have been identified as debilitating or lethal factors in wild or pre-release, captive populations.

A group of crane veterinarians and disease specialists developed protocols for pre-release and pre-transfer health screening for birds selected for release to prevent introduction of diseases and parasites into Florida. Exposure to disease and parasites will be evaluated through blood, serum, and fecal analysis of any individual crane handled post release or at the regular monitoring interval. Remedial action will be taken to return to good health any sick individuals taken into captivity. Sick birds will be held in specially built facilities and their health and treatment monitored by University of Florida veterinarians. Special attention will be given to EEE because an outbreak at Patuxent Wildlife Research Center (Center) in 1984 killed 7 of 39 whooping cranes present at the Center. After the outbreak a vaccine was developed for use on captive cranes. In 1989, EEE was documented in sentinel bobwhite quail and sandhill cranes at the Center. No whooping cranes became ill and it appears the vaccine may provide protection. EEE is present in Florida so the released birds will be vaccinated. Other strains of encephalitis (St. Louis, Everglades) also occur in Florida. The vaccine for EEE may also provide protection against these arboviruses.

When appropriate, other avian species may be used to assess the prevalence of certain disease factors. This could mean using sentinel turkeys for ascertaining exposure probability to encephalitis or evaluating a species with similar food habits for susceptibility to chronic mycotoxicosis.

3. Genetic Considerations

The ultimate genetic goal of the reintroduction program is to establish wild reintroduced populations that embody the maximum level of genetic diversity available from the captive population. Early reintroductions will likely consist of a biased sample of the genetic diversity of the captive gene pool. This bias will be corrected at a later date by selecting and reestablishing breeding whooping cranes that theoretically compensate for any genetic biases in earlier releases.

4. Mortality

Although efforts will be made to reduce mortality, some will inevitably occur as captive-reared birds adapt to the wild. Collision with power lines and fences are known hazards to wild whooping cranes. There are no major power lines crossing the proposed release site. Three- and four-strand barbed wire fencing is used in conjunction with cattle ranching in the Kissimmee area and presents some collision hazard. If whooping cranes begin regular use of areas traversed by power lines or fences, the Service and Commission will consider placing markers on the obstacles to reduce the probability of collisions.

Bobcats are known predators of adult sandhill cranes and, along with Florida panther and alligators, would be potential predators of adult whooping cranes. Bald eagles, gray fox, bobcats, alligators, panthers, owls, and raccoons are potential predators of young cranes. Natural mortality from predators, fluctuating food availability, disease, wild feeding inexperience, etc., will be reduced through predator management, vaccination, soft release, supplemental feeding for a post-release period, and pre-release conditioning. Human-caused mortality will be reduced by information and education efforts directed at landowners and landusers, and review and management of human activities in the area.

5. Special Handling

Under the proposed special regulation, promulgated under authority of section 4(d) of the Act, that will accompany the experimental population designation, Service and Commission employees and agents would be authorized to relocate whooping cranes to avoid conflict with human activities; relocate whooping cranes that have moved outside the appropriate release area when removal is necessary or requested; relocate whooping cranes within the experimental population area to improve survival and recovery prospects; and aid animals which are sick, injured or otherwise in need of special care. If a whooping crane is determined to be unfit to remain in the wild, it would be returned to captivity. Service and Commission employees

would be authorized to salvage or dispose of dead whooping cranes.

6. Coordination With Landowners and Land Management Agencies

The proposed action is being coordinated with potentially affected State and Federal agencies, private landowners, and the general public. As previously noted, the Kissimmee Prairie includes 82,200 ha in private ownership and 104,953 ha in public lands. The primary proposed release area is 22,400 ha of public land. Private land managers were contacted and concur with or do not oppose the proposed action provided it does not interfere with existing lifestyles and current and potential income (Bishop, pers. comm.). The Commission manages wildlife management areas in the Prairie, has been actively involved as a cooperator in pre-release studies, and has actively endorsed the project. The Commission has stated whooping cranes will receive priority management decisions on Three Lakes WMA. The Director General of the Canadian Wildlife Service, a partner with the U.S. Fish and Wildlife Service as noted in the Memorandum of Understanding, has approved the proposed project. Florida Department of Natural Resources (Division of State Parks), National Audubon Society (Kissimmee Prairie Sanctuary), the Department of Defense (Avon Park Bombing Range), St. Johns Water Management District, and other entities have been informed of the proposed release and are aware of the possibility that whooping cranes may be introduced on or move to their project area.

7. Potential Conflicts

Conflicts have resulted when migratory birds have been hunted in areas utilized by whooping cranes. These have resulted from the hunting of sandhill cranes and snow geese (*Chen cerulescens*) which to novice hunters may appear similar to whooping cranes. At least two whooping cranes have been killed when they were mistaken for snow geese, and other whooping cranes have been wounded or shot at in areas where snow geese and sandhill cranes were being hunted. Sandhill cranes and snow geese are not hunted in this area of Florida. No conflicts with migratory bird hunting activities are anticipated.

Traditional hunting in the release area has been for deer (*Odocoileus virginianus*), turkey (*Meleagris gallopavo*), and small game. Conflict with traditional hunting in the release area is not anticipated. Access to some areas where whooping cranes might be particularly vulnerable to human disturbance (i.e., occupied nesting areas, conditioning pens, and critical feeding areas) will be prohibited at times, but such closures will be of short duration and they are not viewed as a source of conflict.

The principal activities on the private property adjacent to the release area are grazing and sod production. Use of these private properties by whooping cranes should not preclude such uses. Coordination with land managers may be necessary to accommodate certain land use activities (i.e., pesticide applications) and use by whooping cranes.

Requests by the public for an opportunity to view whooping cranes, a high profile endangered species, might create conflict on private land when whooping cranes are present. Commission personnel assigned to the Kissimmee Prairie area will be alert to activities of the public attempting to observe whooping cranes on private lands. If such activities begin to infringe on or become a nuisance to the rights of private property owners, the Commission and Service will take action to correct the situation. Commission plans to provide opportunity for the public to view whooping cranes on public property, away from sensitive areas, should reduce or eliminate this potential source of conflict.

Released whooping cranes might wander or migrate from the release site, moving into other states or other locations within Florida. The Service believes such movements are unlikely to occur outside Florida for the reasons mentioned below, but if they do the bird(s) will be recaptured and returned to the release site or to captivity. Likewise, any whooping cranes that wander to locations not conducive to the bird's health or safety will also be captured and moved. Studies of whooping cranes and greater sandhill cranes have shown that migration in these cranes is learned rather than innate behavior.

The cross-fostered whooping cranes in Idaho learned the migration route and wintering site preferences from their parents. An experiment in Florida tested whether captive-reared cranes, with an innate tendency to migrate, would migrate or remain sedentary when released in association with cranes that migrate. Greater sandhill cranes that nest in the Great Lakes States migrate to Florida for the winter. Eggs removed from this wild population were hatched and reared in captivity. The birds were released in Florida where they associated with wild nonmigratory Florida sandhill cranes and with wintering, migratory, greater sandhill cranes. The released birds noticeably expanded their localized movements during subsequent migration periods but remained year-round in the Florida release area. Captive-reared whooping cranes released in Florida are expected to develop a sedentary population.

8. Protection

Recently released whooping cranes will need protection from natural sources of mortality (predators, disease, inadequate foods, etc.) and from human-caused sources of mortality. Natural mortality will be reduced through pre-release conditioning, gentle release, vaccination, predator control, etc. Human-caused mortality will be minimized by placing whooping cranes in an area with low human population density and relatively low development; by working with and educating landowners, land managers, developers, and recreationists to develop means for conducting their existing and planned activities in a manner that is compatible with whooping crane recovery; and by conferring with developers on proposed actions and providing recommendations that will reduce any likely adverse impacts to the cranes.

Before releases are made within Florida, whooping cranes will be added to the list of endangered species provided protection by State law. Florida Wildlife Code, Title 39–27.002 General Prohibitions relative to endangered species states "No person shall pursue, molest, harm, harass, capture, possess, or sell any endangered species or parts thereof or their nests or eggs except as authorized by specific permit. . ."

A draft biological opinion, prepared on the proposed action to reintroduce whooping cranes into the Kissimmee Prairie, concluded that the proposed action will not jeopardize the species. A final biological opinion will be prepared on the final rulemaking.

9. Public Awareness and Cooperation

An extensive sharing of information about the program and the species, via educational efforts targeted toward the public in the region and nationally, will enhance public awareness of this species and its reintroduction. The public will be encouraged to cooperate with the Service and the Commission in attempts to maintain whooping cranes in the release area.

Public Comments Solicited

Comments or recommendations concerning any aspect of this proposed

rule are hereby invited (see "ADDRESSES" section) from State, public, and government agencies, the scientific community, industry, or any other interested party. Comments should be as specific as possible. Final promulgation of a rule to implement this proposed action will take into consideration the comments and any additional information received by the Service. Such communications may lead to a final rule that differs from this proposal.

National Environmental Policy Act

A draft environmental assessment as defined under the authority of the National Environmental Policy Act of 1969 has been prepared and is available to the public at the Service Office identified in the "ADDRESSES" section. This assessment will form the basis for deciding whether this is a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969. The decision will be made before the final rule is published.

Required Determinations

The Service has determined that this is not a major rule as defined by Executive Order 12291 and that it would not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (Pub. L. 96-354). The rule as proposed does not contain any information collection or record keeping requirements as defined in the Paperwork Reduction Act of 1980 (Pub. L. 96-511). The Service has also determined that this action would not involve any taking of constitutionally protected property rights that require preparation of a takings implication assessment under Executive Order 12630. The rule does not require a Federalism assessment under Executive Order 12612 since it would not have any significant federalism effects as described in the order.

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Authors

The principal authors of this rule are Dr. James Lewis, Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Albuquerque, NM (Phone: 505/766-2914); Linda Finger, Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Jacksonville, FL (Phone: 904/232-2580); and Steve Nesbitt, Biological Administrator I, Florida Game and Fresh Water Fish Commission, Gainesville, FL (Phone: 904/336-2230).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend part 17, subchapter B of Chapter I, title 50 of the U.S. Code of Federal Regulations, as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99-625, 100 Stat. 3500; unless otherwise noted.

2. It is proposed to amend § 17.11(h) by revising the entry for "Crane, whooping" under BIRDS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
BIRDS:							
*	*	*	*	*	*	*	
Crane, whooping	*Grus americana*	Canada, U.S.A. (Rocky Mountains east to Carolinas) Mexico.	Entire, except where listed as an experimental population.	E	1,3	17.95(b)	NA
Do	do	do	U.S.A. Florida	XN		NA	17.84(h)
*	*	*	*	*	*	*	

3. It is proposed to amend 50 CFR 17.84 by adding a new paragraph (h) as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(h) Whooping crane (*Grus americana*). (1) The whooping crane population identified in paragraph (h)(8) of this section is a nonessential experimental population.

(2) No person may intentionally take this species in the wild in the experimental population area, except as provided in paragraphs (h) (3) and (4) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take whooping cranes in the wild in the experimental population area for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, and other conservation purposes consistent with the Endangered Species Act and in accordance with applicable State fish and wildlife conservation laws and regulations.

(4) Any employee or agent of the Service or State wildlife agency who is designated for such purposes, when acting in the course of official duties, may take a whooping crane in the wild in the experimental population area if such action is necessary to:

(i) Relocate a whooping crane to avoid conflict with human activities;

(ii) Relocate a whooping crane that has moved outside the Kissimmee Prairie when removal is necessary or requested;

(iii) Relocate whooping cranes within the experimental population area to improve survival and recovery prospects;

(iv) Relocate whooping cranes from the experimental population area into captivity;

(v) Aid a sick, injured, or orphaned specimen; or

(vi) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study.

(5) Any taking pursuant to paragraphs (h) (3) and (4) must be immediately reported to the National Whooping Crane Coordinator, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103 (Phone: 505/766–2904), who, in conjunction with his counterpart in the Canadian Wildlife Service, will determine the disposition of any live or dead specimens.

(6) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species from the experimental population taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(7) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (h)(2) through (6) of this section.

(8) The geographic area that the nonessential experimental population may inhabit will include the entire State of Florida. The reintroduction site will be the Kissimmee Prairie portions of Polk, Osceola, Highlands, and Okeechobee counties. Current information indicates that the Kissimmee Prairie is within the historic range of the whooping crane in Florida. There are no other extant populations of whooping cranes that could come into contact with the experimental population. There are no other extant populations of whooping cranes that could come into contact with the experimental population. The only two extant populations occur well west of the Mississippi River. The Aransas/Wood Buffalo National Park population nests in the Northwest Territories and adjacent areas of Alberta, Canada, primarily within the boundaries of the Wood Buffalo National Park, and winters along the Central Texas Gulf of Mexico coast at Aransas National Wildlife Refuge. The other population, which was cross-fostered by wild sandhill cranes but has failed to reproduce, summers in Idaho, western Wyoming and southwestern Montana and winters in New Mexico. Whooping cranes adhere to ancestral breeding areas, migratory routes, and wintering grounds leaving little possibility that individuals from the two extant populations will stray into Florida. Studies of whooping cranes have shown that migration is learned rather than innate behavior. The experimental population proposed for release at Kissimmee Prairie is expected to remain within the prairie region of central Florida.

(9) The reintroduced population will be closely monitored during the duration of the projects by the use of radio telemetry. Any animal which is determined to be sick, injured, or otherwise in need of special care would be immediately recaptured by Fish and Wildlife Service and/or State wildlife personnel and given appropriate care. Such animals will be released back to the wild as soon as possible, unless physical or behavioral problems make it necessary to return them to a captive breeding facility.

(10) The status of the experimental population will be reevaluated periodically to determine future management needs. This review will take into account the reproductive success and movement patterns of the individuals released on the area.

Dated: August 20, 1992.

John F. Turner,

Director, Fish and Wildlife Service.

[FR Doc. 92–23579 Filed 9–28–92; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

50 CFR Parts 672 and 675

Groundfish of the Gulf of Alaska; and Groundfish of the Bering Sea and Aleutian Islands

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of amendments to fishery management plans; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) has submitted Amendment 22 to the Fishery Management Plan (FMP) for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI) and Amendment 27 to the FMP for Groundfish to the Gulf of Alaska (GOA) for review by the Secretary of Commerce (Secretary). Comments are requested from the public. Copies of the amendments and the environmental assessment/regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA) may be obtained from the Council (see **ADDRESSES**).

DATES: Comments on the FMP amendments should be submitted on or before November 9, 1992.

ADDRESSES: Comments on the FMP amendments should be submitted to Steven Pennoyer, Director, Alaska Region National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802. Copies of the amendments with the EA/RIR/IRFA are available from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510 (telephone 907–271–2809).

FOR FURTHER INFORMATION CONTACT: David C. Ham, Fisheries Management Biologist, Alaska Region, NMFS at 907–586–7230.

SUPPLEMENTARY INFORMATION: The Magnuson Fishery Conservation and Management Act (Magnuson Act) requires that each Regional Fishery Management Council submit any fishery management plan or plan amendment it prepares to the Secretary for review and approval, disapproval, or partial disapproval. The Magnuson Act also requires the Secretary, on receiving the plan or amendment, to immediately publish a notice that the plan or amendment is available for review and approval or disapproval. The Secretary will consider public comments received during the comment period in determining whether to approve the amendments.

If approved, the amendments would establish one trawl test area in the BSAI and two trawl test areas in the GOA for pelagic and bottom trawl fishermen to test their trawl fishing gear. These areas would be available when the BSAI or GOA is closed to trawling.

Regulations proposed by the Council to implement these amendments are scheduled to be published within 15 days of this notice.

List of Subjects in 50 CFR Parts 672 and 675

Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 23, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92–23530 Filed 9–23–92; 4:52 pm]

BILLING CODE 3510–22–M

Notices

Federal Register
Vol. 57, No. 189
Tuesday, September 29, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Agricultural Biotechnology Research Advisory Committee Working Group on Aquatic Biotechnology and Environmental Safety

In accordance with the Federal Advisory Committee Act of October 1972 (Pub. L. No. 92–463, 86 Stat. 770–776), the U.S. Department of Agriculture (USDA), Science and Education, announces the following meeting of a working group of the Agricultural Biotechnology Research Advisory Committee (ABRAC).

The Working Group on Aquatic Biotechnology and Environmental Safety will meet at 170 Hubert H. Humphrey Center, 301 19th Avenue South, University of Minnesota, Minneapolis, Minnesota on October 15, 1992 from 9 a.m. to approximately 4 p.m. The purpose of the meeting is to: (1) Initiate development of draft scientific criteria for performance standards for conducting research in contained facilities such as hatcheries, raceways, ponds, and cages with new lines of freshwater and marine fish, molluscs, and crustaceans, and (2) plan an interdisciplinary workshop of experts at which the draft standards will be reviewed and refined.

The meeting of the working group is open to the public. Persons may particiapte in the meeting as time and space permit.

Further information may be obtained from, and written comments may be sent to, Ms. Maryln Cordle, Senior Regulatory Specialist, Office of Agricultural Biotechnology, room 1001, Rosslyn Plaza East, 14th Street and Independence Avenue SW., Washington, DC 20250. Telephone (703) 235–1510.

Done at Washington, DC, this 9th day of September, 1992.

Duane Acker,

Assistant Secretary, Science and Education.

[FR Doc. 92–23577 Filed 9–28–92; 8:45 am]

BILLING CODE 3410-22-M

Forest Service

Exemption of Horn Salvage Timber Sale, Bug Out Salvage Timber Sale, Topple Salvage Timber Sale, Sheep Salvage Timber Sale, and Sufferin' Smith Salvage Timber Sale from Appeal, Wallowa-Whitman National Forest, Oregon

AGENCY: Forest Service, USDA.

ACTION: Notice to exempt decisions from administrative appeal.

SUMMARY: This is a notification that the decisions to implement the Horn Salvage Timber Sale, Bug Out Salvage Timber Sale, Topple Salvage Timber Sale, (blowdown), Sheep Salvage Timber Sale, and the Sufferin' Smith Salvage Timber Sale located on the La Grande Ranger District of the Wallowa-Whitman National Forest are exempt from appeal. This is in conformance with provisions of 36 CFR 217.4(a)(11) as published January 23, 1989, at Vol. 54, No. 13, pages 3342–3370.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Bruce Kaufman, Timber Staff, Wallowa-Whitman National Forest, 1550 Dewey Avenue, Baker City, Oregon 97814.

SUPPLEMENTARY INFORMATION: A western spruce budworn epidemic began on the La Grande Ranger District in 1980. Within three years nearly all of the susceptible host type had become infested. Defoliation was especially severe from 1985 to 1987 and then again in 1989 and 1990. The many years of defoliation, combined with abnormally dry years, created conditions favorable for the increase in Douglas-fir bark beetle activity during the last three years. Much of the infestation is located on the west side of the La Grande District but has been slowly spreading onto the eastern side of the district over the last 3 years. The insect damage effects all resources, including vegetation, soils, and water.

In addition to the insect-related salvage, during the winter of 1991/92 parts of the La Grande Ranger District were hit by high intensity wind storms. Several areas suffered considerable damage to merchantable size timber. Most blowdown occurred adjacent to roads and in areas recently harvested in generally the northwest part of the district. The purpose of the Topple Salvage Timber Sale is to utilize the high value sawlog material that is not needed for resource protection before it deteriorates and loses its value.

The La Grande interdisciplinary team (IDT) and public comments received on the salvage program identified the need to salvage the dead and dying timber in as short a time as possible while the logs remain merchantable. Although the size of merchantable timber varies within the different areas, white fir averages 13 inches in diameter at breast height (DBH), Douglas-fir averages 14–16 inches DBH, and the other species average 10–12 inches DBH. Deterioration of the merchantability of insect infested or blowdown trees due to "checking" and sap rot is dependent on the tree species and the average diameter. In general, the smaller the diameter of the tree the more rapidly it will deteriorate. Bark beetle killed Douglas-fir trees of less than 14 inches DBH were generally not selected for harvest in any of these salvage sales because they would not remain merchantable long enough to harvest them.

During the summer of 1990 and continuing on into 1991, the La Grande IDT begin the process of scoping and analyzing the potential to salvage timber in all of the areas analyzed in the environmental assessments for the insect related salvage timber sales. Scoping for the Topple Blowdown Salvage was accomplished in 1992. After public meetings, press releases, and contacts with individuals and State and Federal agencies, major issues were identified for each of the environmental assessments. In many cases the major issues related to the insect epidemic and blowdown for the salvage of dead and dying timber in all of the project areas were quite similar with the few exceptions noted in the following description of each major issue:

1. Forest Tree Health—Overall forest tree health is very poor. What management practices would be utilized to modify, diversify, and rejuvenate the forested landscape in the project areas?

2. Riparian Habitat, Fish Habitat, and Water Quality—Any proposed activities

must protect riparian and fish habitat and water quality. Of particular concern are those areas that support or are like-habitat of the sensitive and threatened fish species identified on the La Grande River District.

3. Big Game/Wildlife Habitat—Due to the extensive nature of the insect infestation and past management practices on the District, wildlife habitat has been severely impacted in both the short and long term. What will be the effect or benefits of salvage and rehabilitation of these dead stands of timber on big game and wildlife habitat?

4. Economics/Cost Effectiveness—Any proposed harvest entry must be cost effective while protecting resource values. Salvage volume will be used to meet District sell targets but if not utilized this volume will be lost.

5. Timber Yield and Utilization—The extensive insect infestation has reduced timber yield below acceptable levels and the opportunity exists to utilize this material before lost and to rehabilitate stands in order to return them to their growth potential levels.

6. Access Management—(Horn Salvage, Bug Out Salvage, Sheep Salvage, and Sufferin' Smith Salvage)—The road management plans for these project areas need to protect and enhance resource values within the area, achieve the standards set in the Wallowa-Whitman National Forest Land and Resource Management Plan, and provide reasonable access to the area for public and administrative needs.

7. Fire Management—What management options could be utilized to reduce the high fuel loadings within these areas and the potential for large wildfires?

The IDT developed a range of two to eight alternatives, including the No Action Alternative, for each of the project areas. The effects of these alternatives are disclosed for each project area in the appropriate Environmental Assessment prepared for these proposals. The Proposed Action for each of the projects listed above are described in the table below.

LA GRANDE RANGER DISTRICT SALVAGE SALES

Descriptions	Horn	Bug Out	Topple	Sheep	Sufferin' Smith
Proposed Action	Alt. 2	Alt. 5	Alt. 2	Alt. 4	Alt. 4
Harvest Acres	445	952	5,000	210	766
Harvest Volume	1,340 MBF	2,294 MBF	750 MBF	581 MBF	4,279 MBF
Reforestation Acres	526	593	0	210	766
New Road Construction	.30 mi	0	0	0	2.70 mi
Road Reconstruction	0	2.50 mi	0	12.04 mi	2.10 mi
Logging Systems:					
Tractor	397 ac	773 ac	5,000 ac	11 ac	695 ac
Skyline	141 ac	179 ac	0 ac	199 ac	71 ac

Biological evaluations have been completed for all plant, wildlife, and fish Proposed, Endangered, Threatened, and Sensitive (PETS) species within each of the project areas. Informal consultation has been initiated with National Marine Fisheries Service for threatened spring-summer chinook salmon for all the projects. All biological evaluations indicated that the project could proceed as planned.

These salvage sales were designed to accomplish their objectives as quickly as possible and minimize the amount of salvage volume lost. To expedite these sale projects and the accompanying work, and to prevent delays by appeals, the process according to 36 CFR part 217 is being followed. Under this Regulation the following is exempt from appeal:

Decisions related to rehabilitation of National Forest System Lands and recovery of forest resources resulting from natural disasters or other natural phenomena, such as wildfires * * * when the Regional Forester * * * determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

Upon publication of this notice, The Decision Notices for Horn Salvage Timber Sale, Bug Out Salvage Timber Sale, Topple Salvage Timber Sale, Sheep Salvage Timber Sale, and Sufferin' Smith Salvage Timber Sale will be signed by the La Grande District Ranger. These projects will not be subject to review under 36 CFR part 217.

Dated: September 22, 1992.

Richard A. Ferraro,

Deputy Regional Forester.

[FR Doc. 92-23548 Filed 9-28-92; 8:45 am]

BILLING CODE 3410-01-M

Modernization of Existing Facilities and New Construction, Pacific Unified School District

AGENCY: Forest Service, USDA and Pacific Unified School District.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will jointly prepare an Environmental Impact Statement (EIS), as required by the National Environmental Quality Act (NEPA), and an Environmental Impact Report (EIR), as required by the California Environmental Quality Act, with the Pacific Unified School District, Big Sur, California. The proposed project is the modernization of existing school facilities and new construction to meet state department of education requirements for a high school in an isolated mountain community. The proposal would result in the revision of the existing Forest Service special use permit to include twenty buildable acres (the current permit if for five acres), with a 40-year lease for the National Forest System lands on which school buildings and outdoor education facilities would be placed.

The agency invites comments and suggestions on the scope of analysis to be included in the draft environmental statement. In addition the agency gives notice of the full environmental analysis and decision making process that is beginning on the proposal so that interested and affected people know how they may participate and contribute to the final decision.

DATE: Comments on the scope of the analysis will be accepted for 45 days from the date this notice is published in the Federal Register.

ADDRESS: Submit written comments and suggestions concerning the scope of the analysis to Nancy Knapp, Pacific Unified School District, Pacific Valley c1, Big Sur, CA 93920.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action

should be directed to Kathleen A. Jordan, District Ranger, Monterey Ranger District, 406 S. Mildred Avenue, King City, CA 93930–3423, telephone (408) 385–5434, FAX (408) 385–0628.

SUPPLEMENTARY INFORMATION: The project has been proposed by Pacific Unified School District, in order to meet state department of education requirements for K–12 education in an isolated mountain community. Over 20 sites were considered by a multi-agency site selection committee, with seven of these sites being visited and further evaluated. The present (proposed) high school site has been publically reviewed and recommended by the Big Sur Multi-Agency Committee as meeting state department of education requirements.

Preliminary issues which have been identified are: Visual viewshed, cultural resource impacts, disruption of school during the construction period, disruption of public recreation use of adjacent areas during the construction period, temporary storage of construction materials, location of borrow and disposal areas, native plants, site selection,soil stability, threatened and endangered species, riparian area effects, water quality and quantity, fisheries, fire protection, solid and sanitary waste disposal, energy use and fuel storage, noise, transportation, housing for school staff, cost of maintenance and operation, site security, air quality, existing and changing uses and users.

The project will require revision and extension of the existing Forest Service Special Use Permit. State Historical Preservation Office approval will be needed for cultural resource surveys and reports. The County of Monterey will require a Use Permit. The California Coastal Commission will require a Consistency Determination with the Local Coastal Plan.

The responsible official for the Forest Service and the NEPA process is David W. Dahl, Forest Supervisor, Los Padres National Forest, 6144 Calle Real, Goleta, California, 93117.

The decision to be made by the Forest Supervisor is whether or not to revise the existing Special Use Permit to authorize additional school facilities on a twenty acre portion of National Forest System land for a 40 year term. The potential impacts to adjacent public facilities, particularly the Plaskett Creek Campground and Sand Dollar Day Use Area, will also be considered.

The estimated date for completion of the DEIS is March 1, 1993. The estimated date for completion of the final EIS is August 1, 1993.

The comment period of the Draft Environmental Impact Statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts the agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, U.S. 519, 553 (1978).* Also, enviromental objections that could be raised at the draft environmental impact stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2nd 1016, 1022 (9th Cir. 1986) and *Western Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are available to the Forest Service at a time when it can meaningfully consider them and respond to them in the environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Dated: September 17, 1992.

Mark J. Madrid,

Deputy Forest Supervisor.

[FR Doc. 92–23553 Filed 9–28–92; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Agency Forms Under Review by the Office of Management and Budget

DOC has submitted to OMB for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration.

Title: Applications and Reports for Registration as Tanner or Agent.

Agency Form Number: N/A.

OMB Approval Number: 0648–0179.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 78 hours.

Number of Respondents: 39.

Avg Hours Per Respondent: 2 hours.

Needs and Uses: Under the Marine Mammal Protection Act, Alaskan natives may take marine mammals for subsistence or for creating or selling native handicrafts. Possession of marine mammals so taken is allowed only to natives or registered agents or tanners. The requested information is needed to register tanners/agents and to monitor activities through reports.

Affected Public: Individuals or households, businesses or other for-profit institutions, small businesses or organizations.

Frequency: Annually, recordkeeping.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Ron Minsk, (202) 395–3084.

Agency: National Oceanic and Atmospheric Administration.

Title: Cooperative Charting Program.

Form Numbers: NOAA 77–4 and 77–5.

OMB Approval Number: 0648–0022.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 45,000 hours.

Number of Respondents: 3,000.

Avg Hours Per Respondent: 15 hours (average 3 hours per response — 5 responses per respondent).

Needs and Uses: Forms are used by the U.S. Power Squadrons and U.S. Coast Guard Auxiliary members for reporting observed chart corrections. Corrections are used daily by the National Ocean Service in maintaining and preparing new editions of its nautical charts and for issuing Notices to Mariners. The charts are used nationwide by recreational boaters and commercial vessels for safe navigation on our nation's waterways.

Affected Public: Individuals, non-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ron Minsk, (202) 395–3084.

Agency: National Oceanic and Atmospheric Administration.

Title: Management and Oversight of the National Estuarine Research Reserves System.

Agency Form Number: N/A.

OMB Approval Number: 0648–0121.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 12,532 hours.

Number of Respondents: 94.

Avg Hours Per Respondent: 133 hours (response time ranges between 1.25 and 2,012 hours depending on reporting requirement).

Needs and Uses: Grant monies are available for states to establish estuarine reserves. Grants funds are given to state governments and others to conduct research within those reserves. Applications are necessary to determine eligibility, and reports are needed to determine grant results.

Affected Public: Individuals or households, state or local governments, non–profit institutions.

Frequency: On occasion, quarterly.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Ron Minsk, (202) 395–3084.

Copies of the above information collection proposals can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 482–3271, Department of Commerce, room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to Ron Minsk, OMB Desk Officer, room 3019, New Executive Office Building, Washington, DC 20503.

Dated: September 22, 1992.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 92–23541 Filed 9–28–92; 8:45 am]

BILLING CODE 3510–CW–F

Economic Development Administration

Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA), Commerce.

ACTION: To give firms an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

Firm name	Address	Date petition accepted	Product
United Magnetic Products, Inc	1405 Mineral Wells Highway, Weatherford, TX 76086.	08/17/92	Ferroresonant transformers.
Rack Engineering Company	299 S. 7th Street, Connellsburg, PA 15425	08/17/92	Sheet metal for modular drawer cabinets and bar stock cabinets and parts.
Modern Industries, Inc	3229 East Washington Street, Phoenix, AZ 85034–1607.	08/17/92	Precision metal parts for turbine engine parts for aircraft and solar panels on satellites.
McGuire-Nicholas Company, Inc	2331 Tubeway Avenue, Commerce, CA 90040	08/21/92	Tool accessory apparel: tool belts, holders and bags.
Conversion Equipment Corporation	330 West Taft Avenue, Orange, CA 92665	08/24/92	Power supplies to modify and regulate A/C to operate computer.
Mathey International Ltd	1221 E. Houston (81st.), Broken Arrow, OK 74102.	08/24/92	Oil field wireline equipment, pipe cutting and beveling machines and truck bodies.
Max Buchanan Company	10837 E. Marshall, Ste. L08, Tulsa, OK 74116	08/27/92	Mechano—therapy appliances (Massagers).
Rosewood Resources, Inc	100 Crescent Court, ¿ 500, Dallas, TX 75201	08/31/92	Oil and Natural Gas—Hydrocarbons-Explores for New Oil and Gas Reserves.
Powered Metal Products, Inc	9902 East 46th Place, Tulsa, OK 74146	08/31/92	Metal Products—permanent magnets made of metal also timing pulleys, bar sag gauges, etc.
Crown Yarn Dye Company, Inc	Turner Street, Box 3328, South Attleboro, MA 02703.	09/02/92	Dyed yarn of wool, cotton, nylon, polyester, acetate, rayon acrylic and others.
Winsert, Inc	Industrial Parkway South, Box 285, Marinette, WI 54143.	09/02/92	Valve seat insert rings for diesel and 2-stroke engines, cast of iron and alloy.
Bergh Brothers Company, Inc	171 Commonwealth Avenue, Attleboro Falls, MA 02763.	09/04/92	Metal edging used on picture frames.
Phillips USA, Inc	11535 W. 83rd Terrace, Lenexa, KS 66214	09/04/92	Instruments for administering animal medications.
E–S Plastic Products, Inc	809 Mohr Avenue, Waterford, WI 53185	09/08/92	Plastic parts in aesthetic packaging, cellular telephones and components for battery chargers.
Trans-Tech, Inc	5520 Adamstown Road, Adamstown, MD 21710	09/08/92	Ferrities, garnets, dielectric resonators and substrates.
Napp, Inc	2104 Kramer Lane, Austin, TX 78758	09/08/92	Environmental measurement instruments and minibead blaster.
Nova Biomedical Corporation	200 Prospect St. Waltham, MA 02254	09/08/92	Blood gas "stat profile" analyzer.
Oscar Heyman & Brothers, Inc	501 Madison Avenue, New York, NY 10022	09/08/92	Jewelry—rings, earrings, bracelets, necklaces, brooches of precious metals.
O&O Enterprises, Inc	R.D. ¿2 Box 182C, 124 Rt. 17C, ¿4, Waverly, NY 14892.	09/08/92	Apparel—Cotton women's/girls playsuits/activewear, swimwear and dresses.
Endeco/YSI Inc	13 Atlantis Dr., Marion, MA 02738	009/08/92	Mach. and Equip.—wave-track buyo system (pulsed oxygen systems, towed systems, water level recorders.
Roman Empire Furniture Parts Mfg., Inc dba Regency.	4466 Worth Street, Los Angeles, CA 90063	09/09/92	Furniture—Furniture parts, show wood handles, feet, etc. and bedroom furniture.
Datacon, Inc	60 Blanchard Road, Burlington, MA 01803	09/10/92	Electronics—wire wrapped printed circuit boards.

The petitions were submitted pursuant to section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by the Trade Adjustment Assistance Division, room 7023, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: September 21, 1992.

Kathleen W. Lawrence,

Deputy Assistant Secretary for Program Operations.

[FR Doc. 92-23426 Filed 9-28-92; 8:45 am]

BILLING CODE 3510-24-M

International Trade Administration

Annual Report on the Status of Antidumping and Countervailing Duty Program and Opportunity to Comment

AGENCY: Import Administration/International Trade Administration Department of Commerce.

ACTION: Proposal for an Annual Report on the status of the Antidumping and Countervailing Duty Program and opportunity to comment.

SUMMARY: The International Trade Administration (ITA) is planning to begin issuing an annual report on the status of the antidumping (AD) and countervailing duty (CVD) program. Because this will be a new action, interested parties are invited to comment.

EFFECTIVE DATE: September 28, 1992.

FOR FURTHER INFORMATION CONTACT: Thomas F. Futtner, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 377-3814.

SUPPLEMENTARY INFORMATION:

Background

ITA is proposing to issue an annual report on the status of the AD/CVD program. The first report covering the fiscal year of 1992 (October 1, 1991 through September 30, 1992) will be issued in early 1993. Among other things, the proposed report will include the following:

- A summary of AD/CVD orders and suspension agreements currently in effect.
- A summary of the petitions filed, initiations, and new AD/CVD orders and suspension agreements implemented during the fiscal year.
- A summary of the AD/CVD administrative reviews, scope rulings and protests completed during the fiscal calendar.
- The total number of suspended entries on a case-by-case basis as of the end of the fiscal year.
- A summary of the AD/CVD cases subject to court-ordered injunctions on liquidation.
- The total entered value of merchandise subject to AD/CVD orders entered during the fiscal year.
- The total value of cash deposited and/or bonds posted on the entered merchandise for the fiscal year.

The report will include a list of the AD/CVD orders and suspension agreements currently in effect. It will also summarize some of the key issues and problems encountered in the administration and enforcement of the AD/CVD orders.

All interested parties and the general public may comment on the above and/or any other relevant issue(s) associated with the foregoing. Comments should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B099, U.S. Department of Commerce, Washington, DC 20230. Comments are due no later than 30 days from the publication of this notice.

Dated: September 22, 1992.

Rolf Th. Lundberg, Jr.,

Acting Assistant Secretary for Import Administration.

[FR Doc. 92-23607 Filed 9-28-92; 8:45 am]

BILLING CODE 3510-05-M

[C-614-701]

Certain Steel Wire Nails from New Zealand, Intent To Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of intent to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the countervailing duty order on certain steel wire nails from New Zealand. Interested parties who object to this revocation must submit their comments in writing not later than October 31, 1992.

EFFECTIVE DATE: September 29, 1992.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup, Gayle Longest, or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 482-0983 or 482-4149.

SUPPLEMENTARY INFORMATION:

Background

On October 5, 1987, the Department of Commerce ("the Department") published a countervailing duty order on certain steel wire nails from New Zealand (52 FR 37196). The Department has not received a request to conduct an administrative review of the countervailing duty order on certain steel wire nails from New Zealand for four consecutive annual anniversary months.

In accordance with 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no interested party objects to revocation or requests an administrative review by the last day of the fifth anniversary month. Accordingly, as required by § 355.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this order.

Opportunity to Object

Not later than October 31, 1992, interested parties, as defined in § 355.2(i) of the Department's regulations, may object to the Department's intent to revoke this countervailing duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

If interested parties neither request an administrative review (pursuant I84Backgroundto the Department's notice of opportunity to request administrative review), nor object to the Department's intent to revoke by October 31, 1992, we shall conclude that the order is no longer of interest to

interested parties and shall proceed with the revocation.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Dated: September 23, 1992.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 92-23608 Filed 9-28-92; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Marine Mammals

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

ACTION: Issuance of permit (P517).

On August 7, 1992, notice was published in the Federal Register (57 FR 34911) that an application had been filed by Dr. Kathryn A. Ono, Assistant Research Marine Biologist, Biology Board of Studies and Institute of Marine Sciences, University of California, Santa Cruz, CA 95064, to take Steller sea lions (*Eumetopias jubatus*) by harassment during capture, marking, tagging and handling operations and to incidentally harass California sea lions (*Zalophus californianus*) during periodic censuses of both species.

Notice is hereby given that on September 11, 1992, and as authorized by the provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and the Endangered Species Act of 1973 (16 U.S.C. 1531-1543) the National Marine Fisheries Service issued a Permit for the above taking, subject to certain conditions set forth therein.

Issuance of this Permit is based on a finding that the proposed taking is consistent with the purposes and policies of the Marine Mammal Protection Act. The Service has determined that this research satisfies the issuance criteria for scientific research permits. The taking is required to further a *bona fide* scientific purpose and does not involve unnecessary duplication of research.

Issuance of this Permit, as required by the Endangered Species Act of 1973, is based on a finding that the Permit: (1) was applied for in good faith; (2) does not operate to the disadvantage of the endangered species which is the subject of this Permit; (3) and is consistent with the purposes and policies set forth in Section 2 of the Endangered Species Act of 1973. This Permit was 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.

The Permit is available for review, by appointment, in the Permit Division, Office of Protected Resources, National Marine Fisheries Service, NOAA, 1335 East-West Highway, room 7324, Silver Spring, MD 20910 (301/713-2289); and

Director, Southwest Region, National Marine Fisheries Service, NOAA, 501 W. Ocean Blvd., Long Beach, CA 90802-4213 (310/980-4015).

Dated: September 11, 1992.

Charles Karnella,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 92-23397 Filed 9-28-92; 8:45 am]

BILLING CODE 3510-22-M

COUNCIL ON ENVIRONMENTAL QUALITY

Meeting of President's Commission on Environmental Quality

AGENCY: Council on Environmental Quality, Executive Office of the President, President's Commission on Environmental Quality.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is being provided for a meeting of the President's Commission on Environmental Quality. This meeting is open to the public and there will be an opportunity for public comment.

DATES: The meeting will be held on October 16, 1992.

ADDRESSES: The meeting will be held from 9 am to 1:15 pm on Friday, October 16, 1992, at Room 474 (Indian Treaty Room), Old Executive Office Building, 17th & Pennsylvania Avenue, NW., Washington, DC.

Persons attending the meeting will need to provide their names and dates of birth to Ms. Kim Castain (telephone: (202) 395-5750) by Friday, October 9, 1992, at 5 pm for clearance into the Old Executive Office Building. Space in the Indian Treaty Room is limited and persons interested in attending will be accommodated on a first-come, first-served basis.

Agenda

Friday, October 16, 1992

Old Executive Office Building, 17th & Pennsylvania Avenue, NW., Room 474 (Indian Treaty Room), Washington, DC.

9 am-9:15 am Opening Remarks & Agenda Overview

9:15 am-10:30 am Reports/Discussions of Projects Underway

10:30 am-10:45 am Break

10:45 am-11:45 am Project Updates (Continued)

11:45 am-1:00 pm Emerging Findings Discussion

1 pm-1:15 pm Public Comment

1:15 pm Adjourn

FOR FURTHER INFORMATION CONTACT: Ms. Kim Chastain, Staff Assistant, President's Commission on Environmental Quality (telephone: (202) 395-5750).

SUPPLEMENTARY INFORMATION: The President's Commission on Environmental Quality was establish by Executive Order No. 12737 on December 12, 1990. The Commission has 25 members and is chaired by the Chairman of the Council on Environmental Quality. The function of the Commission is to advise the President on matters involving environmental quality.

David Struhs,

Chief of Staff, Council on Environmental Quality.

[FR Doc. 92-23544 Filed 9-28-92; 8:45 am]

BILLING CODE 3125-01-M

DEPARTMENT OF DEFENSE

Department of the Navy

Planning and Steering Advisory Committee; Closed Meeting

On Thursday, September 1, 1992, a Notice of a closed meeting of the Planning and Steering Advisory Committee was published at 57 FR 39675. That meeting was originally scheduled to be held on September 21, 1992. That meeting has been changed.

The Planning and Steering Advisory Committee will now meet October 9, 1992, from 0900 to 1530, at the Center for Naval Analyses, 4401 Ford Avenue, Alexandria, Virginia. This session will be closed to the public.

For further information concerning this meeting, contact: LT J. E. Williams (N871E2), Pentagon, room 4D534, Washington, DC 20350, Telephone (703) 696-8887.

September 21, 1992.

Patrick W. Kelley,

CAPTAIN, JAGC, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 92-23538 Filed 9-28-92; 8:45 am]

BILLING CODE 3810-AE-F

DEPARTMENT OF EDUCATION

President's Advisory Commission on Educational Excellence for Hispanic Americans; Meeting

AGENCY: President's Advisory Commission on Educational Excellence for Hispanic Americans, Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a forthcoming meeting of the President's Advisory Commission on Educational Excellence for Hispanic Americans. This notice also describes the function of the Commission. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATE AND TIME: October 12, 1992 from 3 p.m. to 6 p.m.

ADDRESS: The Ritz-Carlton Hotel, 2100 Massachusetts Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Florez, Executive Director, White House Initiative on Educational Excellence for Hispanic Americans, U.S. Department of Education, Washington, DC 20202–7588. Telephone: (202) 205–2420.

SUPPLEMENTARY INFORMATION: The President's Advisory Commission on Educational Excellence for Hispanic Americans is established under Executive Order 12729.

The Commission is established to advise the Secretary of Education on the educational status of Hispanic Americans, including the programs of Hispanic Americans toward achievement of the national educational goals, and on Federal efforts to promote quality education for Hispanic Americans.

On October 12, the Commission will meet in an open session from 3 p.m. to 6 p.m. The agenda will include: (1) A report on old business; (2) discussion on the appointment of a new executive director; (3) discussion of the letter from the Secretary extending the charter; and (4) discussion of the progress report to be presented to the Secretary of Education on October 13, 1992.

Records are kept of all Commission proceedings, and are available for public inspection at the office of the White House Initiative on Educational Excellence for Hispanic Americans, 400 Maryland Avenue, SW., Washington, DC 20202–7588 from the hours of 8:30 a.m. to 5 p.m.

Dated: September 23, 1992.

Daniel Bonner,

Deputy Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 92–23532 Filed 9–28–92; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Financial Assistance Award Intent to Award a Cooperative Agreement National Association of Regulatory Utility Commissioners

AGENCY: U.S. Department of Energy.

ACTION: Notice of noncompetitive financial assistance award.

SUMMARY: The U.S. Department of Energy (DOE) announces that pursuant to 10 CFR 600.6(a)(2), it is making a financial assistance award based on an unsolicited application satisfying the criteria of 10 CFR 600.14(e)(1) under Cooperative Agreement Number DE–FC01–93RW00277 to the National Association of Regulatory Utility Commissioners to establish a Nuclear Waste Program Office (NWPO) to support review activities and interaction with the National Association of Regulatory Commissioners (NARUC), DOE/Office of Civilian Radioactive Waste Management (OCRWM), the Nuclear Regulatory Commission (NRC) and others in the development of a repository for the permanent disposal of high-level nuclear waste and spend fuel, under the Nuclear Waste Policy Act (NWPA) of 1982, as amended, (42 U.S.C. 10131 *et seq.*). The anticipated term of the cooperative agreement will be five years, subject to the availability of funds. The agreement will have an estimated cost of $630,000 for the first year to be provided by DOE. NARUC will contribute $41,000 for the first year.

SCOPE: The cooperative agreement will provide funding for NWPO to disseminate information to the electric utility ratepayers on issues regarding disposal of high-level radioactive waste and spend nuclear fuel, monitor and review legislation and regulations that will impact NARUC's members, and conduct conferences and technical forums between public utility commissioners, staff, interest groups and DOE to exchange information and views to promote pubic confidence in the safety of the disposal of high-level radioactive waste and spent fuel.

ELIGIBILITY: Based on the receipt of an unsolicited proposal, eligibility for this award is being limited to the National Association of Regulatory Utility Commissioners, the only nationwide organization of regulatory utility commissioners. It has been determined that this project represents a unique and innovative idea which is not eligible for any financial assistance under a recent, current, or planned solicitation. This activity will accomplish a public purpose of support which is fully compatible with the mission of OCRWM, the sponsoring office, which mission is authorized by the Nuclear Waste Policy Act, as amended.

The term of the cooperative agreement shall be five years from the effective date of the award.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Placement and Administration, Attn: Ms. Gracie Narcho, PR–322.1, 1000 Independence Ave, SW., Washington, DC 20585.

Thomas S. Keefe,

Director, Division "B", Office of Placement and Administration.

[FR Doc. 92–23597 Filed 9–28–92; 8:45 am]

BILLING CODE 6450–01–M

Amendment to Solicitation Number DE–PS01–91RW00231 entitled Assess the Feasibility of Siting a Monitored Retrievable Storage (MRS) Facility

AGENCY: U.S. Department of Energy.

ACTION: Amended notice of availability.

SUMMARY: On June 5, 1991, the Department of Energy published a notice of availability of a restricted eligibility solicitation for conduct of feasibility studies for the siting of a Monitored Retrievable Storage (MRS) facility (56 FR 25674).

Amendments to the restricted eligibility solicitation were announced in the **Federal Register** on: August 30, 1991 (56 FR 43006); December 31, 1991 (56 FR 67604); and April 8, 1992 (57 FR 11942). There have been a total of four amendments to the solicitation.

The Department of Energy hereby announces a fifth amendment to the restricted eligibility solicitation. This amendment extends the closing date to March 31, 1993, for Phase 2 grants. The solicitation is now available inviting the submission by eligible States, Indian tribes, and affected units of local government of applications for financial assistance. Executive Order 12372, Intergovernmental Review of Federal Programs, as implemented by 10 CFR Part 1005, applies to this program.

Those who have previously requested copies of the solicitation will be sent copies of the amendment to the solicitation. Requests for copies of the solicitation and amendments must be in writing to the address shown below.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Placement and Administration, Attn: Mr. Nick Graham, PR-322.1, 1000 Independence Ave., SW., Washington, DC 20585.

Thomas S. Keefe,

Director, Operations Division "B", Office of Placement and Administration.

[FR Doc. 92-23596 Filed 9-28-92; 8:45 am]

BILLING CODE 6450-01-M

Secretary of Energy Advisory Board; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

Name: Secretary of Energy Advisory Board Task Force on Economic Analysis and Modeling Related to Energy.

Date and Time: Friday, October 9, 1992, 9 a.m.-5:30 p.m.

Place: Bureau of Economic Geology, University of Texas, Austin, Texas 78713-7508, 512-471-1534.

Contact: Dr. Jake W. Stewart, Designated Federal Officer, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-7092.

Purpose: The Task Force will advise the Department of Energy on how economic models and tools and analysis can better be used to address issues of energy policy by developing recommendations to clarify analytical needs, facilitate communication between DOE analysts and policy markers, and create institutions within DOE that accumulate knowledge gained through the policy making process.

Tentative Agenda

Friday, October 9, 1992, 9 a.m.-5:30 p.m.

9:00 a.m. Call to Order and Introductions—Welcoming Remarks.
9:15 a.m. Review of activities since last meeting.
10:00 a.m. Break.
10:15 a.m. Presentations by DOE staff describing full costs of Fuel Cycle Study.
10:45 a.m. Task force discussion of Externalities Study.
12:00 p.m. Lunch.
1:00 p.m. Task Force discussion on structure of recommendations and final report.
3:00 p.m. Break.
3:15 p.m. Resume discussion on structure of recommendations and final report.
5:00 p.m Public Comment (10 minute rule).
5:30 p.m. Adjourn.

Public Participation: The meeting is open to the public. The Chairman of the Task Force is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business.

Any member of the public who wishes to make an oral statement pertaining to agenda items should contact the Designated Federal Officer at the address or telephone number listed above. Requests must be received before 3 p.m. (E.D.T.) Tuesday, October 6, 1992, and reasonable provision will be made to include the presentation during the public comment period. It is requested that oral presenters provide 20 copies of their statements at the time of their presentations.

Written testimony pertaining to agenda items may be submitted prior to the meeting. Written testimony must be received by the Designated Federal Officer at the address shown above before 5 p.m. (E.D.T.) Tuesday, October 6, 1992, to assure that it is considered by Board members during the meeting.

Minutes: A transcript of the meeting will be available for public review and copying approximately 30 days following the meeting at the Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays.

Issued: Washington, DC on: September 24, 1992.

J. Robert Franklin,

Acting Advisory Committee Management Officer.

[FR Doc. 92-23594 Filed 9-28-92; 8:45 am]

BILLING CODE 6450-01-M

Secretary of Energy Advisory Board; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

Name: Secretary of Energy Advisory Board Task Force on Space Nuclear Systems.

Date and Time: Tuesday, October 13, 1992, 8 a.m.-4:30 p.m.

Place: Old Town Sheraton Hotel, 800 Rio Grande Blvd., NE., Albuquerque, New Mexico.

Contact: Dr. Jake W. Stewart, Designated Federal Officer, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-7092.

Purpose: The Secretary of Energy Advisory Board Task Force on Space Nuclear Systems was established in August, 1992 to: (1.) review current DOE space nuclear policy in light of national space policy; (2.) review current DOE space nuclear-related activities with respect to their support of present civilian and national security space requirements; (3.) evaluate the role and practices of the DOE in supporting nuclear space systems required for present and future missions of NASA and the DOD; (4.) review environmental safety and health issues associated with space nuclear systems, and determine whether ample consideration is afforded possible alternative systems; (5.) assess opportunities for international cooperation and collaboration in space nuclear systems; (6.) examine aspects of space nuclear systems in the context of nuclear non-proliferation and other national security issues; (7.) provide to the Secretary of Energy recommendations and guidance for most effectively utilizing DOE and other agency resource to serve national goals in the area of space nuclear systems.

Tentative Agenda

Tuesday, October 13, 1992, 8 a.m.—4:30 p.m.

8:00 am Call to Order and Introductions—Welcoming Remarks.
8:45 am Laws concerning space nuclear applications.
9:30 am Conclusions of Defense Science Board concerning Space Thermal Nuclear Propulsion.
10:15 am Break.
10:30 am Strategic Defense needs for Space Nuclear Systems.
11:15 am Air Force requirements for space nuclear applications.
12:00 pm Work lunch—presentations concerning lab tours.
1:00 pm NASA Office of Exploration requirements and plans for space nuclear missions (NASA Code X).
1:45 pm NASA Office of Space Science needs for space nuclear technology (NASA Code S).
2:30 pm NASA Office of Aeronautics and Space Technology requirements and plans for space nuclear applications (NASA Code R).
3:15 pm Break.
3:30 pm National Space Council perspectives on space nuclear systems.
4:15 pm Time for Task Force Members to converse—Public Comment (10-minute rule).
5:00 pm Adjourn.

Public Participation: The meeting is open to the public. The Chairman of the Task Force is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business.

Any member of the public who wishes to make an oral statement pertaining to agenda items should contact the Designated Federal Office at the address or telephone number listed above. Requests must be received before 3 p.m. (E.D.T.) Tuesday, October 6, 1992, and reasonable provision will be made to include the presentation during the public comment period. It is requested that oral presenters provide 20 copies of their statements at the time of their presentations.

Written testimony pertaining to agenda times may be submitted prior to the meeting. Written testimony must be received by the Designated Federal Officer at the address shown above before 5 p.m. (e.d.t.) Tuesday, October 6, 1992, to assure that it is considered by Board members during the meeting.

Minutes: A transcript of the meeting will be available for public review and copying approximately 30 days following the meeting at the Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 am and 4 pm, Monday through Friday except Federal holidays.

Issued: Washington, DC, on: September 24, 1992.

J. Robert Franklin,

Acting Advisory Committee Management Officer.

[FR Doc. 92-23593 Filed 9-28-92; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. CI92-78-000]

Multi-Energy Inc.; Application for Blanket Certificate With Pregranted Abandonment

September 22, 1922.

Take notice that on September 16, 1992, Multi-Energy Inc. (MEI) filed an application under sections 4 and 7 of the Natural Gas Act (NGA) for a blanket certificate with pregranted abandonment authorizing sales in interstate commerce for resale of all categories of natural gas subject to the Commission's NGA jurisdiction. MEI's application is on file with the Commission and open to public inspection.

To be heard or to protest the application a person must file a motion to intervene or a protest on or before October 8, 1992. A person filing a protest or motion to intervene must follow the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All protests or motions to intervene must be filed with the Federal Energy Regulatory Commission, Washington, DC 20426.

The Commission will consider all filed protests in deciding the appropriate action to take but filing a protest does not make a protestant a party to a proceeding. A person wanting to be a party to a proceeding or to participate as a party in a hearing must file a motion to intervene.

Under the procedure provided for here, unless otherwise advised, MEI will not have to appear or be represented at any hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 92-23535 Filed 9-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RS92-71-000]

Overthrust Pipeline Company; Prefiling Conference

September 22, 1992.

Take notice that a prefiling conference will be convened in this proceeding on Thursday, October 8, 1992, at 9 a.m. It will be held at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC. The conference will address the proposal for compliance with Order No. 636 circulated by Overthrust Pipeline Company under letter dated July 2, 1992, together with any modifications circulated before or at the October 8 conference. All interested parties are invited to attend. Attendance at the conference will not confer party status. For additional information, interested persons may contact Jacqueline S. Holmes at (202) 208-1265.

Lois D. Cashell,

Secretary.

[FR Doc. 92-23536 Filed 9-28-92; 8:45 am]

BILLING CODE 6717-01-M

Office of Environment, Safety and Health

Meeting of Environment, Safety and Health Advisory Committee; Open Meeting

Pursuant to the provision of the Federal Advisory Committee Act (Pub. L. No. 92-463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: Environment, Safety and Health Advisory Committee.

Date and Time: Friday, October 23, 1992, 9 a.m.

Place: American Museum of Science and Energy Auditorium, 300 S. Tulane Avenue, Oak Ridge, TN 37830.

Contact: Lisa Kardell, U.S. Department of Energy, Office of Environment, Safety and Health (EH-50), room 7A-075, Washington, DC 20585, Telephone: 202/586-1988.

Purpose of the Committee: To provide advice and guidance to the Department of Energy on matters relating to environment, safety and health at DOE facilities.

Purpose of the Meeting: To gather information regarding Environment, Safety and Health activities at the Department of Energy.

Tentative Agenda:

—Call to order by Robert F. Mathias, Designated Federal Official.
—Remarks by Chairperson Gebbie.
—Update on Environment, Safety and Health Activities at DOE by Paul L. Ziemer, Assistant Secretary for Environment, Safety and Health, U.S. Department of Energy.
—Committee Discussion.
—Local Views.
—Public comment—10-minute rule.
—Subcommittee Reports
—Adjournment

Public Participation: The meeting is open to the public. The Chairperson is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Committee will be permitted to do so, either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Lisa Kardell at the address or telephone number listed above. Requests must be received at least five business days prior to the meeting and reasonable provisions will be made to include the presentation on the agenda. Persons wishing to attend the public meeting should provide their names to (202) 586-1988 by October 16, 1992.

Transcript: Available for public review and copying at the Public Reading Room, room 1E-190, Forrestal Building, 1000 Independence Avenue, S.W., Washington DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on September 24, 1992.

J. Robert Franklin,

Acting Advisory Committee Management Officer.

[FR Doc. 92-23595 Filed 9-28-92; 8:45 am]

BILLING CODE 6450-01-M

Office of Fossil Energy

[FE Docket No. 92-101-NG]

Aluminum Company of America; Order Granting Blanket Authorization To Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of an order.

SUMMARY: The Office of Fossil Energy of the Department of Energy gives notice that it has issued an order granting Aluminum Company of America blanket authorization to import up to 5.05 Bcf of natural gas from Canada over a two-year term beginning on the date of the first import.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, September 23, 1992.

Charles F. Vacek,

Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 92-23592 Filed 9-28-92; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL094511099]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget

(OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 29, 1992.

FOR FURTHER INFORMATION OR TO OBTAIN A COPY OF THIS ICR, CONTACT: Sandy Farmer at EPA, (202) 260092740.

SUPPLEMENTARY INFORMATION:

Office of Air and Radiation

Title: Mobile Sources Emission Factors Survey (EPA ICR No. 619.06; OMB No. 2060090078). This ICR requests renewal of the existing clearance.

Abstract: The Office of Mobile Sources conducts a survey by testing a random sample of privately owned motor vehicles, stratified by class, mileage, and geographical area. The purpose of the survey is to characterize levels of exhaust pollutants for each combination of class and mileage in the sample. EPA uses the data generated by this survey to model air pollution produced by mobile sources, and to determine the impact of regulations and the benefits of control programs.

Burden Statement: The public reporting burden for this collection of information is estimated to average .389 hour per response. This estimate includes the time needed to review instructions.

Respondents: Owners of in-use motor vehicles.

Estimated Number of Respondents: 8,604.

Estimated Total Annual Burden on Respondents: 3,347 hours.

Frequency of Collection: Annually.

Send comments regarding the burden estimate, or any other aspect of this information collection, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM09223Y), 401 M St., SW., Washington, DC 20460.

and

Troy Hillier, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC, 20530.

Dated: September 21, 1992.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 92-23606 Filed 9-28-92; 8:45 am]

Billing Code 6560-50-F

[FRL-4514-9]

Fuels and Fuel Additives; Workshop

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On July 12, 1991, the Ethyl Corporation (Ethyl) submitted an application for a waiver of the prohibition against the introduction into commerce of certain fuels and fuel additives set forth in section 211(f) of the Clean Air Act (Act). This application sought a waiver for the gasoline additive, methylcyclopentadienyl manganese tricarbonyl (MMT), an octane enhancer, commercially labeled by Ethyl as HiTEC 3000, to be blended in unleaded gasoline resulting in a level of 0.03125 (1/32) gram per gallon manganese (gpg Mn). On January 8, 1992, the Agency denied Ethyl's request for a waiver for HiTEC 3000 based in part on new data submitted to the Agency by Ford Motor Company (Ford).

On February 13, 1992, Ethyl filed a petition for review of the January 8, 1992 waiver denial decision in the United States Court of Appeals for the District of Columbia Circuit. EPA and Ethyl subsequently entered into discussions concerning a possible settlement of the court case.

To facilitate further settlement discussions with Ethyl, EPA has decided to formulate an emission testing program intended to address in a timely manner specific unresolved issues concerning the effect of MMT on emissions. To allow interested parties to assist in preparing such a program, a workshop will be conducted on October 28, 1992 in Washington, DC.

DATES: EPA will conduct a one-day public workshop concerning a proposed testing program for vehicles utilizing fuels containing MMT beginning at 10 a.m. on October 28, 1992. Parties wishing to participate in the workshop or wishing to receive a copy of EPA's draft emissions testing proposal should contact David J. Kortum by October 14, 1992 at (202) 233-9020. Parties with prepared presentations should provide copies at the time of the workshop for distribution to other attendees. Parties who attend the workshop and other interested persons may submit written comments to the docket until November 4, 1992.

ADDRESSES: The public workshop will take place at Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202 (telephone 703-413-5500).

Copies of the information relative to the Ethyl application are available for inspection in public docket A-92-41 at the Air Docket (LE-131) of the EPA, room M-1500, 401 M Street, SW., Washington, DC 20460, (202) 260-7548, between the hours of 8:30 a.m. to noon and 1:30 p.m. to 3:30 p.m. weekdays. Any comments from interested parties should be addressed to this docket with a copy forwarded to Mary T. Smith, Director, Field Operations and Support Division (6406J), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services. Copies of the new data submitted by Ethyl may be obtained from the docket.

FOR FURTHER INFORMATION CONTACT: David J. Kortum, Environmental Engineer, Field Operations and Support Division (6406J), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 233-9022.

SUPPLEMENTARY INFORMATION: Section 211(f)(1)(A) of the Act makes it unlawful, effective March 31, 1977, for any manufacturer of a fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for use in light-duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act. EPA has defined "substantially similar" at 56 FR 5352 (February 11, 1991). Section 211(f)(1)(B) of the Act makes it unlawful, effective November 15, 1990, for any manufacturer of a fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model-year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of a model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act. Thus, section 211(f)(1)(B) expands the prohibitions of 211(f)(1)(A), which apply only to light-duty vehicles. Section 211(f)(4) of the Act provides that, upon application by any fuel or fuel additive manufacturer, the Administrator of EPA may waive the prohibitions of section 211(f)(1) if the Administrator determines that the applicant has established that such fuel or fuel additive will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emissions standards to which it has

been certified pursuant to section 206 of the Act. If the Administrator does not act to grant or deny a waiver within 180 days of receipt of the application, the statute provides that the waiver shall be treated as granted.

On July 12, 1991, Ethyl submitted an application under section 211(f)(4) of the Act for a waiver for the fuel additive methylcyclopentadienyl manganese tricarbonyl (MMT), commercially labeled by Ethyl as HiTEC 3000, to be blended in unleaded gasoline resulting in a level of 0.03125 (1/32) gram per gallon manganese (gpg Mn). This was Ethyl's fourth application for a waiver for MMT. Ethyl's first application was submitted on March 17, 1978 for concentrations of MMT resulting in 1/16 and 1/32 gpg Mn in unleaded gasoline. Ethyl's second application was submitted on May 26, 1981 for concentrations of MMT resulting in 1/64 gpg Mn in unleaded gasoline. The Administrator denied these requests for waivers. The decisions and justifications thereof may be found in the September 18, 1978 **Federal Register**, 43 FR 41424, and the December 1, 1981 **Federal Register**, 46 FR 58630. Ethyl's third application, was submitted on May 9, 1990, for concentrations of MMT resulting in a level of 0.3125 (1/32) gpg Mn in unleaded gasoline. Ethyl withdrew its third application on November 1, 1990, before the deadline for the Administrator to make a determination on the application.

On January 8, 1992, the Administrator of EPA denied Ethyl's July 12, 1991, application for a waiver (57 FR 2535, January 22, 1992). The application was denied based in part upon data submitted by Ford Motor Company which indicated that, for the model groups tested by Ford and, for the conditions under which Ford tested its vehicles, the increases in hydrocarbon exhaust emissions as a result of the use of MMT were substantially greater than those observed in the Ethyl test program. In its decision, the Agency stated that a likely factor which might account for the differences observed between the Ethyl and Ford test programs was the severity of the driving cycle. However, the Agency concluded that other factors might be responsible for the observed differences.

In the denial decision, the Agency stated that it had always accepted data from test programs which "model" the fleet in support of waiver applications, but that if an interested party were to present data indicating that a potentially significant subset of the fleet, not tested by the applicant, was especially susceptible to the negative effects of the additive, the Agency could reasonably require specific testing on representative models of that sub-fleet.

In its decision, the Agency also stated that it believes it is reasonable to take into account the effect of a fuel on vehicles' ability to meet future emissions standards. (The "Tier I" tailpipe standards prescribed by section 202(g) begin to take effect in model year 1994, which begins approximately in September 1993.[1] Therefore, regarding the Ford data mentioned above, the Agency stated in its decision that concerns raised by that data related to both current and future standards.

On February 13, 1992, Ethyl filed a petition for review of the January 8, 1992 waiver denial decision in the United States Court of Appeals for the District of Columbia Circuit. EPA and Ethyl subsequently entered into discussions concerning a possible settlement of the court case. In the context of those discussions, Ethyl submitted to the Agency new emissions test data developed by Ethyl since the denial decision.

In its new test program, Ethyl tested six pairs of 1991 Escorts, using both the relatively high-speed driving pattern similar to that utilized by Ford in its testing of 1991 Escorts (the Ford cycle) and, also, after changing emissions system components (catalyst and oxygen sensor), the driving cycle used by Ethyl in the original test program (EPA's durability certification cycle also known as the AMA). Half of the vehicles utilized MMT-containing fuel and half were run on clear fuel (fuel not containing MMT). Ethyl also performed some catalyst efficiency tests on these vehicles utilizing a "slave engine".[2]

Ethyl also tested six 1988 Escorts which were used in its original test program driven on the AMA cycle. In the new program, after replacing the catalyst and oxygen sensor, Ethyl continued mileage accumulation, from 75,000 to 100,000 miles, utilizing the Ford cycle. Likewise, Ethyl tested six 1988 Buicks from its original fleet accumulating mileage (100,000 to 115,000 miles) using the Ford cycle but without replacing any components.

Finally, in this latest test program, Ethyl accumulated mileage on seven pairs of 1992 vehicles (four Crown Victorias, Six Buick Regals and four Ford Mustangs) over 20,000 to 45,000 miles, with and without MMT, using the Ford cycle.

Based on its inspection and analysis of the new Ethyl data, EPA has tentatively concluded that the data indicate that driving cycle does not contribute significantly to MMT-induced increases in hydrocarbon emissions. (EPA's preliminary analysis has been placed in the docket.) However, in addition to addressing the issue of driving cycle, the Ethyl data appear to confirm the finding by Ford that 1991 Escorts experienced a much higher MMT-induced HC increase than that observed in other models tested (either in Ethyl's new program or in the original Ethyl test program). The Agency is concerned that these data could indicate that certain engine and emissions control system configurations are more vulnerable to an MMT-induced emissions increase irrespective of driving cycle.

To facilitate further settlement discussions with Ethyl, EPA has decided to formulate an emission testing program intended to address in a timely manner specific unresolved issues concerning the effect of MMT on emissions. The test program, to be conducted by Ethyl, will be designed to determine: (1) Whether other vehicles utilizing fuels containing MMT are likely to experience increases in hydrocarbon emissions similar to those observed in 1991 Ford Escorts; and (2) whether fuels containing MMT have significant adverse effects on emissions from vehicles utilizing the technologies most likely to be employed to meet future standards.

EPA has decided to hold a public workshop to assist EPA in formulating a proposed emission test program to address these issues. In particular, EPA would like to obtain information and assistance from technical experts outside of the Agency. Moreover, in view of the significance of any future waiver decision concerning MMT for the auto industry and the general public, EPA is interested in obtaining comments concerning a specific emission testing program and decisional framework designed to address and resolve these issues.

The workshop will be conducted on October 28, 1992 at 10 a.m. at the location listed in the addresses section. Prior to the workshop, EPA will prepare a draft emission testing program and decisional framework that will serve as the focus on the discussions during the workshop. (See the "Dates" section above for instructions on how to receive a copy of this draft prior to the workshop.) All interested parties will be

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[1] 56 FR 25724–25790 (June 5, 1991).

[2] A "slave engine" is a stand alone engine which is used to produce consistent emissions which can be tested in catalysts. The purpose is to reduce the inconsistencies in emissions coming out of the engine so specific catalyst effects can be isolated.

invited to comment on the draft document.

Dated: September 24, 1992.

William G. Rosenberg,

Assistant Administrator for Air and Radiation.

[FR Doc. 92-23599 Filed 9-28-92; 8:45 am]

BILLING CODE 6560-5-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirements Submitted to Office of Management and Budget for Review

September 21, 1992.

The Federal Communications Commission has submitted the following information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of these submissions may be purchased from the Commission's copy contractor, Downtown Copy Center, 1990 M Street, NW., Suite 640, Washington, DC 20036, (202) 452-1422. For further information on these submissions contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on these information collections should contact Jonas Neihardt, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503 (202) 395-4814.

OMB Number: 3060-0370

Title: Part 32—Uniform System of Accounts for Telecommunications Companies

Action: Extension of a currently approved collection

Respondents: Business or other for-profit

Frequency of Response: Recordkeeping and on occasion reporting

Estimated Annual Burden: 239 responses, 105.305 hours average burden per response, 25,168 hours total annual burden per response; 68 recordkeepers, 44,216.176 hours average burden per recordkeeper, 3,006,700 hours total annual burden per recordkeeper; 3,031,868 hours total annual burden

Needs and Uses: The Communications Act of 1934, as amended, allows the Commission, in its discretion, to prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. It also authorizes the Commission by general or special orders to require any carrier subject to this Act to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act. The information contained in the various reports submitted to this Commission by the carriers provides necessary detail to enable this Commission to fulfill its regulatory responsibilities. Part 32 imposes essentially recordkeeping requirements. The reporting requirements contained in the rulepart are sporadic or initiated by the carriers.

OMB Number: 3060-0150

Title: Part 22—Public Mobile Service

Action: Revision of a currently approved collection

Respondents: Businesses or other for-profit (including small businesses)

Frequency of Response: Recordkeeping requirement, quarterly, semi-annually, and on occasion reporting

Estimated Annual Burden: 35,828 responses, 8.8 hours average burden per response; 315,286 hours total annual burden per response; 1,200 recordkeepers, 52.27 average burden per recordkeeper, 62,724 hours total annual burden per recordkeeper; 378,010 hours total annual burden

Needs and Uses: Information collection requirements contained in part 22 have been previously submitted to OMB for review/approval. In addition, the Commission has recently proposed a major revision of part 22, and these proposed rules have been submitted to OMB. However, because the new rules may not become effective for another 12 to 18 months, and because of recent questions raised about whether OMB clearance was properly obtained for certain provisions of the current part 22, the Commission is resubmitting the entire part, to ensure that we are in full compliance with the Paperwork Reduction Act of 1980 (PRA). The Commission collects this information to ensure that stations licensed under part 22 do not cause interference to other radio facilities, and otherwise meet basic technical and legal requirements.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-23516 Filed 9-28-92; 8:45 am]

BILLING CODE 6712-01-M

FCC Renews EBSAC Charter

September 22, 1992.

In accordance with the GSA Final Rule on Federal advisory committee management, 41 CFR part 101-6 Sec. 101-6.1015, the Federal Communications Commission is giving official notice on the renewal of the Emergency Broadcast System Advisory Committee (EBSAC). The term of this Committee runs from July 30, 1992 to July 30, 1994.

EBSAC advises the FCC on all matters concerning the Emergency Broadcast System including policies, technologies, plans, regulations and procedures for the existing system and possible new systems at the national, state and local levels.

For additional information, contact the EBS staff at (202) 632-3906.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-23515 Filed 9-28-92; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL RESERVE SYSTEM

Consumer Advisory Council; Meeting of Consumer Advisory Council

The Consumer Advisory Council will meet on Thursday, October 29. The meeting, which will be open to public observation, will take place in the Board Room of the Eccles Building. The meeting is expected to begin at 9 a.m. and to continue until 5 p.m., with a lunch break from 1 until 2 p.m. The Eccles Building is located on C Street, Northwest, between 20th and 21th Streets in Washington, DC.

The Council's function is to advise the Board on the exercise of the Board's responsibilities under the Consumer Credit Protection Act and on other matters on which the Board seeks its advice. Time permitting, the Council will discuss the following topics:

Survey of Mortgage Lending Practices in Boston. Status report on a study by the Federal Reserve Bank of Boston on the lending practices of 132 financial institutions operating in the Boston metropolitan area (specifically what information the lenders rely on in determining whether to grant or deny applications for mortgages).

Home Mortgage Disclosure Act Data. Status report on the 1991 national aggregates of Home Mortgage Disclosure Act data, which will summarize the mortgage activity of all lenders that report HMDA data.

Issues Related to Unlawful Mortgage Discrimination. Briefing by the

Community Affairs and Housing Committee on its activities concerning possible disparate impacts of primary and secondary mortgage market underwriting standards and other issues related to mortgage discrimination.

Burdens and Benefits of Consumer Protection Rules. Discussion of the merits of possible actions that could be taken to reduce the regulatory burden associated with the Board's consumer protection rules.

Consumer Credit Education Activities. A report from the Board's Office of Public Affairs and the International Credit Association (ICA) about the relationship that has been established between the ICA and the Board and others to support quality credit education to teachers and students.

Members Forum. Presentation of individual Council members' views on whether there are visible signs of an economic upturn present within their industries or local economies and whether it is getting easier to obtain a loan.

Governor's Report. Report by Federal Reserve Board Member Lawrence B. Lindsey on recent Board initiatives and issues of concern, with an opportunity for questions from Council members.

Council Member Perspectives. Remarks by Council members identifying special areas of importance and concern to their organizations regarding the provision of financial services to consumers and communities.

Committee Reports. Reports from Council committees on their work and plans for 1993.

Other matters previously considered by the Council or initiated by Council members may also be discussed.

Persons wishing to submit to the Council their views regarding any of the above topics may do so by sending written statements to Ann Marie Bray, Secretary, Consumer Advisory Council, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551. Comments must be received no later than close of business Friday, October 23, and must be of a quality suitable for reproduction.

Information with regard to this meeting may be obtained from Bedelia Calhoun, Staff Specialist, Consumer Advisory Council, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-2412. Telecommunications Device for the Deaf (TDD) users may contact Dorothea Thompson, (202) 452-3544.

Board of Governors of the Federal Reserve System, September 23, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 92-23564 Filed 9-28-92; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

[Dkt. C-3392]

Jason Pharmaceutical, Inc., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, the Maryland marketers of the Medifast diet programs from misrepresenting the efficacy of any very-low-calorie diet program, and from falsely claiming that their physicians are certified in the treatment of obesity. In addition, the order requires the respondents to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss, and requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

DATES: Complaint and Order issued September 16, 1992.[1]

FOR FURTHER INFORMATION CONTACT: Richard Kelly, FTC/H-200, Washington, DC 20580. (202) 326-3304.

SUPPLEMENTARY INFORMATION: On Wednesday, October 23, 1991, there was published in the **Federal Register**, 56 FR 54866, a proposed consent agreement with analysis In the Matter of Jason Pharmaceutical, Inc., et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

Comments were filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45, 52.

Donald S. Clark,

Secretary.

[FR Doc. 92-23586 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

[1] Copies of the Complaint, the Decision and Order, and statements by Commissioners Azcuenaga and Owen are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

[Dkt. No. C-3393]

National Center for Nutrition, Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, the Virginia marketer of the Ultrafast liquid diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

DATES: Complaint and Order issued August 10, 1992.[1]

FOR FURTHER INFORMATION CONTACT: Richard Kelly, FTC/H-200, Washington, DC 20580. (202) 326-3304.

SUPPLEMENTARY INFORMATION: On Wednesday, October 23, 1991, there was published in the **Federal Register**, 56 FR 54866, a proposed consent agreement with analysis In the Matter of National Center for Nutrition, Inc., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

Comments were filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease

[1] Copies of the Complaint, the Decision and Order, and statements by Commissioners Azcuenaga and Owen are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45, 52.

Donald S. Clark,

Secretary.

[FR Doc. 92-23587 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

[Docket 9247]

Phone Programs, Inc.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a New York corporation from misrepresenting the ease with which a premium is obtainable and the content of any telephone information service message to children aged twelve and under. In addition, the respondent would be required to include a clear statement at the beginning of each children's message giving the child a chance to hang up without charge, and would be required to provide a means for parents to prevent, or not be charged for, unauthorized calls by their children.

DATES: Comments must be received on or before November 30, 1992.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joel Winston, FTC/S-4002, Washington, DC 20580. (202) 326-3153.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Agreement Containing Consent Order to Cease and Desist

The agreement herein, by and between Phone Programs Incorporated, a corporation, by its duly authorized officer, hereafter sometimes referred to as respondent, and its attorney, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent Phone Programs Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 919 Third Avenue, New York, New York 10022.

2. Respondent has been served with a copy of the complaint issued by the Federal Trade Commission charging it with violation of section 5(a) of the Federal Trade Commission Act, and has filed its answer denying said charges.

3. Respondent admits all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondent waives:

(a) any further procedural steps;

(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) any claim under the Equal Access To Justice Act.

5. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondent of facts, other than jurisdiction, or of violations of law as alleged in the complaint.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 3.25(f) of the Commission's Rules, the Commission may, without further notice to respondent: (1) Issue its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to-order to respondent's address as stated in this agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Respondent has read the complaint and the order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

For purposes of this order, the term "children" or "child" shall mean a person of age twelve or under.

For purposes of this order, the term "information service for children" shall mean a telephone message accessed through a numbered exchange (*e.g.*, "900") for which a fee is charged, consisting of live or recorded statements promoted or sold primarily to children.

For purposes of this order, the term "premium" shall mean any item respondent offers to send to those who call its information service for children.

For purposes of this order, the term "information service message" shall mean any live or recorded story, program or other communication transmitted to callers of respondent's information service for children.

For purposes of this order, the term "video advertisement" shall mean any advertisement intended for dissemination on television broadcast, cablecast, home video, or theatrical release.

For purposes of this order, the term "affiliate" includes, but is not limited to, corporations with a majority of

shareholders or directors in common with respondent.

I.

It is ordered That respondent Phone Programs Incorporated, a corporation, its successors, assigns, and affiliates, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:.

A. The ease with which a premium is obtainable; and

B. The content of any information service message for children.

II.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing as specified below to disclose, clearly and prominently, whenever an offer of any premium is made, all the material terms, conditions and obligations upon which receipt and retention of the premium is contingent. Such terms, conditions, and obligations shall include, but not be limited to, the number of calls necessary to receive the premium, if more than one, and the need to have a writing implement and paper available to record the necessary information given during the information service message.

The disclosure shall be made in a manner understandable to children, and shall be made in the same medium in which the offer of the premium is made and, in addition, in any information service message.

III.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for an information service for children that does not include the following statement: "Kids, you must ask your mom or dad and get their permission before you call. This call costs money."

The above-required disclosure shall be presented in a manner designed to ensure clarity and prominence. If the disclosure is made in the manner described below, it will be considered as complying with this provision of the order.

A. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The disclosure shall appear immediately following the first video presentation of the "900" telephone number, but in any event shall begin within the first fifteen (15) seconds of the advertisement. The audio portion shall be presented in a slow and deliberate manner. Each line of the video portion shall be at least as large as one-half of the size of the largest presentation of the "900" number that appears on the screen during the advertisement, shall be of a color or shade that readily contrasts with the background, and shall appeal on the screen for the duration of the audio disclosure.

B. In any print advertisement, the disclosure shall be parallel to the base of the advertisement and shall be placed in close proximity to the 900 number. All lines of the disclosure when taken together shall be the same size or larger than the largest presentation of the 900 number, but in any event the type size of each line of the disclosure shall be no less than 12 point, bold-face type.

C. In any radio advertisement, the disclosure shall be presented in a slow and deliberate manner and shall appear immediately following the first presentation of the "900" telephone number, but in any event it shall begin within the first fifteen (15) seconds of the advertisement.

Nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertisement in any medium.

IV.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for an information service for children that does not include a disclosure of the cost of a call to the information service. This disclosure shall be presented in a manner designed to ensure clarity and prominence. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement.

V.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, shall include, at the beginning of every information service message, an introductory preamble that states in a slow, deliberate and clear manner the following: "This telephone call costs money. If you do not have your mom or dad's permission, hang up now and there will be no charge for this call."

VI.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from billing or causing to be billed, or collecting any funds or causing any funds to be collected, for any call to any information service for children terminated within no less than five (5) seconds of the end of the introductory preamble, as required by Paragraph V of this Order.

Provided, in the event that any provision of a federal law or regulation of the Federal Communications Commission is in "actual conflict" with any requirement imposed by Paragraph V or VI of this Order, compliance with such law or regulation shall not be deemed to be a violation of this Order. As used herein, "actual conflict" shall mean that it is impossible for respondent to comply with both the law or regulation and Paragraph V and VI of this Order.

VII.

It is further ordered That respondent Phone Programs Incorporated, its successors, assigns, and affiliates, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from including children to call its information service for children and thereby incur charges, without providing any reasonable means for the person responsible for payment of such charges

to exercise control over the transaction. For purposes of this Paragraph, if the respondent does not provide, prior to placement of any call by a child, a reasonable means for the person responsible for payment to avoid unauthorized calls, the provision of a reasonable means to exercise control over the transaction shall be the use of the respondent's best efforts to ensure that one-time refunds or credits are provided upon request for unauthorized calls made by children, as specified below. Best efforts shall include at least the following:

A. Contracting with the appropriate interstate common carrier or local exchange carrier to:

(1) Identify in all telephone bills containing charges for calls to respondent's information service for children each telephone call to such service by the characters "CHILD CALL;"

(2) Place in all telephone bills containing charges for calls to respondent's information service for children, clearly and prominently in close proximity to the itemization of those charges, a toll-free or local telephone number specified to be used for consumer inquiries concerning charges on the telephone bill; *provided*, that a general billing inquiry telephone number for customer inquiries concerning charges on the telephone bill shall satisfy this requirement;

(3) Refer all customers who call the toll-free number inquiring about the charges for respondent's information service for children to their local exchange carrier for information regarding the availability of blocking in their jurisdiction; and

(4) Provide a one-time prompt and full credit or refund at the customer's request for all such calls, whether such request is made to the toll-free or local telephone number specified herein or in any other manner; *provided*, that respondent must contract with the carrier to provide a second prompt and full credit or refund to any customer who requests the first credit or refund during a period of the billing cycle where unauthorized calls have been made, but do not yet appear on the customer's bill, and subsequently requests a second credit or refund for any additional unauthorized calls made before the date of the first request for a credit or refund;

provided, that if the interstate common carrier utilized by respondent employs local exchange carriers to provide billing inquiry services, respondent shall be in compliance with subparagraphs A (3) and (4) of this Paragraph if its contract with the interstate common carrier provides that the interstate common carrier notify each local exchange carrier of the interstate common carrier's policies to:

(i) Provide the customer with information regarding the availability of blocking 900 number calls; and

(ii) Provide upon request one-time refunds or credits for unauthorized calls by children, as provided in subparagraph A(4) of this Paragraph.

B. In the event that respondent receives any information that the interstate common carrier has failed to fulfill its obligations under the contract required by subparagraph A of this Paragraph, immediately notifying the interstate common carrier:

(1) Of the existence of the alleged failure(s);

(2) Of the carrier's responsibility to fulfill its obligations under the contract;

(3) Of the need to investigate and correct all past failures; and

(4) That if a pattern or practice of failures continues, respondent will terminate the use of said carrier for any information service for children; and

C. Terminating the use of said interstate common carrier for any information service for children, in the event that the interstate common carrier does not correct all past failures or continues to fail to fulfill its obligations under said contract.

D. Compliance with the requirements set forth in subparagraphs A–C of this Paragraph is deemed to be satisfactory compliance with this Paragraph.

Provided, that for purposes of this Paragraph, the mere inclusion of any audio or video disclosure relating to parental authorization in advertisements or information service messages is expressly deemed not to be a reasonable means, prior to placement of any call by a child, for the person responsible for payment to avoid unauthorized calls.

VIII.

It is further ordered That for three (3) years from the date of service of this Order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: (1) All advertisements for information services for children and all corresponding information service messages; (2) a record of all credit or refund requests made for charges billed for respondent's information services for children; (3) all documents relating to compliance with Paragraph VII of this Order, and (4) all consumer complaints and dispositions thereof relating to respondent's information services for children.

IX.

It is further ordered That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

X.

It is further ordered That respondent shall forthwith distribute a copy of this Order to each of its operating divisions and any carrier(s) or other entities providing billing and/or collection service for its information services for children.

XI.

It is further ordered That respondent shall, within sixty (60) days after service of this Order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Phone Programs, Inc. ("respondent" or "PPI").

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns PPI's television advertisements for its pay-per-call information services for children. These are services accessed by calling a numbered telephone exchange (*e.g.*, 900), in which callers hear recorded stories, games or contests featuring animated or fictional characters.

The Commission's complaint in this matter charges respondent with engaging in unfair and deceptive practices in connection with the advertising and sale of its information services for children. According to the complaint, respondent's ads represented that children who complete a call to

respondent's information service for children would readily and easily obtain the "gift" (or "premium") specified in the advertisement simply by calling the advertised number. This representation is alleged to be false and misleading. In order to obtain the premium, callers were required to follow a number of complex steps that children could not reasonably follow. For example, callers needed to transcribe an address given rapidly and without warning after the recorded story message and were required to send a copy of the phone bill showing the charge for the call to that address.

The complaint also alleges that respondent's advertisements failed to disclose that there are material terms and conditions for obtaining the premium, including the need for a writing implement and paper to transcribe the ordering information.

The complaint also alleges that PPI misrepresented what a child would hear when he/she called PPI's Popeye story line. According to the complaint, PPI's ads and story messages claimed that callers to the story line would hear news about Popeye's birthday. The complaint alleges that these representations were false and misleading because, in fact, only the last of the twenty-nine messages in the series contained any information about Popeye's birthday.

Finally, the complaint alleges that respondent has unfairly induced children to call its information services without providing any reasonable means for the person responsible for paying the charges to exercise control over the transaction. These practices are alleged to cause substantial consumer injury and constitute unfair practices.

The consent order contains provisions designed to remedy the violations charged and to prevent respondent from engaging in similar deceptive and unfair acts and practices in the future.

Part I of the order prohibits respondent from misrepresenting in the advertising or sale of its information services for children the ease with which a premium is obtainable. Part I of the order also prohibits PPI from misrepresenting the content of any information service message for children. The order defines information services for children as fee-charged phone services accessed through a numbered exchange consisting of live or recorded statements promoted or sold primarily to children aged twelve or under.

Part II of the order requires respondent to disclose, clearly and prominently, whenever an offer of premium is made, all of the material terms, conditions and obligations upon which receipt and retention of any premium is contingent. These terms must include, at a minimum, the number of calls needed to receive the premium, if more than one, and the need for a writing implement and paper to transcribe the ordering information. The disclosure must be made in the same medium as the premium offer and also in the recorded message.

Part III of the order requires respondent to include the following disclosure, presented in a manner designed to ensure clarity and prominence, in its advertisements for its information services for children: "Kids, you must ask your mom or dad and get their permission before you call. This call costs money." The order specifies with particularity the manner in which the disclosures shall be presented in different media.

Part IV of the order requires respondent to disclose in a manner designed to ensure clarity and prominence, in all of its advertisements for information services for children, the cost of the telephone call to such services.

Part V of the order requires respondent to include, at the beginning of every recorded phone message for children, the following introductory message in a slow, deliberate and clear manner: "This telephone call costs money. If you do not have your mom or dad's permission, hang up now and there will be no charge for this call."

Part VI of the order prohibits respondent from collecting any funds for any call terminated within five seconds of the end of the introductory preamble required by Part V. Part VI also provides that in the event that the order's introductory message requirement is in actual conflict with a federal law or regulation, compliance with such law or regulation shall not be deemed to be a violation of the order. The term "actual conflict" is defined to mean that it is impossible for respondent to comply with both the law or regulation and the order.

Part VII of the order requires that respondent not induce children to call its information services for children unless it provides a reasonable means for persons responsible for payment to exercise control over the transaction. If respondent does not provide a reasonable means for such persons to avoid unauthorized calls before they are made, respondent must use its best efforts to ensure that one-time credits or refunds are provided upon request for unauthorized calls made by children. "Best efforts" is defined to include, at a minimum, contracting with the appropriate phone company to: (1) Identify in all telephone bills containing charges for calls to respondent's information service for children each telephone call to such service by the characters "Child Call"; (2) place in all bills containing charges for respondent's information service for children, a toll-free number for customer inquiries; (3) refer to all customers who call such toll-free number to their local phone company for information on blocking of 900 calls; and (4) provide a one-time prompt and full refund or credit, upon request, for unauthorized calls made by children. Best efforts also requires respondent to monitor the phone company's compliance with the order requirements and take certain action, including termination of its contract with the phone company, if the phone company does not fulfill its obligations under its contract with respondent.

Part VIII of the order requires respondent to maintain and make available to the Federal Trade Commission for inspection and copying all advertisements for information services for children and all corresponding information service messages, records of all credits or refund requests and their dispositions, all consumer complaints, and all documents relating to the implementation of Part VII, for a period of three years.

Part IX of the order requires respondent to notify the Commission prior to any change in the corporation that may affect compliance obligations arising out of this order.

Part X of the order requires respondent to distribute a copy of the order to each of its operating divisions and to any entity providing billing and/or collection services for its information services for children.

Part XI of the order requires respondent to file a compliance report.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms.

Donald S. Clark,

Secretary.

[FR Doc. 92-23591 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

[Dkt. C-3394]

Sandoz Nutrition Corporation; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, the Minnesota-based marketer of the Optifast diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients or any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

DATES: Complaint and Order issued August 10, 1992.[1]

FOR FURTHER INFORMATION CONTACT: Richard Kelly, FTC/H-200. Washington, DC 20580. (202) 326-3304.

SUPPLEMENTARY INFORMATION: On Wednesday, October 23, 1991, there was published in the **Federal Register**, 56 FR 54866, a proposed consent agreement with analysis In the Matter of Sandoz Nutrition Corporation, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

Comments were filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45, 52.

Donald S. Clark,

Secretary.

[FR Doc. 92-23588 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

[Docket 9248]

Diran M. Seropian, M.D.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, a Florida physician from conspiring with the medical staff of Broward General Medical Center to prevent competition from physicians of the Cleveland Clinic Florida, a non-profit provider of health care services, or any other provider of health care services.

DATES: Complaint issued June 12, 1991. Order issued September 11, 1992.[1]

FOR FURTHER INFORMATION CONTACT: Mark Horoschak, FTC/S-3115, Washington, DC 20580. (202) 326-2756.

SUPPLEMENTARY INFORMATION: On Monday, May 4, 1992, there was published in the **Federal Register**, 57 FR 19130, a proposed consent agreement with analysis In the Matter of Diran M. Seropian, M.D., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

Comments were filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45.

Donald S. Clark,

Secretary.

[FR Doc. 92-23589 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

[Docket No. 9246]

University Health, Inc., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, a non-profit corporation and two of its subsidiaries, for ten years, from acquiring St. Joseph Hospital or any other hospital in the Augusta, Georgia area—and from consolidating the operations of respondents' University Hospital with those of St. Joseph or any other local general hospital—without prior FTC approval.

DATES: Complaint issued April 2, 1991. Order issued September 9, 1992.[1]

FOR FURTHER INFORMATION CONTACT: Mark Horoschak or Oscar Voss, FTC/S-3115, Washington, DC 20580. (202) 326-2756 or 326-2750.

SUPPLEMENTARY INFORMATION: On Tuesday, June 30, 1992, there was published in the **Federal Register**, 57 FR 29084, a proposed consent agreement with analysis in the Matter of University Health, Inc., et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: (Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 18.

Donald S. Clark,

Secretary.

[FR Doc. 92-23590 Filed 9-28-92; 8:45 am]

BILLING CODE 6750-01-M

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation; Waiver/Clarification of Certain Federal Travel Regulation Provisions Applicable to Relocation Allowances and Entitlements of Federal Employees Being Relocated From or To Presidentially Declared Disaster Areas of Florida and Louisiana

AGENCY: Federal Supply Service, GSA.

ACTION: Notice.

SUMMARY: The General Services Administration (GSA) has been asked to provide exceptions to certain Federal Travel Regulation (FTR) (41 CFR 301-304) provisions to assist Federal employees relocating to or from Florida and Louisiana localities designated a Presidentially declared disaster area as a result of Hurricane Andrew. On

[1] Copies of the Complaint, the Decision and Order, and statements by Commissioners Azcuenaga and Owen are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

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September 21, 1992, by letter to the Heads of all Executive agencies, the Administrator of General Services waived certain provisions, and clarified the application of certain other provisions, of the FTR to help alleviate hardships encountered by Federal employees relocating to or from the Florida and Louisiana disaster areas. A copy of the Administrator's letter is attached for informational purposes.

FOR FURTHER INFORMATION CONTACT: Jane Groat, General Services Administration, Transportation Management Division (FBX), Washington, DC 20406, telephone FTR or commercial 703-305-5253.

SUPPLEMENTARY INFORMATION: To assist Federal employees relocating from or to the Presidentially declared disaster areas of Florida and Louisiana, agencies have expressed a need to extend the maximum time period allowed for temporary storage of household goods, occupancy of temporary quarters, and completion of residence transactions, as well as to pay for reappraisal and reinspection of damaged homes, after repair, in the case of employees participating in the relocation services program. The attached letter advises agencies of the following authorities available to them, either under existing regulation or by waiver of certain FTR provisions, to assist relocating employees affected by Hurricane Andrew:

(1) Under existing authority, an agency may use the household goods nontemporary storage provision for isolated locations within CONUS (41 CFR 302-9.1) to accommodate relocated employees who need an extension of the maximum time limitation on temporary storage of household goods (applicable in all the declared disaster locations);

(2) The existing 120-day time limitation on occupancy of temporary quarters provided in 41 CFR 302-5.2(a)(2) is waived, allowing agencies to authorize extensions, as needed, in 60-day increments (applicable in all the declared disaster locations);

(3) Also waived is the existing temporary quarters standard-CONUS-rate-based reimbursement ceiling provided in 41 CFR 302-5.4(c). Agencies are authorized to establish a ceiling based on a rate that is not in excess of (a) 300 percent of the applicable maximum per diem rate for disaster localities specified in GSA Bulletins FTR 6 (57 FR 40466, Sept. 3, 1992) and 7, and any supplement(s) thereto, during the period of effectiveness of GSA Bulletins FTR 6 and 7, or (b) 150 percent of the applicable maximum per diem rate for Florida and Louisiana disaster localities not specified in GSA Bulletins FTR 6 or 7 and related supplements, as well as for all disaster locations upon expiration of GSA Bulletins FTR 6 and 7;

(4) The existing 3-year time limitation on completion of residence transactions provided in 41 CFR 302-6.1(e) is waived, allowing agencies to authorize extensions as needed in 1-year increments (applicable in all the declared disaster locations). Also waived is the existing 3-year time limitation, provided in 41 CFR 302-1.6(c), which governs the beginning of travel and transportation associated with a permanent change of official station. This allows agencies to authorize, as needed, extensions in 1-year increments when the 3-year time limitation for completion of residence transactions is extended under the above waiver authority (applicable in all the declared disaster locations); and

(5) Under existing authority, agencies may pay under the terms and conditions of the relocation services contract for reappraisal and reinspection of hurricane-damaged homes, after repair, in the case of employees participating in the relocation services program.

Dated: September 22, 1992.

By delegation of the Commissioner, Federal Supply Service.

Allan W. Beres,

Assistant Commissioner, Transportation and Property Management.

Attachment

September 21, 1992

To: Heads of Executive agencies

Dear [Agency Head]:

Late last month, the most costly natural disaster in our nation's history struck south Florida and the Gulf coast of Louisiana. Hurricane Andrew has left hundreds of thousands homeless and caused billions of dollars in damage. The Federal Government is providing direct assistance and coordinating relief efforts on a massive scale, requiring significant Federal travel to the affected areas. Federal agencies have expressed a need for exceptions to certain Federal Travel Regulation (FTR) (41 CFR 301-304) provisions to accommodate unusual circumstances encountered by Federal employees performing official travel in, or being permanently relocated from or to, only the Presidentially declared disaster areas of Florida and Louisiana.

To aid agencies in carrying out their relief efforts and other necessary missions, GSA Bulletin FTR 6 issued on August 28, 1992 (Enclosure 1), and published at 57 FR 40466, authorizes agencies to approve actual subsistence expense travel reimbursement not to exceed 300 percent of the applicable maximum per diem rate for the Florida counties of Broward, Dade, and Monroe, and for the Louisiana parishes of Assumption, Iberia, Iberville, Lafourche, St. John the Baptist, St. Martin, St. Mary, and Terrebonne. This action is intended to alleviate the difficulty of obtaining suitable lodging at reasonable rates given the current shortage situation. We are issuing Supplement 1 to GSA Bulletin FTR 6 to extend the effective dates therein for an additional 30-day period, and also are issuing GSA Bulletin FTR 7 to mirror for Collier County, Florida and the Parish of East Baton Rouge, Louisiana the authority granted in GSA Bulletin FTR 6.

I also have made the decision to waive additional FTR provisions to aid employees in the process of permanently relocating to or from the areas most severely damaged by Hurricane Andrew. Many of their homes were either destroyed or rendered temporarily uninhabitable. Following are specific actions you may take, either within existing FTR (41 CFR 301-304) authority or within the special waiver authority I am hereby granting to the regulation, to help alleviate the Hurricane-related relocation hardships encountered by these employees. Except as otherwise specified, the actions may be applied as necessary in any of the Florida counties and Louisiana parishes officially designated as a Presidentially declared disaster area following Hurricane Andrew (Enclosure 2), and are retroactive to the effective date of the disaster declaration applicable to each area.

First, in the case of employees who need an extension of the household goods temporary storage time limit, you may use the provisions at 41 CFR 302-9.1 governing nontemporary storage at an isolated location in the continental United States and convert temporary storage to nontemporary storage. Under this provision heads of individual agencies are responsible for designating an isolated official station at which conditions exist for allowing nontemporary storage of household goods at Government expense. Nontemporary storage may be authorized for up to 3 years as necessary.

Second, for those employees relocating to or from a Presidentially declared disaster area who need for reasons attributable to the disaster an extension of the maximum period for occupancy of temporary quarters, I am waiving the maximum 120-day time limitation provided at 41 CFR 302-5.2(a)(2). Agencies are hereby granted authority to extend the temporary

quarters time period in 60-day increments when the head of the agency, or his/her designee, determines that there are compelling reasons for the continued occupancy of temporary quarters.

Additionally, I am waiving the provision at 41 CFR 302–5.4(c) which limits reimbursement for temporary quarters subsistence expenses to a maximum amount based on the standard CONUS rate. Instead, agencies may approve reimbursement for temporary quarters subsistence expenses not to exceed a maximum amount computed in accordance with 41 CFR 302–5.4(c) as follows:

(a) Based on a rate that is not in excess of 300 percent of the maximum per diem rate applicable for the disaster locality for those areas specified in, and during the period covered by, GSA Bulletins FTR 6 and 7 and any supplements thereto; or

(b) Based on a rate that is not in excess of 150 percent of the maximum per diem rate applicable for the disaster locality for disaster areas not specified in GSA Bulletins FTR 6 and 7 and any supplements thereto, as well as for all disaster locations upon expiration of GSA Bulletins FTR 6 and 7 and any supplements thereto.

Third, for those employees relocating to or from a Presidentially declared disaster area who need an extension of the maximum period for completion of residence transactions, I am waiving the maximum 3-year time limitation provided at 41 CFR 302–6.1(e). Agencies are hereby granted authority to extend the period for completion of residence transactions, as needed, in 1-year increments. Correspondingly, I am waiving the maximum 3-year time limitation (provided at 41 CFR 302–1.6(c)) applicable to the beginning of travel and transportation in connection with a change of official station. Agencies are hereby granted authority to extend the period for beginning travel and transportation, as needed, in 1-year increments when the 3-year time limitation for completion of residence transactions is extended under the authority of this paragraph.

Finally, for employees participating in the relocation services program whose residences had already been appraised and/or inspected prior to Hurricane Andrew and whose residences now must be repaired due to the disaster and reappraised and/or reinspected, it is important to note that the expense(s) of the second appraisal/inspection are payable by the agency. They do not constitute duplicate payments for the same service. Such reappraisals/reinspections will be considered as a discrete transaction arising from a new event bearing no relation to the first order for service. If an agency orders the new service, it may pay for the service under the contract's terms and conditions.

The impact of the Hurricane Andrew disaster upon the resources of the Federal Government is great and likely will continue for a protracted period. The authorities I have outlined in this letter are intended to assist you in carrying out your agency's mission with minimum disruption and to allow you to successfully meet the needs of both your employees and the public. It is important that you exercise these authorities judiciously and only as long as is warranted by individual circumstances.

Sincerely,

(John P. Hiler signed for)

Richard G. Austin,

Administrator of General Services.

2 Enclosures

ENCLOSURE 1

[GSA Bulletin FTR 6]

Federal Travel Regulation; Actual Subsistence Expense Reimbursement in Presidentially Declared Disaster Areas in Florida and Louisiana

August 28, 1992

To: Heads of Federal agencies

Subject: Reimbursement for actual subsistence expenses in Presidentially declared disaster areas of Florida and Louisiana.

1. *Purpose.* This bulletin informs agencies of the establishment of a special actual subsistence expense ceiling for official travel to Florida and Louisiana localities designated as Presidentially declared disaster areas as a result of Hurricane Andrew. This special rate may be applied retroactively to claims for reimbursement covering travel during the periods of August 24 through September 22, 1992 for designated Florida areas, and August 26 through September 24, 1992 for designated Louisiana areas.

2. *Background.* The Federal Travel Regulation (FTR) (41 CFR 301–8) permits the Administrator of General Services to establish a higher actual subsistence expense reimbursement rate for the reimbursement of actual subsistence expenses of Federal employees on official travel to an area within the continental United States. The head of an agency may request establishment of such a rate when special or unusual circumstances, such as a natural disaster resulting in a Presidential disaster declaration, result in an extreme increase in subsistence costs for a temporary period.

3. *Maximum rate and effective date.* The Administrator of General Services, pursuant to 41 CFR 301–8.3(c), has increased the maximum daily amount of reimbursement that may be approved for actual and necessary subsistence expenses for official travel to Florida and Louisiana localities designated as Presidentially declared disaster areas as a result of Hurricane Andrew. For travel during the 30-day period, August 24 through September 22, 1992 for Florida, and August 26 through September 24, 1992 for Louisiana, agencies may approve actual subsistence expense reimbursement not to exceed 300 percent of the applicable maximum per diem rate for the affected Florida counties and Louisiana parishes listed in paragraph 4, below.

4. *Affected localities.* The special reimbursement rate described in paragraph 3, above, applies for travel to the following areas of Florida and Louisiana:

FLORIDA: Counties of Broward, Dade, and Monroe.

LOUISIANA: Parishes of Assumption, Iberia, Iberville, Lafourche, St. John the Baptist, St. Martin, St. Mary, and Terrebonne.

5. *Expiration date.* This bulletin expires on December 31, 1992.

6. *For further information contact.* Jane E. Groat, General Services Administration, Transportation Management Division (FBX), Washington, DC 20406, telephone FTS or commercial 703–305–5253.

By delegation of the Commissioner, Federal Supply Service.

Allan W. Beres,

Assistant Commissioner, Transportation and Property Management.

ENCLOSURE 2

Presidentially declared disaster areas in Florida and Louisiana as a result of Hurricane Andrew

Following is a complete listing (current as of September 15, 1992) of all Florida counties and Louisiana parishes declared disaster areas as a result of Hurricane Andrew:

FLORIDA: Counties of Broward, Collier, Dade, and Monroe.

LOUISIANA: Parishes of Acadia, Allen, Ascension, Assumption, Avoyelles, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, Rapides, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Landry, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, West Baton Rouge, and West Feliciana.

A total of 4 counties in Florida and 36 parishes in Louisiana have been designated as disaster areas.

[FR Doc. 92-23549 Filed 9-28-92; 8:45 am]

BILLING CODE 6820-24-M

[GSA Bulletin FTR 6, Supplement 1]

Federal Travel Regulation; Actual Subsistence Expense Reimbursement in Presidentially Declared Disaster Areas in Florida and Louisiana

September 21, 1992

To: Heads of Federal agencies

Subject: Reimbursement for actual subsistence expenses in Presidentially declared disaster areas of Florida and Louisiana.

1. *Purpose.* This supplement informs agencies of the extension for an additional 30-day period of the special actual subsistence expense ceiling described in GSA Bulletin FTR 6 (57 FR 40466, Sept. 3, 1992) for official travel to certain Florida and Louisiana localities designated as Presidentially declared disaster areas as a result of Hurricane Andrew.

2. *Explanation of change.* The Administrator of General Services, pursuant to 41 CFR 301-8.3(c), has extended for an additional 30 days the period during which agencies may approve, in accordance with paragraph 3 of GSA Bulletin FTR 6, actual and necessary subsistence expense reimbursement not to exceed 300 percent of the applicable maximum locality per diem rate for official travel to the Presidentially declared disaster areas in Florida and Louisiana named in paragraph 4 of GSA Bulletin FTR 6. For Florida counties named in GSA Bulletin FTR 6 the extended period covers September 23 through October 22, 1992; for Louisiana parishes named in GSA Bulletin FTR 6 the extended period covers September 25 through October 24, 1992.

3. *Expiration date.* This supplement expires on December 31, 1992.

4. *For further information contact.* Jane E. Groat, General Services Administration, Transportation Management Division (FBX), Washington, DC 20406, telephone FTS or commercial 703-305-5253.

By delegation of the Commissioner, Federal Supply Service.

Allan W. Beres,

Assistant Commissioner, Transportation and Property Management.

[FR Doc. 92-23551 Filed 9-28-92; 8:45 am]

BILLING CODE 6820-24-M

[GSA Bulletin FTR 7]

Federal Travel Regulation; Actual Subsistence Expense Reimbursement in Presidentially Declared Disaster Areas in Florida and Louisiana

September 21, 1992

To: Heads of Federal agencies

Subject: Reimbursement for actual subsistence expenses in Presidentially declared disaster areas of Florida and Louisiana.

1. *Purpose.* This bulletin informs agencies of the establishment of a special actual subsistence expense ceiling for official travel to two Florida and Louisiana localities designated as Presidentially declared disaster areas as a result of Hurricane Andrew. These two locations are in addition to the three Florida counties and eight Louisiana parishes for which a special actual subsistence expense ceiling was announced in GSA Bulletin FTR 6 issued on August 28, 1992 (57 FR 40466, Sept. 3, 1992). This special rate may be applied retroactively to claims for reimbursement covering travel during the periods of September 23 through October 22, 1992 for the new Florida area, and September 25 through October 24, 1992 for the new Louisiana area.

2. *Background.* The Federal Travel Regulation (FTR) (41 CFR 301-8) permits the Administrator of General Services to establish a higher actual subsistence expense reimbursement rate for the reimbursement of actual subsistence expenses of Federal employees on official travel to an area within the continental United States. The head of an agency may request establishment of such a rate when special or unusual circumstances, such as a natural disaster resulting in a Presidential disaster declaration, result in an extreme increase in subsistence costs for a temporary period.

The General Services Administration (GSA) issued GSA Bulletin FTR 6 on August 28, 1992 (57 FR 40466) authorizing a special actual subsistence expense ceiling for official travel performed to certain Presidentially declared disaster areas in Florida and Louisiana resulting from Hurricane Andrew. The effective period of the special reimbursement ceiling announced in GSA Bulletin FTR 6 has been extended by Supplement 1 to Bulletin 6. The Federal Emergency Management Agency has now requested establishment of a special actual subsistence expense ceiling for two additional Hurricane Andrew disaster locations, one in Florida and one in Louisiana.

3. *Maximum rate and effective date.* The Administrator of General Services, pursuant to 41 CFR 301-8.3(c), has increased the maximum daily amount of reimbursement that may be approved for actual and necessary subsistence expenses for official travel to the specified Florida and Louisiana localities designated as Presidentially declared disaster areas as a result of Hurricane Andrew. For travel during the 30-day period, September 23 through October 22, 1992 for Florida, and September 25 through October 24, 1992 for Louisiana, agencies may approve actual subsistence expense reimbursement not to exceed 300 percent of the applicable maximum per diem rate for the affected Florida county and Louisiana parish listed in paragraph 4, below.

4. *Affected localities.* The special reimbursement rate described in paragraph 3, above, applies for travel to the following areas in Florida and Louisiana:

FLORIDA

Collier County

LOUISIANA

Parish of East Baton Rouge

5. *Expiration date.* This bulletin expires on December 31, 1992.

6. *For further information contact.* Jane E. Groat, General Services Administration, Transportation Management Division (FBX), Washington, DC 20406, telephone FTS or commercial 703-305-5253.

By delegation of the Commissioner, Federal Supply Service.

Allan W. Beres,

Assistant Commissioner, Transportation and Property Management.

[FR Doc. 92-23550 Filed 9-28-92; 8:45 am]

BILLING CODE 6820-24-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N-92-3515]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Angela Antonelli, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708-0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: September 23, 1992.

Kay Weaver,

Acting Director, IRM Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Proposal: Single Family Application for Insurance Benefits.

Office: Housing.

Description of the Need for the Information and Its Proposed Use: This form will be used to provide the Department with information needed to process and pay claims on defaulted FHA insured home mortgage loans.

Form Number: HUD-27011, Parts A, B, C, D, and E.

Respondents: Businesses or Other For-Profit.

Frequency of Submission: On Occasion.

Reporting Burden:

	Number of respondents	X	Frequency of response	X	Hours per response	=	Burden Hours
HUD-27011, parts A, B, C, D, & E	8,000		11.87		1.33		126,350
Recordkeeping	8,000		1		.50		4,000

Total Estimated Burden Hours: 130,350.

Status: Reinstatement.

Contact: John A. Chin, HUD, (202) 708-2163, Angela Antonelli, OMB (202) 395-6880.

Dated: September 23, 1992.

[FR Doc. 92-23521 Filed 9-28-92; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Outer Continental Shelf Advisory Board; Renewal

This notice is published in accordance with section 9(a)(2) of the Federal Advisory Committee Act (5 U.S.C. Appendix). Notice is hereby given that the Secretary of the Interior is renewing the Outer Continental Shelf (OCS) Advisory Board Charter.

The purpose of the OCS Advisory Board is to provide advice to the Secretary of the Interior and other officers of the Department in the performance of discretionary functions of the OCS Lands Act, as amended, including all aspects of leasing, exploration, development, and protection of the resources of the OCS.

Further information regarding the Committee may be obtained from the Chief, Office of OCS Advisory Board Support, Minerals Management Service, Department of the Interior, 381 Elden Street, Herndon, Virginia 22070.

Certification

I hereby certify that the renewal of the Outer Continental Shelf Advisory Board Charter is in the public interest in connection with the performance of duties imposed on the Department of the Interior by 43 U.S.C. 1331 et seq.

Dated: September 17, 1992.

Manuel Lujan, Jr.,

Secretary of the Interior.

[FR Doc. 92-23547 Filed 9-28-92; 8:45 am]

BILLING CODE 4310-MR-M

Bureau of Land Management

Review of Land Use Plan, Exception to the California Desert Conservation Area Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the Bureau of Land Management (BLM) is considering an exception to the California Desert Conservation Area (CDCA) Plan, in accordance with 43 CFR 1610.5-5 and the procedures outlined in Chapter 7 of the CDCA Plan. This proposed exception, if approved, would allow the issuance of a Right-of-Way Grant across public land for a water pipeline, larger than 12 inches, outside of a designated utility corridor but within a contingent corridor. The Mojave Water Agency has applied for a Right-of-Way Grant, under 43 CFR 2800, to construct, operate and maintain a 30-inch water pipeline to deliver State Project Water from the Aqueduct in

Hesperia, California to the vicinity of the Town of Yucca Valley. A contingency corridor was identified in the CDCA Plan along the proposed pipeline alignment across public land. If approved, the BLM proposes to permit an exception to the CDCA Plan for this proposed project and not to activate this contingent corridor.

DATES: Written comments must be submitted or postmarked no later than October 30, 1992.

ADDRESSES: Written comments should be sent to: Stephen Johnson, Special Projects Manager, Bureau of Land Management, California Desert District Office, 6221 Box Springs Boulevard, Riverside, California 92507-0714.

FOR FURTHER INFORMATION CONTACT: Stephen Johnson, Special Projects Manager, California Desert District Office; (714) 697-5234.

SUPPLEMENTARY INFORMATION: The Mojave Water Agency (MWA) is an instrumentality, authorized by the State of California, with responsibility for wholesaling State Project Water to local water purveyors in the Morongo Basin portion of San Bernardino County. In 1989, several communities in the Morongo Basin (Yucca Valley, Joshua Tree and Landers) voted to approve general obligation bonds to fund the construction of a 68.4 mile pipeline to convey State Project Water from the City of Hesperia, along the north slope of the San Bernardino Mountains, to these communities. After detailed engineering and environmental studies, a pipeline alignment was selected by MWA which follows existing public roads, including State Highway 247. This proposed pipeline will be 30 inches in diameter and will cross public land, administered by the BLM, for approximately 15 percent of the total route, or 9.67 miles.

Portions of the Morongo Basin have experienced severe overdraft from historic pumping activities. Without access to State Project Water, some local aquifers could be depleted. The 30-inch size of this pipeline is dictated to ensure delivery to the Morongo Basin of up to 10,900 acre feet of water per year of State Project Water. This volume of State Project Water could be delivered during those years when sufficient water is available from the State Water Project. The water delivered to the Morongo Basin will be served to water customers by the local water purveyors that have contracted for State Project Water.

The BLM contemplates that this water pipeline, as proposed, should be considered as an exception to the CDCA Plan, rather than activating the contingency corridor that parallels State Highway 247 from Lucerne Valley to Yucca Valley. An Environmental Assessment is being prepared that will evaluate the effects of constructing and operating this proposed water pipeline from its point of origin to its point of termination, including the 9.67 miles of public land. It is anticipated that this Environmental Assessment will be issued in November 1992.

Dated: September 22, 1992.

Richard E. Fagan,

Acting Desert District Manager.

[FR Doc. 92-23554 Filed 9-28-92; 8:45 am]

BILLING CODE 4310-40-M

[AZ-020-08-4320-12]

Kingman Resource Area Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting—Kingman Resource Area Grazing Board.

SUMMARY: The Kingman Resource Area Grazing Advisory Board will hold a meeting on Wednesday, November 4, 1992. The meeting will start at 9 a.m. in the Kingman Resource Area Conference Room, 2475 Beverly Avenue, Kingman, Arizona 86401.

The agenda for the meeting will include:

1. Update of the Kingman Resource Management Plan.
2. Status of Wilderness/Range Improvement Maintenance Schedules.
3. Report on Range Improvements for FY 92/93.
4. Allotment Management Plan Update.
5. Request for Advisory Board Expenditures.
6. Arrangements for Future Meetings.

The meeting is open to the public. Anyone wishing to make oral or written statements to the Board is requested to do so through the office of the District Manager, 2015 West Deer Valley Road, Phoenix, Arizona 85027, at least seven days prior to the meeting date.

Summary minutes of the Board meeting will be maintained in the District Office and be made available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Dated: September 23, 1992.

David J. Miller,

Associate District Manager.

[FR Doc. 92-23609 Filed 9-28-92; 8:45 am]

BILLING CODE 4310-32-M

[AZ-020-08-4320-12]

Southwestern Arizona Grazing Advisory Board; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting—Southwestern Arizona Grazing Advisory Board.

SUMMARY: The Southwestern Arizona Grazing Advisory Board will hold a meeting on Thursday, November 5, 1992. The meeting will start a 9 a.m. in the Phoenix District Conference Room, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

The agenda for the meeting will include:

1. Update of the Bureau's Exchange Program.
2. Update of the Santa Maria Ranch.
3. Status of Wilderness Program.
4. Report on Range Improvements for FY 92/93.
5. Range Program Summary Update.
6. Request for Advisory Board Expenditures.
7. Arrangements for Future Meetings.

The meeting is open to the public. Anyone wishing to make oral or written statements to the Board is requested to do so through the office of the District Manager, 2015 West Deer Valley Road, Phoenix, Arizona 85027, at least seven days prior to the meeting date.

Summary minutes of the Board meeting will be maintained in the District Office and be made available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Dated: September 23, 1992.

David J. Miller,

Associate District Manager.

[FR Doc. 92-23610 Filed 9-28-92; 8:45 am]

BILLING CODE 4310-32-M

[CA-010-4212-13, CACA 30807]

Realty Action; Exchange of Public Land in El Dorado County, CA

AGENCY: Bureau of Land Management (BLM), Interior.

SUMMARY: The following described public land is being considered for exchange under section 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1716):

Selected Public Land

El Dorado County, CA

T. 11 N., R. 9E., M.D.M.

Sec. 12: all public land lying north and east of State Highway 49, including the

NW¼NE¼SE¼, E½NW¼SE¼NW¼, and W½NE¼SE¼NW¼
Totaling Approximately 35-acres.

The above described public land is being considered for a possible transfer to adjacent owners ED and Virginia Bacchi. The subject tracts are difficult to manage in Federal ownership and are of minimal value to the general public.

In exchange the public would receive a conservation easement on 29-acres of private riverfront property on the South Fork of the American River. The property fronts approximately one-half mile (2400 ft.) of this extremely popular river. The easement would essentially prevent future disturbances detrimental to wildlife habitat, and preserve the scenic qualities present. The conservation easement would be located on the following described private land:

Offered Conservation Easement

El Dorado County, CA

T. 11 N., R. 9E., M.D.M.
Sec. 15: that portion of the W½NW¼ lying west of the South Fork of the American River (APN 105-120-25)
Totaling Approximately 29-acres.

SUPPLEMENTARY INFORMATION: The above described Federal land would be transferred subject to a reservation to the United States for a right-of-way for ditches and canals constructed under the authority of the Act of August 20, 1890 (43 U.S.C. 943); also rights-of-way of record would be identified as prior existing rights.

All necessary clearances including clearances for archaeology, and rare plants and animals would be completed prior to any conveyances of title by the United States.

This proposal is considered to be in the public interest and is consistent with current land use plans.

The selected public land described in this notice is hereby segregated form settlement, location and entry under the public land laws and from the mining laws for a period of two years from the date that this notice is published in the **Federal Register**, or until patent is issued by the United States.

For additional Information: Contact Mike Kelley at (916) 985-4474, or at the address listed below.

ADDRESSES: For a period of 45 days from publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, c/o the Area Manager, Folsom Resource Area, 63 Natoma Street, Folsom, CA 95630.

D.K. Swickard,
Area Manager.
[FR Doc. 92-23539 Filed 9-28-92; 8:45 am]
BILLING CODE 4310-40-M

Bureau of Reclamation

Paradox Valley Unit, Colorado River Basin Salinity Control Project, Colorado

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of cancellation of a draft supplement to the final environmental statement (FES#): INT-FES-79-14.

SUMMARY: The Bureau of Reclamation will not prepare a draft supplement to the Paradox Valley Unit Final Environmental Statement (FES-79-14) as published in the **Federal Register**, 54 FR 53193, December 27, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Stan Powers, Bureau of Reclamation, PO Box 640, Durango, CO 81302, telephone: (303) 385-6500.

SUPPLEMENTARY INFORMATION: The draft supplement would have covered changes to the plans for the Paradox Valley Unit resulting from investigations and tests conducted after preparation of FES 79-14. Additional testing indicated that the goal of annually preventing 180,000 tons of salt from entering the Dolores River could be achieved at a pumping rate of 1.5 cubic feet per second (ft^3/s) as opposed to the 5.0 ft^3/s pumping rate presented in the FES. As a result, the brine disposal method was reevaluated and disposal by injection appeared to be more feasible than the evaporation procedure recommended in the FES.

A draft environmental assessment addressing the construction and testing of test injection facilities was prepared and distributed to the public for review and comment. After comments were incorporated, the document was finalized and a Finding of No Significant Impact was signed. Test facilities have been constructed and testing of the injection concept is underway. Results from these tests will enable a final evaluation of brine disposal by injection rather than by evaporation. If injection is selected as the preferred alternative, the original 1979 Definite Plan Report will be amended and additional National Environmental Policy Act compliance will be done.

Interested public entities and individuals may obtain information on the proposed changes to the project plans by contacting Mr. Stan Powers at the address above.

Dated: September 15, 1992.

Joe D. Hall,
Deputy Commissioner
[FR Doc. 92-23611 Filed 9-28-92; 8:45 am]
BILLING CODE 4310-09-M

National Park Service

Civil War Sites Advisory Commission Meeting

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of meeting of the Civil War Sites Advisory Commission.

Notice is hereby given in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix (1988), that a meeting of the Civil War Sites Advisory Commission will be held on Monday, November 9, 1992, at the National Park Service, 800 North Capitol Street, NW, Training Room—Lower Level, Washington, DC 20002. The meeting will begin at 9 a.m. and conclude before 3:30 p.m.

This meeting constitutes the eleventh meeting of the Commission. The primary focus of the meeting will be on preparing the Commission's draft report. The Commission will welcome input from the public on the subject of Civil War site evaluation and preservation, especially as it relates to Civil War sites in Washington, DC and surrounding states.

Space and facilities to accommodate members of the public may be limited and persons will be accommodated on a first-come, first-served basis. Anyone may file a written statement with the Commission concerning matters to be discussed.

Persons wishing further information concerning the meeting or who wish to submit written statements, may contact Ms. Jan Townsend, Interagency Resources Division, P.O. Box 37127, Washington, DC 20013-7127 (telephone 202-343-3936). Draft summary minutes of the meeting will be available for public inspection about 8 weeks after the meeting, in suite 250, 800 N. Capitol St., NW., Washington, DC 20002.

Dated: September 21, 1992.

Lawrence E. Aten,
Acting Executive Director and Chief, Interagency Resources Division.
[FR Doc. 92-23519 Filed 9-28-92; 8:45 am]
BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before September 19, 1992. Pursuant to 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by October 14, 1992.

Patrick W. Andrus,

Acting Chief of Registration, National Register.

Arkansas

Garland County

Rix, Charles N., House, 628 Quapaw Ave., Hot Springs, 92001393

Union County

Smith—McCurry House, AR 15 N side, 3.5 mi. E of El Dorado, El Dorado vicinity, 92001394

California

Riverside County

Southern Hotel, 445 D St., Perris, 92001384

Maryland

Montgomery County

Friends Advice, 19001 Bucklodge Rd., Boyds vicinity, 92001383

Mississippi

Oktibbeha County

Overstreet School Historic District, Roughly bounded by Hogan, Montgomery, Gillespie, Jackson, Wood and Washington Sts. and the Illinois Central RR tracks, Starkville, 92001398

New Jersey

Camden County

Camden Free Public Library Main Building, 616 Broadway, Camden, 92001385

Warren County

Johnsonburg Historic District, NJ 519 and 661 adjacent parts of Mott and Allamuchy Rds., Frelinghuysen Township, Johnsonburg, 92001386

New York

Cayuga County

Church Street—Congress Street Historic District (Moravia MPS), Roughly bounded by S. Main, Church, Park and Congress Sts., Moravia, 92001364

North Main Street Historic District (Moravia MPS), N. Main St. and part of Keeler Ave., Moravia, 92001365

Ohio

Montgomery County

Fire Blocks Historic District, Roughly bounded by Jefferson, Fourth, St. Clair and Second Sts., Dayton, 92001374

Summit County

Stewart—Hanson Farm, 2832 Call Rd., Stow, 92001376

Oregon

Linn County

Harrisburg Odd Fellows Hall, 190 Smith St., Harrisburg, 92001382

Multnomah County

Crumpacker, Maurice, House, 12714 SW. Iron Mountain Blvd., Portland, 92001378

Green, Bertha M. and Marie A., House, 2610 SW. Vista Ave., Portland, 92001379

Mann, Anna Lewis, Old People's Home, 1021 NE. 33rd Ave., Portland, 92001380

Oriental Apartments, 3562 SE. Harrison St., Portland, 92001377

Umatilla County

LaDow Block, 201–239 SE. Court Ave., Pendleton, 92001381

Texas

Dallam County

Dallam County Courthouse, Jct. of Fifth and Denrock Sts., Dalhart, 92001375

Stephens County

Fort Davis Family Fort, Address Restricted, Breckenridge vicinity, 92001363

Victoria County

Presbyterian Iglesia Nicea (Victoria MRA), 401 S. DeLeon, Victoria, 92001362

Sengele, Alphonse T., House (Victoria MRA), 502 E. Juan Linn, Victoria, 92001361

Urban, Fred, House, (Victoria MRA) 501 E. River, Victoria, 92001360

Virginia

Albermarle County

Bellair, Cty. Rt. S side, 3.8 mi. E of jct. with VA 20, Charlottesville vicinity, 92001372

Bedford County

Rothsay, US 221 N side, 2000 ft. E of jct. with VA 811, Forest, 92001387

Essex County

Linden, US 17 SW side, 0.5 mi. S of Champlain, Champlain vicinity, 92001397

Northumberland County

Kirkland Grove Campground, VA 779, 1.6 mi. S of Heathsville, Heathsville vicinity, 92001391

Rice's Hotel, Jct. of Co. Rts. 1001 and 1002, Heathsville, 92001389

Pulaski County

Dublin Historic District, Roughly, Giles Ave. from Long to Main Sts., Church St. from Giles to Linkous Ave. and E. Main from Giles to Ziegler St., Dublin, 92001369

Roanoke County

Harshbarger House, 316 John Richardson Rd. (Co. Rt. 743), Roanoke (Independent City) vicinity, 92001390

Tazewell County

Wynn, James, House, 408 S. Elk St., Tazewell, 92001368

Wise County

Country Cabin, Jct. of US 23 and VA 790, Norton vicinity, 92001395

Wythe County

Crockett's Cove Presbyterian Church, VA 600 E of jct. with VA 603, Wytheville vicinity, 92001373

Charlottesville Independent City

Mount Zion Baptist Church, 105 Ridge St., Charlottesville (Independent City), 92001388

Fairfax Independent City

29 Diner, 10536 Lee Hwy., Fairfax (independent City), 92001370

Fairfax Public School, 10209 Main St., Fairfax (Independent City), 92001367

Hampton Independent City

Buckroe Beach Carousel, 602 Settlers Landing Rd., Hampton (Independent City), 92001396

Lynchburg Independent City

Virginia Episcopal School, 400 Virginia Episcopal School Rd., Lynchburg (Independent City), 92001392

Petersburg Independent City

Blandford Cemetery, 319 S. Crater Rd., Petersburg (Independent City), 92001371

Portsmouth Independent City

Cedar Grove Cemetery, 301 Fort Ln., Portsmouth (Independent City), 92001366

[FR Doc. 92–23520 Filed 9–28–92; 8:45 am]

BILLING CODE 4310–70–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32144]

Montana Rail Link, Inc.—Lease and Operation—Burlington Northern Railroad Co.

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10505, the Commission exempts from the prior approval requirements of 49 U.S.C. 11343 *et seq.* the lease and operation by Montana Rail Link, Inc. of Burlington Northern Railroad Company's line from Phosphate to Helena, MT, subject to standard employee protective conditions.

DATES: The exemption is effective on September 29, 1992. Petitions to reopen must be filed by October 19, 1992.

ADDRESSES: Send pleadings referring to Finance Docket No. 32144 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.
(2) Petitioner's representative: Mark H. Sidman, Adam M. Mycyk, Weiner, Brodsky, Sidman & Kider, P.C., 1350 New York Avenue, NW., Washington, DC 20005–4797.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder, (202) 927–5610.

[TDD for hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359.

[Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Decided: September 22, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–23664 Filed 9–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 32140]

Montana Rail Link, Inc.—Purchase and Operation Exemption—Line of Burlington Northern Railroad Co.

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10505, the Commission exempts from the prior approval requirements of 49 U.S.C. 11343 *et seq.*, the purchase by Montana Rail Link, Inc., and its operation of Burlington Northern Railroad Company's 12-mile line between Whitehall and Spire Rock, MT, subject to standard employee protective conditions.

DATES: The exemption is effective on September 29, 1992. Petitions to reopen must be filed by October 19, 1992.

ADDRESSES: Send pleadings referring to Finance Docket No. 32140 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.
(2) Mark H. Sidman, Adam M. Mycyk, Weiner, Brodsky, Sidman & Kider, P. C., 1350 New York Avenue, NW., Washington, DC 20005–4797.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder, (202) 927–5610.

[TDD for hearing impaired: (202) 927–5721]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Decided: September 22, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–23665 Filed 9–28–92; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-24,206]

Honeywell, Incorporated; Fort Washington, PA; Revised Determination on Reconsideration

By order dated June 25, 1992, The United States Court of International Trade (USCIT) in *Former Employees of Honeywell, Inc.* v. *U.S. Secretary of Labor* (USCIT 90–08–00437) remanded this case to the Department for further investigation.

On September 3, 1992, the Department met with the union and its counsel in Philadelphia in response to the Court's remand concerning worker separations resulting from the outsourcing of production to foreign companies offshore.

At that meeting the union identified several products imported by the company that replaced similar products formerly produced at Fort Washington and that were marketed to the same customer base served by the Fort Washington plant. Currently, all production at Fort Washington has ceased and all production workers have been separated. The only remaining activities are marketing and sales, administration and engineering and design.

The workers were previously certified for trade adjustment assistance under petition TA–W–16,688 which expired on June 11, 1989. Although the reconsideration findings show that sales for Fort Washington increased in 1989 compared to 1988, it has become clear in this remand investigation that significant items of production have been replaced by products from offshore firms during the relevant period.

The findings illustrate the long term strategy of the company to improve its competitiveness. As a result of this strategy, sometime around the period beginning in 1987 the company began a program of global outsourcing of production. The findings suggest that a significant portion of this outsourcing went to foreign firms offshore. This outsourced production was imported back to Honeywell to serve the same customer base.

Other findings show that the workers were used interchangeably and are not readily identifiable by product. Accordingly, since the worker separations resulting from the transfer of Fort Washington's production to foreign offshore companies and its importation back to Honeywell was significant, the Department is recommending that all the workers of the Fort Washington plant of Honeywell, Inc., be certified eligible to apply for adjustment assistance.

Conclusion

After careful consideration of the new facts obtained on reconsideration, it is concluded that increased imports of articles like or directly competitive with those produced at Honeywell, Inc., Fort Washington, Pennsylvania contributed importantly to total or partial separation of workers at Honeywell, Inc. In accordance with the provisions of the Trade Act of 1974, I make the following revised determination:

All workers of Honeywell, Inc., Fort Washington, Pennsylvania who became totally or partially separated from employment on or after June 11, 1989 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 21st day of September 1992.

Stephen A. Wandner,

Deputy Director, Office of Legislation & Actuarial Service, Unemployment Insurance Service.

[FR Doc. 92–23583 Filed 9–28–92; 8:45 am]

BILLING CODE 4510–30–M

[TA-W-27,474]

Performance Semiconductor Corporation; Sunnyvale, CA; Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on July 6, 1992 in response to a worker petition which was filed on July 6, 1992 on behalf of workers at Performance Semiconductor Corporation, Sunnyvale, California.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 18th day of September, 1992.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 92-23582 Filed 9-28-92; 8:45 am]

BILLING CODE 4510-30-M

Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is publishing, for public information, a list of the following employers which have attestations on file with DOL for using alien crewmembers for longshore activities in U.S. ports.

ADDRESSES: Attestations and supporting documentation for each attestation are available for inspection in the Public Disclosure Room, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N4456, 200 Constitution Avenue, NW., Washington, DC 20210.

Any complaints regarding a particular attestation or an employer's activities under that attestation, shall be filed with a local office of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor. The address of such offices are found in many local telephone directories, or may be obtained by writing to the Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

Regarding the Attestation Process

Chief, Division of Foreign Labor Certifications, U.S. Employment Service. Telephone: 202-535-0163 (this is not a toll-free number).

Regarding the Complaint Process

Chief, Farm Labor Program, Wage and Hour Division. Telephone 202-523-7605 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 (IA), employers are, in certain circumstances, required to submit attestations to the Department of Labor (DOL) in order to be allowed by the Immigration and Naturalization Service (INS) to use alien crewmembers to perform specified longshore activity(ies) at U.S. ports. The employer's attestation must be on file with DOL before the INS will permit such longshore work. Public Law 101-649, 104 Stat. 4978. The Employment and Training Administration, pursuant to 20 CFR 655.550, is publishing the following list of employers which have submitted attestations which have been accepted for filing. The list of employers is published so that U.S. longshore workers and other persons and organizations can be aware of employers who have requested alien crewmembers for longshore activities in U.S. ports. In addition, attestations and supporting documentation are available for inspection at the address for the Employment and Training Administration set forth in the **ADDRESSES** section of this notice.

If a person wishes to file a complaint regarding a particular attestation or an employer's activity(ies) under that attestation, such complaint must be filed at the address for the Wage and Hour Division of the Employment Standards Administration set forth in the **ADDRESSES** section of this notice.

Signed at Washington, DC, this 21st day of September, 1992.

Robert A. Schaerfl,

Director, United States Employment Service.

United States Department of Labor; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; for the Period of 05/31/91 to 04/26/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200021
Disposition: Accepted for Processing; Date: 02/04/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200015
Disposition: Accepted for Processing; Date: 02/04/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200025
Disposition: Accepted for Processing; Date: 02/04/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/05/92; ETA Case No.: 200032
Disposition: Accepted for Processing; Date: 02/06/92

Employer Name: Sunmar Shipping Inc.
U.S. Business Agent: Railsback
Street Address: 5400 Columbia Seafirst Center 701 Fifth Avenue
City, State, Zip: Seattle, WA
Telephone No.: 206-623-7580
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200028
Disposition: Returned to Employer; Date: 02/05/92

Employer Name: Sunmar Shipping Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Akutan, Alaska, AK

Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/11/92; ETA Case No.: 200067
Disposition: Accepted for Processing; Dated: 02/13/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Akutan, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200023
Disposition: Accepted for Processing; Date: 02/04/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200106
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200097
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200104
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/16/92; ETA Case No.: 200122
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200117
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Alitak Bay, Alaska Alitak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200114
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Amak Island, Alaska Amak Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200135
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Amak Island, Alaska Amak Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200131
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Amak Island, Alaska Amak Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200142
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Amak Island, Alaska Amak Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200125
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Amak Island, Alaska Amak Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200146
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Atka, Alaska Atka, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200136
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Atka, Alaska Atka, AK
Activities Requested: LOAD, OPER of EQUIP

Receipt Date: 02/14/92; ETA Case No.: 200133
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Atka, Alaska Atka, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200140
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Atka, Alaska Atka, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200126
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7527
Port Name/State: Atka, Alaska Atka, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200147
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200080
Disposition: Accepted for Processing; Dated: 02/14/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200071
Disposition: Accepted for Processing; Dated: 02/13/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200073
Disposition: Accepted for Processing; Dated 2/14/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200083
Disposition: Accepted for Processing; Dated 02/14/92
Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200087
Disposition: Accepted for Processing; Dated 02/14/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Beaver Inlet, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200077
Disposition: Accepted for Processing; Dated 02/14/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200020
Disposition: Accepted for Processing; Dated 02/04/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200016
Disposition: Accepted for Processing; Dated 02/04/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200027
Disposition: Accepted for Processing; Dated 02/04/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/05/92; ETA Case No.: 200031
Disposition: Accepted for Processing; Dated: 02/06/92
Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/11/92; ETA Case No.: 200068
Disposition: Accepted for Processing; Dated: 02/13/92
Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: Railsback
Street Address: 5400 Columbia Seafirst Center 701 Fifth Avenue

City, State, Zip: Seattle, WA
Telephone No.: 206-623-7580
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200029
Disposition: Returned to Employer; Dated: 02/05/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Chignik Chignik, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200024
Disposition: Accepted for Processing; Dated: 02/04/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200192
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200207
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200200
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200220
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200228
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200079
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200070
Disposition: Accepted for Processing; Dated: 02/13/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200070
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200082
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200086
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Dutch Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200076
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Egegik Bay, Alaska Egigik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200189
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Egegik Bay, Alaska Egigik Bay, AK

Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200204
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Egegik Bay, Alaska Egigik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200197
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Egegik Bay, Alaska Egigik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200214
Disposition: Accepted for Processing; Dated: 04/10/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Egegik Bay, Alaska Egigik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200222
Disposition: Accepted for Processing; Dated 04/10/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Hagemeister Strait, Alaska Hagemeister S
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200188
Disposition: Accepted for Processing; Dated 04/10/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Hagemeister Strait, Alaska Hagemeister S
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200212
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Hagemeister Strait, Alaska Hagemeister S
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200196
Disposition: Accepted for Processing; Dated 04/09/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Hagemeister Strait, Alaska Hagemeister S
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200215
Disposition: Accepted for Processing; Dated 04/10/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Hagemeister Strait, Alaska Hagemeister S
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200223
Disposition: Accepted for Processing; Dated: 4/10/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Harris Bay, Alaska Harris Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200139
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Harris Bay, Alaska Harris Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200134
Disposition: Accepted for Processing; Dated: 01/19/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Harris Bay, Alaska Harris Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200141
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Harris Bay, Alaska Harris Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200129
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Harris Bay, Alaska Harris Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200149
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin, AK

Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200238
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200181
Disposition: Return to Employer; Dated: 03/27/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200174
Disposition: Returned to Employer; Dated 03/27/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200236
Disposition. Accepted for Processing; Dated: 04/14/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200168
Disposition: Returned to Employer; Dated: 03/27/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200234
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03/17/92; ETA Case No.: 200177
Disposition: Returned to Employer; Dated: 03/27/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200240
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200186
Disposition: Returned to Employer; Dated: 03/27/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Iniskin Bay, Alaska Iniskin Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200242
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200180
Disposition: Returned to Employer; Dated: 03/27/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200239
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200239
Disposition: Accepted for Processing; Dated: 04/14/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200173
Disposition: Returned to Employer; Dated: 03/27/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP

Receipt Date: 04/01/92; ETA Case No.: 200171
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200235
Disposition: Accepted for Processing; Dated: 04/14/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300 West
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200176
Disposition: Retuned to Employer; Dated: 03/27/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300 West
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200241
Disposition: Accepted for Processing; Dated: 04/14/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200185
Disposition: Returned to Employer; Dated; 03/27/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Ivanof Bay, Alaska Ivanof Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/16/92; ETA Case No.: 200243
Disposition: Accepted for Processing; Dated: 04/14/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kiliuda Bay, Alaska Kiliuda Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200105
Disposition: Accepted for Processing; Dated: 02/18/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kiliuda Bay, Alaska Kiliuda Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200098
Disposition: Accepted for Processing; Dated: 02/18/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kiliuda Bay, Alaska Kiliuda Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200099
Disposition: Accepted for Processing; Dated: 02/18/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Kiliuda Bay, Alaska Kiliuda Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200123
Disposition: Accepted for Processing, Dated: 02/19/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Kiliuda Bay, Alaska Kiliuda Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200113
Disposition: Accepted for Processing; Dated; 02/18/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200041
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200066
Disposition: Accepted for Processing; Dated: 02/11/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200060
Disposition: Accepted for Processing; Dated: 02/11/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP

Receipt Date: 02/07/92; ETA Case No.: 200045
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200047
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: King Cove, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200052
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200190
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200205
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200198
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200213
Disposition: Accepted for Processing; Dated: 04/10/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200221
Disposition: Accepted for Processing; Dated: 04/10/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Larsen Bay, Alaska Larsen Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200138
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Larsen Bay, Alaska Larsen Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200132
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Larsen Bay, Alaska Larsen Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200144
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Larsen Bay, Alaska Larsen Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200128
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Larsen Bay, Alaska Larsen Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200145
Disposition: Accepted for Processing; Dated: 02/19/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200037
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200065

Disposition: Accepted for Processing; Dated: 02/11/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200061
Disposition: Accepted for Processing; Dated: 02/11/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200046
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200048
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Lost Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200055
Disposition: Accepted for Processing; Dated: 02/10/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200091
Disposition: Returned to Employer; Dated: 02/17/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03/14/92; ETA Case No.: 200152
Disposition: Accepted for Processing; Dated: 02/28/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200091
Disposition: Returned to Employer; Dated: 02/17/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03114/92; ETA Case No.: 200153
Disposition: Accepted for Processing; Dated: 02/28/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200088
Disposition: Returned to Employer; Dated: 02/17/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03/14/92; ETA Case No.: 200151
Disposition: Accepted for Processing; Dated: 02/28/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200089
Disposition: Returned to Employer; Dated: 02/17/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03/14/92; ETA Case No.: 200155
Disposition: Accepted for Processing; Dated: 02/28/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200092
Disposition: Returned to Employer; Dated: 02/17/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Makushin Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 03/14/92; ETA Case No.: 200154

Disposition: Accepted for Processing; Dated: 02/28/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200232
Disposition: Returned to Employer; Dated: 04/15/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200178
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200172
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200231
Disposition: Returned to Employer; Dated: 04/15/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/1/92; ETA Case No.: 200170
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200230
Disposition: Returned to Employer; Dated: 04/15/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200233
Disposition: Returned to Employer; Dated: 04/15/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200175
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200187
Disposition: Returned to Employer; Dated: 03/27/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Naked Island, Alaska Naked Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200229
Disposition: Returned to Employer; Dated: 04/15/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Nunavechak Bay, Alaska Nunavechak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200194
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Nunavechak Bay, Alaska Nunavechak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200210
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Nunavechak Bay, Alaska Nunavechak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200202
Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Nunavechak Bay, Alaska Nunavechak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200217
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Nunavechak Bay, Alaska Nunavechak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200225
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200108
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200095
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200102
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200120
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200118
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Port Bailey, Alaska Port Bailey, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200116
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Moller, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200040
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Moller, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200063
Disposition: Accepted for Processing; Dated: 02/11/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Port Moller, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200058
Disposition: Accepted for Processing; Dated: 02/11/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Port Moller, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200043
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Port Moller, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200054
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200038
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200064
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Nissui Shipping Corporation

U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200059
Disposition: Accepted for Processing; Dated 02/11/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200044
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200050
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Sand Point, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200051
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sawmill Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200036
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sawmill Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200033
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sawmill Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200056
Disposition: Accepted for Processing; Dated: 02/11/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Sawmill Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200034
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Sawmill Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200035
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Security Cove, Alaska Security Cove, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200191
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Security Cove, Alaska Security Cove, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200206
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Security Cove, Alaska Security Cove, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200199
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Security Cove, Alaska Security Cove, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200216
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Security Cove, Alaska Security Cove, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200224
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.

Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sitkalidak Bay, Alaska Sitkalidak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No: 200109
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sitkalidak Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200094
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Sitkalidak Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200101
Disposition: Accepted for Processing; Dated 02/18/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Sitkalidak Bay, Alaska Sitkalidak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200119
Disposition: Accepted for Processing; Dated 02/19/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Sitkalidak Bay, Alaska Sitkalidak Bay, A
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200112
Disposition: Accepted for Processing; Dated 02/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200039
Disposition: Accepted for Processing; Dated 02/10/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200062
Disposition: Accepted for Processing; Dated 02/11/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliot Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206–286–1700
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200057
Disposition: Accepted for Processing; Dated: 02/11/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200042
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Sunmar Shipping, Inc.
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200049
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Squaw Harbor, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/07/92; ETA Case No.: 200053
Disposition: Accepted for Processing; Dated: 02/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: St. George Island, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200110
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: St. George Island, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/10/92; ETA Case No.: 200093
Disposition: Accepted for Processing; Dated: 02/18/93

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: St. George Island, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200100
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145

Port Name/State: St. George Island, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200121
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: St. George Island, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200111
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Matthew Island, Alaska St. Matthew I
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200137
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Matthew Island, Alaska St. Matthew I
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/19/92; ETA Case No.: 200130
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Matthew Island, Alaska St. Matthew I
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200143
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: St. Matthew Island, Alaska St. Matthew I
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200127
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: St. Matthew Island, Alaska St. Matthew I
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200148
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Paul St. Paul, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200019
Disposition: Accepted for Processing; Dated: 02/04/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Paul St. Paul, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200017
Disposition: Accepted for Processing; Dated: 02/04/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: St. Paul St. Paul, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200026
Disposition: Accepted for Processing; Dated: 02/04/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: St. Paul St. Paul, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/05/92; ETA Case No.: 200030
Disposition: Accepted for Processing; Dated: 02/06/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: St. Paul St. Paul, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 01/31/92; ETA Case No.: 200022
Disposition: Accepted for Processing; Dated: 02/04/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Summit Island, Alaska Simmit Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200193
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Summit Island, Alaska Simmit Island, Ak
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200208
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Summit Island, Alaska Simmit Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200201

Disposition: Accepted for Processing; Dated: 04/09/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Summit Island, Alaska Simmit Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200219
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Summit Island, Alaska Simmit Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200227
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Talitlik Narrows, Alaska Talitlik Narrow
Activities Requested:
Receipt Date: 03/17/92; ETA Case No.: 200156
Disposition: Accepted for Processing; Dated: 03/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Tatitlik Narrows, Alaska Tatitlik Narrow
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200164
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agency: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Tatitlik Narrows, Alaska Tatitlik Narrow
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200163
Disposition: Accepted for Processing; Dated: 03/26/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Tatitlik Narrows, Alaska Tatitlik Narrow
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200166
Disposition: Accepted for Processing; Dated: 03/26/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Tatitlik Narrows, Alaska Tatitlik Narrow
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200182
Disposition: Accepted for Processing; Dated: 03/26/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Thumb Bay, Alaska Thumb Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200161
Disposition: Accepted for Processing; Dated: 03/26/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Thumb Bay, Alaska Thumb Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200165
Disposition: Accepted for Processing; Dated: 03/26/92
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Thumb Bay, Alaska Thumb Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200183
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Togiak Bay, Alaska Togiak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200195
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Togiak Bay, Alaska Togiak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200211
Disposition: Returned to Employer; Dated: 04/09/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Togiak Bay, Alaska Togiak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200203
Disposition: Accepted for Processing; Dated: 04/09/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Togiak Bay, Alaska Togiak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200218
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies

Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Togiak Bay, Alaska Togiak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/25/92; ETA Case No.: 200226
Disposition: Accepted for Processing; Dated: 04/10/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Two Moon Bay Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200157
Disposition: Accepted for Processing; Dated: 03/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Two Moon Bay Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200160
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Two Moon Bay Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200159
Disposition: Accepted for Processing; Dated: 03/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Two Moon Bay, Alaska Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200158
Disposition: Accepted for Processing; Dated: 03/18/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Two Moon Bay, Alaska Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200162
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Two Moon Bay, Alaska Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/01/92; ETA Case No.: 200167
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Two Moon Bay, Alaska Two Moon Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 04/04/92; ETA Case No.: 200184
Disposition: Accepted for Processing; Dated: 03/26/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Uganik Bay, Alaska Uganik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200107
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Uganik Bay, Alaska Uganik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200096
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Uganik Bay, Alaska Uganik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200103
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Uganik Bay, Alaska Uganik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/18/92; ETA Case No.: 200124
Disposition: Accepted for Processing; Dated: 02/19/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Uganik Bay, Alaska Uganik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200115
Disposition: Accepted for Processing; Dated: 02/18/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Wide Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200078
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Wide Alaska Bay AK

Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200069
Disposition: Accepted for Processing; Dated: 02/13/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Wide Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200084
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Wide Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/13/92; ETA Case No.: 200081
Disposition: Accepted for Processing; Dated: 02/14/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Wide Bay, Alaska, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 02/14/92; ETA Case No.: 200074
Disposition: Accepted for Processing; Dated: 02/14/92

Division of Foreign Labor Certification; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; 08/17/92 TO 08/30/92

There was no D–1 Crewmember Attestation activity from this Region for this time period.

Division of Foreign Labor Certification; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; 08/31/92 TO 09/13/92

There was no D–1 Crewmember Attestation activity from this Region for this time period.

United States Department of Labor; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; For the Period of 05/11/92 TO 05/24/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Alinchak Bay, Alaska Alinchak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200324
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Alinchak Bay, Alaska Alinchak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200314
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Alinchak Bay, Alaska Alinchak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200318
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Alinchak Bay, Alaska Alinchak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200321
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Alinchak Bay, Alaska Alinchak Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200317
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Bold Island, Alaska Bold Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200301
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Bold Island, Alaska Bold Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200305
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Bold Island, Alaska Bold Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200309
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Bold Island, Alaska Bold Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200293

Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Taiyo Gyogyo Kabuskiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Bold Island, Alaska Bold Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200297
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Cape Romanzof, Alaska Cape Romanzof, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200290
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Cape Romanzof, Alaska Cape Romanzof, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200290
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Cape Romanzof, Alaska Cape Romnazof, AD
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200288
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Cape Romanzof, Alaska Cape Romanzof, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200289
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Cape Romanzof, Alaska Cape Romanzof, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200287
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Taigo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Cape Romanzof, Alaska Cape Romanzof, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200291
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Kayokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Ikatan bay, Alaska Ikatan Bay AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200302
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Ikatan Bay, Alaska Ikatan Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200306
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Ikatan Bay, Alaska Ikatan Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200310
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10-1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907-272-6145
Port Name/State: Ikatan Bay, Alaska Ikatan Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200294
Disposition: Accepted for Processing; Dated: 05/12/94
Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907-272-7537
Port Name/State: Ikatan Bay, Alaska Ikatan Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200298
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Kyokuyo Co. Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Noyes Island, Alaska Noyes Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200327
Disposition: Accepted for Processing; Dated: 05/12/92
Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Noyes Island, Alaska Noyes Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200330
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Noyes Island, Alaska Noyes Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200331
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Noyes Island, Alaska Noyes Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200329
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Noyes Island, Alaska Noyes Island, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/23/92; ETA Case No.: 200328
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Port Estralla, Alaska Port Estralla, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200303
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Port Estralla, Alaska Port Estralla, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200307
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Port Estralla, Alaska Port Estralla, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200311
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Port Estralla, Alaska Port Estralla, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200295
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Port Estralla, Alaska Port Estralla, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200299
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Shelter Bay, Alaska Shelter Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200325
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Shelter Bay, Alaska Shelter Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200312
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Shelter Bay, Alaska Shelter Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200319
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Shelter Bay, Alaska Shelter Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200322
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Shelter Bay, Alaska Shelter Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200316
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ugashik Bay, Alaska Ugashik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200326
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nichiro Corporation

U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ugashik Bay, Alaska Ugashik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200313
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Ugashik Bay, Alaska Ugashik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200320
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Ugashik Bay, Alaska Ugashik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200323
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Ugashik Bay, Alaska Ugashik Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200315
Disposition: Accepted for Processing; Dated: 05/12/92

Employer Name: Kyokuyo Co., Ltd.
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Volcano Bay, Alaska Volcano Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200300
Disposition: Accepted for Processing; Dated 05/12/92

Employer Name: Nichiro Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Volcano Bay, Alaska Volcano Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200304
Disposition: Accepted for Processing; Dated 05/12/92

Employer Name: Nissui Shipping Corporation
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Volcano Bay, Alaska Volcano Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200308
Disposition: Accepted for Processing; Dated 05/12/92

Employer Name: Rokuchu Marine Corporation
U.S. Business Agent: A.N.P. Shipping Co.
Street Address: P.O. Box 10–1300
City, State, Zip: Anchorage, AK 99610
Telephone No.: 907–272–6145
Port Name/State: Volcano Bay, Alaska Volcano Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200292
Disposition: Accepted for Processing; Dated 05/12/92

Employer Name: Taiyo Gyogyo Kabushiki Kaisha
U.S. Business Agent: North Star Maritime Agencies
Street Address: P.O. Box 102019
City, State, Zip: Anchorage, AK 99510
Telephone No.: 907–272–7537
Port Name/State: Volcano Bay, Alaska Volcano Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 05/22/92; ETA Case No.: 200296
Disposition: Accepted for Processing; Dated 05/12/92

Division of Foreign Labor Certification; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; 05/25/92 to 06/07/92

There was no D–1 Crewmember Attestation activity from this Region for this time period.

Division of Foreign Labor Certification; Attestations filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; 06/08/92 to 06/21/92

There was no D–1 Crewmember Attestation activity from this Region for this time period.

United Stated Department of Labor; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; For the Period of 06/22/92 to 07/05/92

Employer Name: Sanwa Sempaku Kabushiki Kaisha
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 07/02/92; ETA Case No.: 200334
Disposition: Returned to Employer; Dated 06/25/92

Employer Name: Sanwa Sempaku Kabushiki Kaisha
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 07/02/92; ETA Case No.: 200335
Disposition: Returned to Employer; Dated 06/25/92

United States Department of Labor; Attestations filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; For the Period of 07/06/92 to 07/19/92

Employer Name: Sanwa Sempaku Kabushiki Kaisha
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119–4151
Telephone No.: 206–286–1700
Port Name/State: Clark's Point, Alaska Clark's Point, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 07/02/92; ETA Case No.: 200337
Disposition: Accepted for Processing; Dated: 07/10/92

Employer Name: Sanwi Sempaku Kabushiki Kaisha
U.S. Business Agent: Alaska Maritime Agencies, Inc.
Street Address: 300 Elliott Avenue West
City, State, Zip: Seattle, WA 98119-4151
Telephone No.: 206-286-1700
Port Name/State: Kvichack Bay, Alaska Kvichack Bay, AK
Activities Requested: LOAD, OPER of EQUIP
Receipt Date: 07/02/92; ETA Case No.: 200336
Disposition: Accepted for Processing; Dated: 07/10/92

Division of Foreign Labor Certification; Attestations Filed by Employers Using Alien Crewmembers for Longshore Activities at U.S. Ports; Region VI—Dallas; 08/03/92 TO 08/16/92

There was no D-1 Crewmember Attestation activity from this Region for this time period.

[FR Doc. 92-23429 filed 9-28-92; 8:45 am]
BILLING CODE 4510-30-M

Mine Safety and Health Administration

Consolidation Coal Co. et al.; Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Consolidation Coal Company

[Docket No. M-92-102-C]

Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241-1421 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Osage No. 3 Mine (I.D. No. 46-01455) located in Monongalia County, West Virginia. Due to deteriorating roof and rib conditions, the area being evaluated by check point No. 3, which is the subject of a granted petition, docket number (M-83-16-C), cannot be safely traveled and will be eliminated. The petitioner proposes to continue using evaluation check points Nos. 2 and 8 to measure the quantity and quality of air entering and leaving the affected area. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

2. Consolidation Coal Company

[Docket No. M-92-103-C]

Consolidation Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241-1421 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Osage No. 3 Mine (I.D. No. 46-01455) located in Monongalia County, West Virginia. Due to deteriorating roof conditions and an accumulation of water, the petitioner proposes to eliminate the evaluation point at 7 west, a monitoring point for the bleeder system for check points 7 and 15 which is the subject of a granted petition, docket number (M-88-229-C), and establish check points for Nos. 7, 8 and 9 to evaluate the quantity and quality of air entering and leaving the affected area instead of traveling the return aircourse in its entirety. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

3. Little Rock Coal Company

[Docket No. M-92-104-C]

Little Rock Coal Company, RR 2, Box 39, Hegins, PA 17938 has filed a petition to modify the application of 30 CFR 75.1400 (hoisting equipment; general) to its No. 1 Slope Mine (I.D. No. 36-08320) located in Schuylkill County, Pennsylvania. The petitioner proposes to use a slope conveyance (gunboat) without safety catches to transport persons. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

4. Peabody Coal Company

[Docket No. M-92-105-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.1700 (oil and gas wells) to its Camp No. 11 Mine (I.D. No. 15-08357) located in Union County, Kentucky. The petitioner proposes to seal and mine through oil and gas wells. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

5. Western Fuels-Utah, Inc.

[Docket No. M-92-106-C]

Western Fuels-Utah, Inc., P.O. Box 1067, Rangely, Colorado 81648 has filed a petition to modify the application of 30 CFR 75.507 (power connection points) to its Deserado Mine (I.D. No. 05-03505) located in Rio Blanco, Colorado. The petitioner proposes to use a non-permissible submersible pump in return air, bleeder air and sealed areas. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

6. Hobet Mining, Inc.

[Docket No. M-92-107-C]

Hobet Mining, Inc., P.O. box 305, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 77.208(e) (storage of material) to its Beth Station No. 79 Preparation Plant (Mine) (I.D. No. 46-05398), and its No. 21 Surface Mine (I.D. No. 46-04670) both located in Boone County, West Virginia, and to its Pine Creek No. 12 Preparation Plant (Mine) (I.D. No. 46-06197) and its No. 7 Surface Mine (I.D. No. 46-02249) both located in Logan County, West Virginia. The petitioner proposes to transport, store and use compressed gas cylinders on service vehicles and to store and use compressed gas cylinders in a preparation plant without removing the regulators and replacing the protective caps. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

7. Peabody Coal Company

[Docket No. M-92-108-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.325(b) (air quantity) to its Camp No. 1 Mine (I.D. No. 15-02709) located in Union County, Kentucky. Section 75.325(b) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same pool. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

8. Peabody Coal Company

[Docket No. M-92-109-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.360(c)(1) (pre-shift examinations) to its Camp No. 1 Mine (I.D. No. 15-02709) located in Union County, Kentucky. Section 75.360(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake

and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

9. Peabody Coal Company

[Docket No. M-92-110-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.360(c)(1) (pre-shift examinations) to its Martwick Underground Mine (I.D. NO. 15-14070) located in Muhlenberg, Kentucky. Section 75.360(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

10. Peabody Coal Company

[Docket No. M-92-111-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.362(c)(1) (on-shift examination) to its Martwick Underground Mine (I.D. No. 15-14070) located in Muhlenberg County, Kentucky. Section 75.362(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

11. Peabody Coal Company

[Docket No. M-92-112-C]

Peabody Coal Company, P.O. box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.362(c)(1) (on-shift examination) to its Camp No. 1 Mine (I.D. No. 15-02709) located in Union County, Kentucky. Section 75.362(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

12. Peabody Coal Company

[Docket No. M-92-113-C]

Peabody Coal Company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.362(c)(1) (on-shift examination) to its Camp No. 11 Mine (I.D. No. 15-08357) located in Union County, Kentucky. Section 75.362(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

13. Peabody Coal Company

[Docket No. M-92-114-C]

Peabody Coal company, P.O. Box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.325(b) (air quantity) to its Camp No. 11 Mine (I.D. No. 15-08357) located in Union County, Kentucky. Section 75.325(b) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

14. Peabody Coal Company

[Docket No. M-92-115-C]

Peabody Coal Company, P.O. box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.360(c)(1) (pre-shift examinations) to its Camp No. 11 Mine (I.D. No. 15-08357) located in Union County, Kentucky. Section 75.360(c)(1) is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

15. Peabody Coal Company

[Docket No. M-92-116-C]

Peabody Coal Company, P.O. box 1990, Henderson, Kentucky 42420-1990 has filed a petition to modify the application of 30 CFR 75.325(b) (air quantity) to its Martwick Underground Mine (I.D. No. 15-14070) located in Muhlenberg, Kentucky. Section 75.325(b)

is not scheduled to be effective until November 16, 1992. The petitioner proposes to use the stopping line constructed to separate the intake and return aircourses in rooms previously developed on the same panel. Permanent stopping lines would be constructed when rooms are driven more than 600 feet deep from the centerline of the panel from which the rooms are driven, and temporary stopping lines would be used when rooms are driven 600 feet deep or less from the centerline of the panel from which the rooms are driven. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

16. Consolidation Coal Company

[Docket No. M-92-117-C]

The United Mine Workers of American (UMWA), 900 Fifteenth Street, NW., Washington, DC has filed a request to amend a petition filed by the Consolidation Coal Company, Robinson Run Mine, (I.D. No. 56-01318), located in Monongalia County, West Virginia for 30 CFR 75.326 (aircourses and belt haulage entries), Docket Number M-90-192-C. The UMWA requests that the petition be amended so that: (1) when the carbon monoxide system gives an audible signal at 15 ppm above the established ambient level and the miners are on the surface, no one is to be permitted to enter the mine except those persons designated to investigate the source of the alarm. When a determination is made as to the source of the alarm and that the mine is safe to enter, the miners may be permitted underground: and (2) When the carbon monoxide system gives an audible signal at 15 ppm above the established ambient level and miners are enroute into the mine, they must be held at or withdrawn to a safe location outby the sensor(s) activating the alarm. An investigation must be made as to the source of such alarm and once a determination is made that the mine is safe to enter, the miners must be permitted to proceed underground.

17. Commercial Stone Company, Inc.

[Docket No. M-92-12-C]

Commercial Stone Company, Inc., 2200 Springfield Pike, Connellsville, Pennsylvania 15425 has filed a petition to modify the application of 30 CFR 56.6220 (I.D. No. 36-00047) located in Fayette County, Pennsylvania. The petitioner proposes to use a bulk blend truck to produce ammonium nitrate-fuel oil and ammonium nitrate-fuel oil emulsions for both face and bench holes.

Request for Comments

Persons interested in these petitions may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before October 29, 1992. Copies of these petitions are available for inspection at that address.

Dated: September 22, 1992.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 92-23584 Filed 9-28-92; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 92-55]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee.

DATES: October 21, 1992, 8:30 a.m. to 4 p.m.; and October 22, 1992, 8:30 a.m. to noon.

ADDRESSES: National Aeronautics and Space Administration, Dryden Flight Research Facility, Conference Room 1, Building 4800, Edwards, CA 93523.

FOR FURTHER INFORMATION CONTACT: Ms. Catherine Smith, Office of Aeronautics and Space Technology, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-2367.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Dryden Flight Research Facility Overview
—Aeronautics Update
—Advanced Subsonic Technology Program Plans
—Aeronautics and Space Engineering Board Aeronautics Study
—Aerospace Research & Technology Subcommittee Meeting Status
—Flight Research Strategy Implementation at Dryden Flight Research Facility
—Benchmarking in U.S. Aerospace Research Facilities
—Securing U.S. Leadership in Advanced Computing Capabilities
—Facilities Tours

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: September 22, 1992.

John W. Gaff,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 92-23523 Filed 9-28-92; 8:45 am]

BILLING CODE 7510-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 40-08027-MLA and ASLBP No. 91-623-01-MLA]

Atomic Safety and Licensing Board Before Administrative Judge James P. Gleason, Presiding Officer

In the Matter of Sequoyah Fuels Corporation, (Source Materials License No. Sub-1010); Order (Status Conference).

September 22, 1992

Under the authority of 10 CFR § 2.1209, a Status Conference will be held on this proceeding at 9 a.m. on November 17, 1992 in the fifth floor hearing room of the Atomic Safety and Licensing Board Panel, East-West Towers, 4350 East West Highway, Bethesda, Maryland.

The Conference is being held to obtain detailed, complete and timely information on schedules in the license renewal application process with the view of determining whether the present hearing proceeding can be accelerated. In the interest of obtaining the latest reliable information, it would be helpful if the Sequoyah Fuels Corporation (licensee) and the Staff would arrange to have officials available at the Conference who have knowledge of the licensee's operations, authority over scheduling plant operations and the scheduling of Staff material licensing activities. The identity and expertise of these individuals should be made known to the parties prior to the Conference. It would also be useful for the Licensee and Staff to submit, at least one week before the Conference, reports of the schedule changes made since the

license renewal application was filed on August 29, 1990.

Ordered: Bethesda, Maryland, September 22, 1992.

For the Atomic Safety and Licensing Board.

James P. Gleason,

Presiding Officer, Administrative Judge.

[FR Doc. 92-23543 Filed 9-28-92; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-31216; File No. SR-NASD-92-16]

Self-Regulatory Organizations; National Association of Securities Dealers; Extension of Public Comment Period for Proposed Rule Change

September 22, 1992.

On May 1, 1992, the National Association of Securities Dealers ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change 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, that would enhance operation of the Select Net Service by adding Consolidated Quotation Service ("CQS") securities to those eligible for trading through SelectNet. Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 30961, July 27, 1992) and by publication in the **Federal Register** (57 FR 34158, August 3, 1992). On August 24, 1992, the Commission extended the period for public comment until September 24, 1992.[1]

The Commission received a request for another extension of the period for public comment on the proposed rule change.[2] The Commission finds that the complexity and significance of the filing dictates a longer comment period to ensure complete analysis of the proposal. Thus, the Commission finds good cause, pursuant to section 19(b)(2) of the Act, to extend the period for comment.

The Commission hereby extends the period for public comment on the proposed rule change for a period of 36 days, until October 30, 1992.

[1] Securities Exchange Act Release No. 31083 (August 24, 1992, 57 FR 39411.

[2] See letter to Elizabeth MacGregor, Branch Chief, Division of Market Regulation, Commission, from Geraldine Brindisi, Security, American Stock Exchange, dated September 22, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-23558 Filed 9-28-92; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

September 23, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Allied Research Corporation
Common Stock, $.10 Par Value (File No. 7-9167)
Williams Companies, Inc.
$2.21 Cumulative Preferred Stock (File No. 7-9168)
Nuveen Select Tax Free Income Portfolio 4
Beneficial Interest, $.01 Par Value (File No. 7-9169)
West Company Incorporated
Common Stock, $0.25 Par Value (File No. 7-9170)
Bandag, Incorporated
Class A Non-voting Common Stock, $1 Par Value (File No. 7-9171)
Blackrock Florida Insured Municipal 2008 Term Trust, Inc.
Common Shares of Beneficial Interest, $.01 Par Value (File No. 7-9172)
Blackrock Insured Municipal 2008 Term Trust, Inc.
Common Stock, $.01 Par Value (File No. 7-9173)
Blackrock New York Insured Municipal 2008 Term Trust, Inc.
Common Stock, $.01 Par Value (File No. 7-9174)
Blackrock California Insured Municipal 2008 Term Trust, Inc.
Common Stock, $.01 Par Value (File No. 7-9175)
HMO America, Inc.
Common Stock, $.01 Par Value (File No. 7-9176)
American Adjustable Rate Term Trust, Inc. 1999
Common Stock, $.01 Par Value (File No. 7-9177)
Metro Bancshares, Inc.
Common Stock, $.01 Par Value (File No. 7-9178)
MuiYield Quality Fund II, Inc.
Common Stock, $.10 Par Value (File No. 7-9179)
TJX Companies, Inc.
Series C Cum. Cv. Pfd. Stock, $1.00 Par Value (File No. 7-9180)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 15, 1992, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-23527 Filed 9-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Investment Company Act Rel. No. 18968; 811-6522]

American Vision Funds, Inc.; Proposed Deregistration

September 22, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of proposed deregistration under the Investment Company Act of 1940 ("Act").

RELEVANT ACT SECTION: Section 8(f).

SUMMARY: The SEC proposed to declare by order, on its own motion, that American Vision Funds, Inc. (the "Fund") has ceased to be an investment company under the Act.

HEARING OR NOTIFICATION OF HEARING: An order of deregistration will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary. Hearing requests should be received by the SEC by 5:30 p.m. on October 19, 1992. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: James E. Anderson, Law Clerk, at (202) 272-7027, or C. David Messman, Branch Chief, at (202) 272-3018. (Division of

Investment Management, Office of Investment Company Regulation).

STATEMENT OF FACTS: The following is a summary of information regarding the Fund.

1. The Fund is an open-end non-diversified management company organized as a Maryland corporation. The Fund filed a registration statement under the Securities Act of 1933 on December 31, 1991. The registration statement did not become effective. The Fund registered as an investment company under the Act on January 14, 1992.

2. The SEC filed a complaint against the Fund in the United States District Court for the Central District of California on March 17, 1992.[1] The complaint alleged, among other things, that the Fund: (a) Violated section 13(a)(3) of the Act by acquiring assets in violation of the Fund's investment policies and restrictions; (b) violated section 17(f) of and rule 17f-2 under the Act by failing to keep its assets with a proper custodian; (c) violated section 17(g) of the Act by failing to obtain a fidelity bond; (d) violated rule 22c-1 under the Act by selling, redeeming, or repurchasing redeemable securities issued by a registered investment company at prices other than those based on the current net asset value of each security, and (e) violated section 31 of the Act by failing to keep proper books and records. The complaint also alleged that Fund's investment adviser, Public Funding Group, Inc. (the "Advertiser"), and its president, V. Thayne Whipple II, committed fraud in the offer or sale of securities in violation of section 17(a) of the Securities Act of 1933, and in connection with the purchase or sale of securities in violation of section 10(b) of the Securities Exchange Act of 1934, and with aiding and abetting the Fund in committing the violations set forth above.

3. The complaint alleged the following facts. The Fund distributed its securities solely in exchange for portfolio assets. By mid-February 1992, the Fund claimed to have 30 shareholders and total assets of approximately $115 million. The portfolio assets consisted of common stock and "commercial paper" notes. None of the stock held by the Fund was traded on any U.S. stock exchange, nor were any bid or ask prices listed for them during the Fund's existence. None of the commercial paper was rated by any commercially available rating service. All of the "commercial paper" was in fact merely promissory notes that had been signed and presented to the Fund in exchange for Fund shares. Nevertheless, the Adviser calculated the value of the portfolio assets at their face amounts, thus grossly overstating the fund's total asset value. The Fund accepted the stock and notes in exchange for Fund shares in order to allow the use of the Fund's shares by the shareholders as collateral for loans from brokerage firms. To facilitate the use of the Fund's shares as collateral, the Adviser arranged to have the daily net asset values of the Fund's shares reported to the National Association of Securities Dealers, Inc. for public quotation. Subsequently, the Fund shareholders attempted to use the Fund shares as collateral for approximately $18.6 million of margin loans from broker-dealers.

4. On March 31, 1992, the Fund, the Adviser, and Whipple consented to the entry of a judgment and permanent injunction against them. In addition to enjoining them from future violations of the securities laws as set fort in the complaint, the judgment required that the Fund be dissolved by returning the portfolio securities to the shareholders who originally exchanged such securities for shares of the Fund.

5. All of the portfolio securities except shares of IT BK Group of companies, Inc. ("IT Bank") and Sonnergie, Inc. ("Sonnergie") were returned to the persons and entities that exchanged them for shares of the Fund. The Fund shareholders who had exchanged the securities of these two companies did not respond to letters or repeated telephone calls seeking instructions on where to send the IT Bank and Sonnergie stock certificates. When the Fund's president attempted to transfer the shares back to the Fund's shareholders through IT Bank's and Sonnergie's transfer agent, he was informed that the transfer agent records for IT Bank and Sonnergie had been sent to Italy and Germany, respectively.

6. On September 1, 1992, the Fund deposited the stock certificates of IT Bank and Sonnergie with the United States District court for the Central District of California. Each of the remaining thirteen shareholders was mailed a notice stating that their shares of IT Bank and Sonnergie had been deposited with the court. The Fund has no remaining assets and is enjoined from engaging in an further business activities.

7. Section 8(f) of the Act allows the Commission to deregister an investment company on its own motion if it finds that the company has ceased to be an investment company.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-23528 Filed 9-28-92; 8:45 am]

[BILLING CODE 8010-01-M]

[1] Securities and Exchange Commission V. Public Funding Group, Inc., *et al.*, Civil Action No. 92 1646 (C.D. Cal. filed March 17, 1992).

[Rel. No. IC-18971; 811-5675]

R.R. Fund, Inc.; Application

September 22, 1992.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "1940 Act").

APPLICANT: R.R. Fund, Inc..

RELEVANT 1940 ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

FILING DATE: The application on Form N-8F was filed on October 1, 1990 and amended on September 10, 1992.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 16, 1992, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, 575 Fifth Avenue, 17th Floor, New York, NY 10017.

FOR FURTHER INFORMATION CONTACT: Felice R. Foundos, Staff Attorney, (202) 272-2190, or Barry D. Miller, Senior Special Counsel, (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end, non-diversified management company organized as a corporation under the laws of the State of Maryland. On January 11, 1989, applicant filed a registration statement pursuant to section 8(b) of the 1940 Act. On that date, applicant also filed a registration statement pursuant to the Securities Act of 1933. The registration statement never became effective and applicant never commenced a public offering of its shares.

2. Applicant was formed because of a beneficial tax treatment which has since expired. With consent of applicant's two shareholders, the board of director's authorized the dissolution of applicant on October 16, 1989.

3. Pursuant to the liquidation, the securities held in applicant's portfolio were sold at competitive bid in the market to brokers who were primary government securities dealers. Because applicant's portfolio consisted solely of fixed income securities, no brokerage commissions were incurred.

4. On November 30, 1989, applicant's shareholders redeemed their shares and received a final distribution of $22,323,438 representing the net asset value of applicant ($5,567 of which was paid in the form of a dividend) less $11,000 being held in an escrow account to pay liquidation expenses. Subsequently, the liquidation expenses were paid and the remainder distributed to shareholders.

5. As of the date of the application, the applicant had no assets, debts or liabilities, and was not a party to any litigation or administrative proceeding.

6. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding up of its affairs.

7. On April 26, 1990, applicant filed Articles of Dissolution dissolving its corporate existence in Maryland.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-23557 Filed 9-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-18967; 811-3261]

Strategic Treasury Positions, Inc.; Application

September 22, 1992.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Strategic Treasury Positions, Inc.

RELEVANT ACT SECTIONS: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on June 10, 1992 and amended on August 24, 1992.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 19, 1992, and should be accompanied by proof of service on applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, Park 80 West, Plaza Two, Saddle Brook, New Jersey 07662.

FOR FURTHER INFORMATION CONTACT: James M. Curtis, Staff Attorney, at (202) 504-2406, or Barry D. Miller, Senior Special Counsel (202) 272-3018 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end diversified management investment company that was organized as a corporation under the laws of Texas. On September 16, 1981, applicant registered under the Act and filed a registration statement under the Securities Act of 1933 to register 1,000,000,000 shares of applicant's common stock. Applicant's registration statement was declared effective on November 24, 1981, and applicant commenced its initial public offering on such date.

2. Applicant's assets have steadily decreased since 1987, thereby making it increasingly difficult for applicant to enjoy meaningful economies of scale. On December 30, 1991, the net assets of applicant equaled $1,917,323. If the Fund were to continue in operation, Lexington Management Corporation ("LMC") anticipates that the expense ratio would increase materially.

3. On December 29, 1991, applicant's board of directors approved the Plan of Complete Liquidation and Termination of applicant (the "Plan"). On January 29, 1992, applicant mailed proxy materials relating to the proposed liquidation to its shareholders. At a special meeting of shareholders held on March 16, 1992, applicant's shareholders approved the Plan.

4. Pursuant to the Plan, on May 15, 1992, applicant distributed $1,067,214 to its shareholders, which amount represented the cash value of applicant's portfolio and the net proceeds received from the liquidation of the portfolio holdings of applicant in connection with the winding-up of applicant's business and affairs. Applicant's portfolio securities were sold through brokers at market price without any brokerage commission paid. Each shareholder received his or her proportionate interest based on net asset value.

5. Applicant's liquidation expenses were approximately $3,503. Applicant paid approximately $3 of this amount, and LMC, applicant's management adviser, paid the balance of approximately $3,500.[1]

6. Applicant has no securityholders, assets, debts, or other liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not engaged and does not propose to engage in any business activity other than those necessary for the winding up of its affairs.

7. Applicant intends to file Articles of Dissolution with the Department of Assessments and Taxation of Texas with a request to delay effectiveness until an order has been issued by the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-23525 Filed 9-28-92; 8:45 am]

BILLING CODE 8010-01-M

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[1] Per a letter dated September 16, 1992, applicant stated that its investment advisory agreement required LMC to absorb applicant's ordinary business expenses to the extent such expenses exceeded 1.5% of average daily net assets. As a result, LMC paid liquidation expenses of approximately $3,500.

[Rel. No. IC—18966; 811-3335]

Strategic Gold/Minerals Fund, Inc.; Notice of Application

September 22, 1992.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Strategic Gold/Minerals Fund, Inc.

RELEVANT ACT SECTIONS: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on June 10, 1992 and amended on August 24, 1992.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing request should be received by the SEC by 5:30 p.m. on October 19, 1992, and should be accompanied by proof of service on applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, Park 80 West, Plaza Two, Saddle Brook, New Jersey 07662.

FOR FURTHER INFORMATION CONTACT: James M. Curtis, Staff Attorney, at (202) 504-2406, or Barry D. Miller, Senior Special Counsel (202) 272-3018 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end diversified management investment company that was organized as a corporation under the law of Texas. On December 1, 1981, applicant registered under the Act and filed a registration statement under the Securities Act of 1933 to register 200,000,000 shares of applicant's common stock. Applicant's registration statement was declared effective on May 20, 1982, and applicant commenced its initial public offering on such date.

2. Applicant's assets have steadily decreased since 1985, thereby making it increasingly difficult for applicant to enjoy meaningful economies of scale. On May 14, 1992, applicant had total net assets of $597,636 comprising 326,956 shares outstanding. If the Fund were to continue in operation, Lexington Management Corporation ("LMC") anticipates that the expense ratio would increase materially.

3. On December 29, 1991, applicant's board of directors approved the Plan of Complete Liquidation and Termination of applicant (the "Plan"). On January 29, 1992, applicant mailed proxy materials relating to the proposed liquidation to its shareholders. At a special meeting of shareholders held on March 16, 1992, applicant's shareholders approved the Plan.

4. Pursuant to the Plan, on May 15, 1992, applicant distributed $598,329 to its shareholders, which amount represented the cash value of applicant's portfolio and the net proceeds received from the liquidation of the portfolio holdings of applicant in connection with the winding-up of applicant's business and affairs. The portfolio securities were sold through brokers at market price without any brokerage commission paid. Each shareholder received his or her proportionate interest based on net asset value.

5. Applicant's liquidation expenses were approximately $6,320. Applicant paid approximately $3,520 of this amount, and LMC, applicant's management adviser, paid the balance of approximately $2,800.[1]

6. Applicant has no securityholders, assets, debt, or other liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not engaged and does not propose to engage in any business activity other than those necessary for the winding up of its affairs.

7. Applicant intends to file Articles of Dissolution with the Department of Assessments and Taxation of Texas with a request to delay effectiveness until an order has been issued by the Commission.

[1] Per a letter dated September 16, 1992, applicant stated that its investment advisory agreement required LMC to absorb applicant's ordinary business expenses to the extent such expenses exceeded the most restrictive expense limits imposed by any statute or regulatory authority of any jurisdiction in which applicant's securities were offered for sale. As a result, LMC paid liquidation expenses of approximately $2,800.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-23524 Filed 9-28-92; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review, Midland International Airport; Midland, TX

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by City of Midland, Texas, for Midland International Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96-193) and 14 CFR part 150 are in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Midland International Airport under part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before March 16, 1993.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps and of the start of its review of the associated noise compatibility program is September 17, 1992. The public comment period ends November 16, 1992.

FOR FURTHER INFORMATION CONTACT: Ben Guttery, Federal Aviation Administration, Texas Airport Development Office, Forth Worth, Texas, 76193-0651, 817/624-5609. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Midland International Airport are in compliance with applicable requirements of part 150, effective September 17, 1992. Further, FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before March 16, 1993. This notice also announces the availability of this program for public review and comment.

Under section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The City of Midland submitted to the FAA on May 18, 1992, noise exposure maps, descriptions and other documentation which were produced during Midland International Airport FAR part 150 Noise Exposure and Land Use Compatibility Study. It was requested that the FAA review this material as the noise exposure maps, as described in section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by the City of Midland. The specific maps under consideration are identified in the submission as Figure D2 for existing conditions and Figure G1 for the future noise exposure conditions. The FAA has determined that these maps for Midland International Airport are in compliance with applicable requirements. This determination is effective on September 17, 1992. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under § 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Midland International Airport, also effective on September 17, 1992. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before March 16, 1993.

The FAA's evaluation will be conducted under the provisions of 14 CFR part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, Airports Division, Southwest Region, Texas Airport Development Office, Fort Worth, Texas 76193–0651.

Midland International Airport, 9506 LaForce Boulevard, Midland, Texas 79711–0305

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Southwest Region, September 17, 1992.

George D. Conley,

Manager, Texas Airport Development Office.

[FR Doc. 92–23567 Filed 9–28–92; 8:45 am]

BILLING CODE 4910–13–M

FAA Approval of Noise Compatibility Program; Valley International Airport; Harlingen, TX

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by City of Harlingen under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96–193) and 14 CFR part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On March 18, 1992, the FAA determined that the noise exposure maps submitted by the City of Harlingen under part 150 were in compliance with applicable requirements. On September 11, 1992, the Administrator approved the Valley International Airport noise compatibility program. Most of the recommendations of the program were approved.

EFFECTIVE DATE: The effective date of the FAA's approval of the Valley International Airport noise compatibility program is September 11, 1992.

FOR FURTHER INFORMATION CONTACT: Ben Guttery, ASW–651F, Texas Airport Development Office, Federal Aviation Administration, Fort Worth, Texas 76193, 817–624–5609. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for Valley International Airport effective September 11, 1992.

Under section 104(a) of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an

airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses and prevention of additional noncompatible land uses within the area covered by the noise exposure maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR part 150 program recommendations is measured according to the standards expressed in Part 150 and the Act and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR part 150, § 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where federal funding is sought, requests for project grants must be submitted to the Texas Airport Development Office in Fort Worth, Texas.

The City of Harlingen submitted to the FAA on November 25, 1991, the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study conducted from September 1989 through December 1991. The Valley International Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on March 18, 1992. Notice of this determination was published in the **Federal Register** on April 1, 1992.

The Valley International Airport study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion to the year 1996. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in section 104(b) of the Act. The FAA began its review of the program on March 18, 1992, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained six proposed actions for noise mitigation on and/or off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective September 11, 1992.

Outright approval was granted for most of the specific program elements. The establishment of a noise complaint and investigation program, an update and review of the FAR Part 150 Program in 5 years, an improved approach/departure system, and the acquisition of land for the reduction of noise sensitive land uses were all approved. The extension of Runway 13–31 by 1,300 was disapproved pending the submittal of additional information. The implementation of height hazard and airport zoning was approved in part.

These determinations are set forth in detail in a Record of Approval endorsed by the Administrator on September 11, 1992. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of Valley International Airport.

Issued in Fort Worth, Texas, September 16, 1992.

George D. Conley,

Manager, Texas Airport Development Office.

[FR Doc. 92–23566 Filed 9–28–92; 8:45 am]

BILLING CODE 4910–13–M

Proposed Terminal Control Area at Raleigh, NC; Public Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: This notice announces two fact-finding informal airspace meetings to solicit information from airspace users and others concerning a proposal to establish a Terminal Control Area (TCA) for the Raleigh-Durham, NC, area, and to provide interested persons an opportunity to discuss the proposal. All comments received during these meetings will be considered prior to the issuance of a Notice of Proposed Rulemaking. The establishment of a TCA is being considered due to the increased volume of traffic arriving and departing the Raleigh-Durham Airport.

TIME AND DATES: These meetings will be held at 7 p.m. to 10 p.m., Tuesday, October 27 and Wednesday, October 28, 1992. Comments must be received on or before December 28, 1992.

PLACE: Million Air Maintenance Facility, 1704 E. International Drive, Raleigh-Durham International Airport. (Across the street from RDU AFSS).

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Air Traffic Division, ASO–500, Federal Aviation Administration, P.O. Box 20636, Atlanta, GA 30320.

CONTACT PERSON FOR MORE INFORMATION: Thomas Adams; Air Traffic Manager; Raleigh-Durham, NC, Airport Traffic Control Tower; 1000 Sawyer Circle; Morrisville, NC; telephone: (919) 840–0070.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) These meetings will be informal in nature and will be conducted by a representative of the Administrator,

FAA Southern Region. Each participant will be given an opportunity to make a presentation, although a time limit may be imposed.

(b) These meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the panel will be asked to sign in and estimate the amount of time needed for such presentation so that timeframes can be established. This will permit the panel to allocate an appropriate amount of time for each presenter. The panel may allocate the time available for each presentation in order to accommodate all speakers. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel. These meetings may be adjourned at any time if all persons present have had the opportunity to speak.

(d) Position papers or other handout material relating to the substance of the meetings may be accepted. Participants wishing to submit handout material should present three copies to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded. However, a summary of the comments made at these meetings will be filed in the docket.

Agenda for Each Meeting

Opening Remarks and Discussion of Meeting Procedures, Briefing on Background for Proposal, Public Presentations, Closing Comments.

Issued in Washington, DC, on September 18, 1992.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 92-23574 Filed 9-28-92; 8:45 am]

BILLING CODE 4910-13-M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition

Determination

Notice is hereby given on the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "THE ROYAL CITY OF SUSA: ANCIENT NEAR EASTERN TREASURES FROM THE LOUVRE" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the Metropolitan Museum of Art, New York, New York from on or about November 17, 1992, to on or about March 7, 1993, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Dated: September 23, 1992.

Alberto J. Mora,

General Counsel.

[FR Doc. 92-23581 Filed 9-28-92; 8:45 am]

BILLING CODE 8230-01-M

[1] A copy of this list may be obtained by contacting Mr. Paul W. Manning of the Office of the General Counsel of USIA. The telephone number is 202/619-6827, and the address is room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 57, No. 189
Tuesday, September 29, 1992

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).

DEPARTMENT OF ENERGY

FEDERAL ENERGY REGULATORY COMMISSION

Notice

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: September 30, 1992, 10:00 a.m.

PLACE: 825 North Capitol Street, N.E., Room 9306, Washington, D.C. 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

Note.—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Lois D. Cashell, Secretary, Telephone (202) 208-0400. For a recording listing of items stricken from or added to the meeting, call (202) 208-1627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Reference and Information Center.

Consent Agenda—Hydro, 965th Meeting—September 30, 1992, Regular Meeting (10:00 a.m.)

CAH-1.
Project No. 9401-008,, Halecrest Company
Project No. 8595-002, Energy Storage Corporation
Project No. 9105-002, Esperanza Power Limited Partnership

CAH-2.
Omitted

CAH-3.
Project No. 7270-011, Northern Wasco County People's Utility District

CAH-4.
Docket No. EL86-54-000, Philadelphia Corporation v. Sandy Hollow Power Company
Project No. 4334-008, Philadelphia Corporation
Project No. 5728-010, Sandy Hollow Power Company

CAH-5.
Project No. 2370-041, Pennsylvania Electric Company

CAH-6.
Project No. 2100-052, California Department of Water Resources

CAH-7.
Project No. 11105-000, City of Oswego, New York

Consent Electric Agenda

CAE-1.
Docket No. ER92-92-764-000, New England Power Company
Docket No. ER92-766-000, Northeast Utilities Service Company

CAE-2.
Docket Nos. ER92-2-000, ER92-3-000, ER92-4-000, ER92-7-000, ER92-14-000, ER92-27-000 and ER92-443-000, United Illuminating Company

CAE-3.
Docket No. ER92-774-000, Maine Public Service Company
Docket No. EL91-56-000, Houlton Water Power Company, Van Buren Light and Power District and Eastern Maine Electric Cooperative V. Maine Public Service Company

CAE-4.
Docket No. ER92-294-001, Montana Power Company

CAE-5.
Docket No. ER92-592-001, Yankee Atomic Electric Company

CAE-6.
Docket No. ER92-624-001, Western Resources, Inc. and Kansas Gas & Electric Company

CAE-7.
Docket Nos. ER92-346-001 and ER92-347-001, Central Hudson Gas & Electric Corporation
Docket No. ER92-379-001, Kansas Power & Light Company
Docket Nos. ER92-382-001 and ER92-550-001, New England Power Company
Docket No. ER92-430-001, Potomac Electric Power Company
Docket Nos. ER92-446-001 and ER92-538-001, Kansas Gas & Electric Company
Docket No. ER92-473-001, Puget Sound Power & Light Company
Docket No. ER92-486-001, UtiliCorp United, Inc.
Docket Nos. ER92-495-001, ER92-496-001, ER92-497-001, ER92-498-001, ER92-499-001, ER92-500-001, ER92-501-001, ER92-502-001, ER92-503-001 and ER92-504-001, Tucson Electric Power Company
Docket No. ER92-525-001, Florida Power & Light Company
Docket No. ER92-529-001, Centerior Energy
Docket No. ER92-532-001, Washington Water Power Company
Docket No. ER92-534-001, St. Joseph Light & Power Company
Docket No. ER92-535-001, UNITIL Power Corporation
Docket No. ER92-539-001, Pacific Gas & Electric Company
Docket Nos. ER92-540-001, ER92-541-001 and ER92-542-001, Duke Power Company
Docket No. ER92-544-001, Montaup Electric Company
Docket No. ER92-547-001, PacifiCorp Electric Operations
Docket No. ER92-548-001, Southern California Edison Company

CAE-8.
Docket No. ER92-589-002, United Illuminating Company

CAE-9.
Docket No. FA89-28-002, System Energy Resources, Inc.

CAE-10.
Docket No. QF92-54-001, Polk Power Partners, L.P.

CAE-11.
Omitted

CAE-12.
Omitted

CAE-13.
Omitted

CAE-14.
Omitted

CAE-15.
Omitted

CAE-16.
Omitted

CAE-17.
Docket No. ER91-471-000, PacifiCorp Electric Operations

CAE-18.
Docket Nos. ER92-143-000 and EL92-21-000, Florida Power & Light Company

CAE-19.
Docket No. ER92-330-003, Green Mountain Power Corporation

CAE-20.
Docket No. EL92-25-000, Cities and Villages of Albany and Hanover, Illinois; Alta Vista, Bellevue, Fairbank, Fredericksburg, Grafton, Guttenberg, Readlyn, Sabula and Strawberry Point, Iowa; and Rushford and St. Charles, Minnesota v. Interstate Power Company

CAE-21.
Docket No. EL92-37-000, Doswell Limited Partnership

CAE-22.
Docket Nos. ER87-122-001 and ER87-232-001, Boston Edison Company

CAE-23.
Docket No. ER89-48-000, Southern Company Services, Inc.

CAE-24.
Docket No. ER92-122-002, Mississippi Power Company

CAE-25.
Docket No. ER92-286-001, New England Power Company

Consent Miscellaneous Agenda

CAM-1.
Docket No. RM92-17-000, Elimination of Certain Filing Fees in Parts 346 and 381

Consent Oil and Gas Agenda

CAG-1.
Omitted

CAG-2.
Docket No. RP92-226-000, Kern River Gas Transmission Company

CAG–3.
Docket No. RP92–137–000, Transcontinental Gas Pipe Line Corporation
CAG–4.
Docket No. RP92–165–000, Trunkline Gas Company
CAG–5.
Docket No. RP92–222–000, Northern Border Pipeline Company
CAG–6.
Docket No. RP92–223–000, Northwest Pipeline Corporation
CAG–7.
Docket No. RP92–225–000, Texas Eastern Transmission Corporation
CAG–8.
Docket No. RP92–227–000, Eastern Shore Natural Gas Company
CAG–9.
Docket No. TA93–1–32–000, Colorado Interstate Gas Company
CAG–10.
Docket No. TM93–1–33–000, El Paso Natural Gas Company
CAG–11.
Docket No. TQ92–6–34–000, Florida Gas Transmission Company
CAG–12.
Docket Nos. TQ92–7–21–000 and TM93–1–21–001, Columbia Gas Transmission Corporation
CAG–13.
Docket No. TA92–1–55–001, Questar Pipeline Company
CAG–14.
Docket No. RP92–224–000, Northwest Pipeline Corporation
CAG–15.
Docket No. RI88–30–004, Phillips 66 Natural Gas Company
CAG–16. Omitted
CAG–17.
Docket No. RP91–200–001, Texas Eastern Transmission Corporation
CAG–18.
Docket No. TQ92–5–1–002, Alabama-Tennessee Natural Gas Company
CAG–19.
Docket No. RP89–48–021, Transwestern Pipeline Company
CAG–20.
Docket No. GP91–8–001, Jack J. Grynberg, Individually and as General Partner for the Greater Green River Basin Drilling Program: 72–73 v. Rocky Mountain Natural Gas Company, a division of KN Energy, Inc.
Docket No. GP91–10–001, Rocky Mountain Natural Gas Company v. Jack J. Grynberg, Individually and as General Partner for the Greater Green River Basin Drilling Program: 72–73
CAG–21.
Docket No. RP91–212–008, Stingray Pipeline Company
CAG–22.
Docket Nos. RP92–132–001 and RP91–203–010, Tennessee Gas Pipeline Company
CAG–23.
Omitted
CAG–24.
Omitted
CAG–25.
Docket No. CP89–1525–005, Northwest Pipeline Corporation
CAG–26.
Docket No. RP91–203–017, Tennessee Gas Pipeline Company
CAG–27.
Docket Nos. RP91–204–010, RP90–111–018, RP91–79–007, TM91–4–2–003, TM92–2–2–001 and RP85–47–008, East Tennessee Natural Gas Company
CAG–28.
Docket Nos. RP88–119–023, RP88–191–029, RP89–30–005, RP90–122–008, RP91–29–012, RP91–167–005, RP88–228–036, RP88–249–008, RP89–29–012, RP89–149–007, RP88–119–023, RP89–242–007, CP87–115–007, CP89–470–005, TA84–2–9–021, TA85–1–9–013, TA89–1–9–003, TA90–1–9–007, TA91–1–1–005, RP91–16–004, CP87–103–010, RP91–210–012 and CP91–3135–003, Tennessee Gas Pipeline Company
CAG–29.
Docket No. RP91–183–001, Midwestern Gas Transmission Company
CAG–30.
Docket No. RP92–190–001, Carnegie Natural Gas Company
CAG–31.
Docket No. RP91–229–008, Panhandle Eastern Pipe Line Company
CAG–32.
Omitted
CAG–33.
Omitted
CAG–34.
Docket No. RP88–44–020, El Paso Natural Gas Company
CAG–35.
Omitted
CAG–36.
Docket Nos. RP91–202–000, 002, RP88–227–000, 001, 002, 003, 004 and 005 (Phase II), Paiute Pipeline Company
CAG–37.
Docket Nos. RP89–65–000 and 005, Inland Gas Company, Inc.
CAG–38.
Omitted
CAG–39.
Docket Nos. RP92–60–001, RP91–188–008 and CP92–261–001, El Paso Natural Gas Company
CAG–40.
Docket Nos. RP88–259–055, CP89–1227–014, RP90–124–010 and RP90–161–006, Northern Natural Gas Company
CAG–41.
Docket No. RS92–34–000, Gas Gathering Corporation
CAG–42.
Docket No. RS92–51–000, Valley Gas Transmission, Inc.
CAG–43.
Docket Nos. RP92–21–000, RP92–73–000 and CP92–508–000, National Fuel Gas Supply Corporation
CAG–44.
Docket Nos. RS92–1–002, CP90–2275–005, RP89–161–023, 024, CP91–667–004, RP89–172–004 and RP92–231–000, ANR Pipeline Company
CAG–45.
Docket No. RS92–90–000, Wyoming Interstate Company, Ltd.
CAG–46.
Docket Nos. CP92–602–000 and RS92–76–000, Pelican Interstate Gas System
CAG–47.
Docket No. CP88–137–008, ANR Pipeline Company
Docket No. CP88–651–009, Northwest Pipeline Company
CAG–48.
Docket No. CP92–166–001, Algonquin LNG, Inc. and Algonquin Gas Transmission Company
CAG–49.
Docket No. CP89–1554–002, Colorado Interstate Gas Company
CAG–50.
Docket No. CP92–246–001, Peoples Natural Gas Company, Division of UtiliCorp United Inc. v. Williams Natural Gas Company and Vulcan Chemicals Division of Vulcan Materials Company
CAG–51.
Omitted.
CAG–52.
Docket Nos. RP91–166–011, TA92–1–37–001 and CP92–79–001, Northwest Pipeline Corporation
Docket No. G–17350–012, Pacific Gas Transmission Company
CAG–53.
Docket No. CP92–522–001, Tarpon Transmission Company
CAG–54.
Docket Nos. CP90–316–002 and CP90–317–002, Empire State Pipeline
Docket Nos. CP90–854–003, 001, CP90–920–002, CP90–967–002 and CP90–968–002, National Fuel Gas Supply Corporation
Docket Nos. CP90–1989–003 and 001, CNG Transmission Corporation
Docket Nos. CP91–724–002 and CP91–2251–001, Tennessee Gas Pipeline Company
Docket No. CI92–63–000, Rochester Gas & Electric Corporation
CAG–55.
Docket No. CI86–56–004, Citizens Gas Supply Corporation
Docket No. CI92–37–000, Canada Imperial Oil Limited
Docket No. CI92–51–000, Mercado Gas Services, Inc.
Docket No. CI92–53–000, GEMCO Gas Marketing Inc.
Docket No. CI92–54–000, Allegheny Energy Marketing Company
Docket No. CI92–59–000, Atlanta Gas Light Company
Docket No. CI92–60–000, Virginia Electric and Power Company
Docket No. CI92–61–000, Llano, Inc.
Docket No. CI92–62–000, Colonial Gas Company
Docket No. 92–63–000, Rochester Gas and Electric Corporation
Docket No. CI92–68–000, Dartmouth Power Associates Limited Partnership
Docket No. CI92–69–000, Universal Resources Corporation
Docket No. CI92–70–000, EnergyNorth Natural Gas, Inc.
Docket No. CI92–76–000, Sioux Pointe Inc.
CAG–56.
Omitted
CAG–57.
Docket No. CP91–1618–002, Tennessee Gas Pipeline Company
CAG–58.
Docket No. CP92–430–000, Enron Natural Gas Liquids Corporation and Tennessee Gas Pipeline Company
CAG–59.

Docket No. CP87-75-008, Tennessee Gas Pipeline Company

CAG-60.

Docket Nos. RS92-16-000, RP91-187-006 and CP91-2448-003, Florida Gas Transmission Company

CAG-61.

Docket Nos. RS92-24-001, RP88-115-030, RP90-104-018, RP90-192-011 and CP89-1119-002, Texas Gas Transmission Corporation

CAG-62.

Docket Nos. RS92-46-001, RP90-109-009, *et al.*, and TA91-1-86-003, Pacific Gas Transmission Company

CAG-63.

Docket No. PR91-23-000, Midcoast Ventures I

CAG-64.

Docket Nos. RP89-183-042, TC89-8-006, RP91-43-006, TM91-3-43-006, RP91-152-020 and RS92-12-001, Williams Natural Gas Company

CAG-65.

Docket Nos. IS87-36-000, 001 and OR92-4-000, Endicott Pipeline Company

Hydro Agenda

H-1.

Omitted

Electric Agenda

E-1.

Docket No. Reduction in Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978. Notice of Proposed Rulemaking.

Miscellaneous Agenda

M-1.

Omitted

M-2.

Docket No. PL92-1-000, Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines and Electric Utilities. Statement of Policy.

Oil and Gas Agenda

I. Pipeline Rate Matters

PR-1.

Docket No. RP92-179-002, Florida Gas Transmission Company. Order on rehearing.

PR-2.

Docket Nos. RP91-26-000, *et al.*, RP91-162-000 and RP92-18-000, El Paso Natural Gas Company. Order on outstanding issues and take-or-pay costs.

II. Restructuring Matters

RS-1.

Reserved

III. Pipeline Certificate Matters

PC-1.

Docket No. CP89-2173-000, Arkla Energy Resources, a Division of Arkla, Inc. and Mississippi River Transmission Corporation

Docket Nos. CP89-217-000 and 001, Arkla Energy Resources, a Division of Arkla, Inc.

Docket No. CP89-2195-000, ANR Pipeline Company

Docket No. RP91-65-005, Arkla Energy Resources, a Division of Arkla, Inc.

Order (1) on applications to abandon and sell certain facilities to ANR Pipeline Company, and for ANR to require and operate the facilities, and (2) on request for rehearing of prior order certificating Line AC and on clarifying suspension order.

Dated: September 23, 1992.

Lois D. Cashell,

Secretary.

[FR Doc. 92-23666 Filed 9-25-92; 9:56 am]

BILLING CODE 6717-01-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 12:00 noon, Monday, October 5, 1992.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Proposed 1993 Federal Reserve Bank officer salary structure adjustment.
2. Proposed 1993 Federal Reserve Board employee salary structure adjustments and merit program.
3. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
4. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: September 25, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-23730 Filed 9-25-92; 3:37 pm]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

TIME AND DATE: 10:00 a.m., Tuesday, November, 3, 1992.

PLACE: Room 532, Federal Trade Commission Building, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

STATUS: Open.

MATTER TO BE CONSIDERED: Hearing of Oral Presentations by the Direct Market Association and the Mail Order Association of America in the Mail Order Merchandise Trade Regulation Rule Proceeding.

CONTACT PERSON FOR MORE INFORMATION: Bonnie Jansen, Office of Public Affairs: (202) 326-2180, Recorded Message: (202) 326-2711.

Donald S. Clark,

Secretary.

[FR Doc. 92-23681 Filed 9-25-92; 8:45 am]

BILLING CODE 6750-01-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE-92-26]

TIME AND DATE: October 9, 1992 at 2:00 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting.
2. Minutes.
3. Ratification List.
4. FY 93 Expenditure Plan and FY 94 budget Request.
5. Notice of proposed final rulemaking for 19 CFR Parts 210 and 211.
6. Continuation of discussion of APO matters.
7. Any items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Paul R. Bardos, Acting Secretary, (202) 205-2000.

Issued: September 22, 1992.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 92-23756 Filed 9-25-92; 3:34 pm]

BILLING CODE 7020-02-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE-92-27]

TIME AND DATE: October 14, 1992 at 2:00 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting.
2. Minutes.
3. Ratification List.
4. Inv. No. TA-201-63 (Extruded Rubber Thread)—briefing and vote.
5. Items left over from previous agenda.

CONTACT PERSON FOR MORE INFORMATION: Paul R. Bardos, Acting Secretary, (202) 205-2000.

Issued: September 22, 1992.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 92-23757 Filed 9-25-92; 3:26 pm]

BILLING CODE 7020-02-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of September 28, October 5, 12, and 19, 1992.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of September 28

Tuesday, September 29

2:00 p.m.
Briefing on AEOD Annual Report (NUREG-1272, Vol. 6, Nos. 1 and 2) (Public Meeting) (Contact: Tom Novak, 301-492-4484)

Wednesday, September 30

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of October 5—Tentative

Wednesday, October 7

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of October 12—Tentative

Wednesday, October 14

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of October 19—Tentative

Wednesday, October 21

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: Affirmation of "Final Rule, 10 CFR Part 20, 'Disposal of Waste Oil by Incineration'—Response to Petition for Rulemaking from Edison Electric Institute and the Utility Nuclear Waste Management Group" scheduled for September 23, *postponed.*

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meeting Call (Recording)—(301) 504-1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504-1661.

Dated: September 24, 1992.

William M. Hill, Jr.,

Office of the Secretary.

[FR Doc. 92-23758 Filed 9-25-92; 8:45 am]

BILLING CODE 7590-01-M

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Notice of a Meeting.

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 C.F.R. Section 7.5) and the Government in the Sunshine Act (5 U.S.C. Section 552b), hereby gives notice that it intends to hold a meeting at 1:00 p.m. on Monday, October 5, 1992, and at 8:30 a.m. on Tuesday, October 6, 1992, in Washington, D.C. The October 5 meeting, at which the Board will consider 1) the July 17, 1992, Postal Rate Commission Opinion and Recommended Decision in Docket No. MC91-3, Second-Class Pallet Discount, 1991, and 2) a filing with the Postal Rate Commission to Establish a Bulk Small Parcel Service, is closed to the public. (See 57 FR 44404, September 25, 1992)

The October 6 meeting is open to the public and will be held in the Benjamin Franklin Room on the 11th floor of U.S. Postal Service Headquarters, 475 L'Enfant Plaza, S.W. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

Agenda

Monday Session

October 5—1:00 p.m. (Closed)

1. Consideration of the Postal Rate Commission Opinion and Recommended Decision in Docket No. MC91-3, Second-Class Pallet Discount, 1991. (John L. DeWeerdt, Associate General Counsel, Office of Postal Rates and Mailing Rules.)
2. Consideration of a Filing with the Postal Rate Commission to Establish a Bulk Small Parcel Service. (Charles C. McBride, Director, Strategic Services Integration.)

Tuesday Session

October 6—8:30 a.m. (Open)

1. Minutes of the Previous Meeting, August 31-September 1, 1992.
2. Remarks of the Postmaster General. (Marvin Runyon.)
3. Board of Governors 1993 Meeting Schedule. (Norma Pace, Chairman.)
4. Board of Governors 1993 Budget. (Norma Pace, Chairman.)
5. Consideration of FY 1993 Operating Budget. (M. Richard Porras, Finance and Planning.)
6. Debt Restructuring Plan. (Michael S. Coughlin, Deputy Postmaster General.)
7. Restoring Mail Service in the Miami Area. (James C. Walton.)
8. Status Report on the Construction of the National Postal Museum. (Dennis E. Wamsley, Facilities.)
9. Tentative Agenda for November 2-3, 1992, meeting in Dallas, Texas.

David F. Harris,

Secretary.

[FR Doc. 92-23674 Filed 9-25-92; 11:03 am]

BILLING CODE 7710-12-M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting.

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of September 28, 1992.

A closed meeting will be held on Monday, September 28, 1992, at 1:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Schapiro, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Monday, September 28, 1992, at 1:30 p.m., will be:

Institution of administrative proceedings of an enforcement nature.
Institution of injunctive actions.
Formal order of investigation.
Settlement of administrative proceedings of an enforcement nature.
Settlement of injunctive action.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Kaye Williams at (202) 272-2400.

Dated: September 24, 1992.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-23667 Filed 9-25-92; 9:57 am]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 57, No. 189
Tuesday, September 29, 1992

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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Part 305

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure

Correction

In rule document 92–15878 beginning on page 30101 in the issue of Wednesday, July 8, 1992 make the following corrections:

§ 305.92–6 [Corrected]

On page 30110, in § 305.92–6:

1. In the first column, in the first paragraph, in the second line from the bottom, footnote reference "2" and footnote "2" at the bottom of the page should read "1"; in the second paragraph, in the fifth line, footnote reference "3" and footnote "3" at the bottom of the page should read "2".

2. In the second column, in the first full paragraph, in the fourth line, footnote reference "4" and footnote "4" at the bottom of the page should read "3"; in the second paragraph, in the sixth line, footnote reference "5" and footnote "5" at the bottom of the page should read "4".

3. In the third column, under **Recommendation**, in paragraph 1., in the third line from the bottom, footnote "6" corresponding to footnote reference "5" should read "5"; in paragraph 2.(e), in the last line line, footnote reference "7" and footnote "7" at the bottom of the page should read "6"; and in paragraph 2.(f), in the last line, footnote reference "8" and footnote "8" at the bottom of the page should read "7".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 91–033–1]

Postentry Quarantine of Plants

Correction

In proposed rule document 92–21533 beginning on page 40872 in the issue of Tuesday, September 8, 1992 make the following correction:

§ 319.37–7 [Corrected]

On page 40875, in the third column, in § 319.37–7(a)(3), in the fourth line, after "requirements" insert "of this section and that services by State inspectors are available".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 274 and 276

[Amendment No. 345]

Food Stamp Program; Standards for Approval and Operation of Food Stamp Electronic Benefit Transfer Systems

Correction

In rule document 92–7510 beginning on page 11218 in the issue of Wednesday, April 1, 1992, make the following corrections:

§ 274.14 [Corrected]

1. On page 11250, in the third column, in § 274.12(c)(3)(i)(B), in the second line from the bottom, insert "the" after "through".

2. On page 11253, in the first column, in § 274.12(e)(4)(vi), in the last line, "program" was misspelled.

3. On the same page, in the second column, in § 274.12(f)(4), in the fourth line, "household" should read "households"; and in the sixth line, "benefit" should read "benefits".

4. On page 11254, in the second column, in § 274.12(f)(10)(vi), in the fifth line, "372.4(b)" should read "272.4(b)".

5. On page 11255, in the 3rd column, in § 272.12(h)(2), in the 13th line, "available" was misspelled.

6. On page 11258, in the third column, in § 272.12(l)(1)(iii), in the first line, "and" should read "or"

7. On the same page, in the same column, in § 272.12(m)(1), in the second line from the bottom, "§ 277.18(1)" should read "§ 277.18(l)".

§ 276.2 [Corrected]

8. On page 11259, in the first column, in § 276.2(b)(7), in the tenth line, "authorized" should read "unauthorized".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA–11–2–5406; FRL–4201–3]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; Bay Area Air Quality Management District

Correction

In proposed rule document 92–21145 beginning on page 40159 in the issue of Wednesday, September 2, 1992, on page 40159, in the first column, under **SUMMARY**, in the first line, after "limited" insert "approval and limited".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Bambermycins and Tylosin

Correction

In rule document 92–12753 beginning on page 23058 in the issue of Monday, June 1, 1992, make the following correction:

1. On page 23058, in the third column, in the first paragraph, in the sixth line, "Crowmark" should read "Growmark".

2. On the same page, in the same column, in the last paragraph, in the seventh line, "abambermycins" should read "a bambermycins".

BILLING CODE 1505-01-D

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32097]

Burlington Northern Railroad Co.; Purchase Exemption; Chicago Central & Pacific Railroad Co.

Correction

In notice document 92-22365 beginning on page 42762 in the issue of Wednesday, September 16, 1992, in the second column, under **DATES:**, in the fourth line, "September 28, 1992", should read "October 6, 1992".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 141

Invoice Requirements

Correction

In proposed rule document 92-21037 beginning on page 40361 in the issue of Thursday, September 3, 1992 make the following corrections:

§ 141.89 [Corrected]

1. On page 40367, in § 141.89(a), in the table, in the second column, in 2 d., "is" should read "in".

2. On page 40368, in § 141.89(a), in the table, under Chapter 56, in the second column, in the first line, "NEPS" should read "Neps".

3. On page 40369, in § 141.89(a), in the table, under Chapter 57, "5703" should appear opposite "1." the third time it appears in the second column; "5704" should appear opposite "1." the fourth time it appears in the second column; and "5705" should appear opposite "1." the fifth time it appears in the second column.

4. On page 40370, in § 141.89(a), in the table, under Chapter 58, in the entry for 5811, in the second column, in 2., insert "fiber" after "fabric".

5. On page 40372, in § 141.89(a), in the table, under Chapter 61:

a. "6109.10.0007" should appear opposite "State whether * * *" in the second column.

b. "6109.10.0009" should appear opposite "Identify * * *" the first time it appears in the second column.

c. "6109.10.0037" should appear opposite "Identify * * *" the second time it appears in the second column.

d. "6109.90.1047" should appear opposite "Identify * * *" the third time it appears in the second column.

e. Replace the leaders that appear after "6109.90.1530" with "and".

f. In 6117.10, in the second column, in the first line, "Shaws" should read "Shawls".

6. On page 40373, in § 141.89(a), in the table, under Chapter 62, "6216.00.12 and 6216.10.18" should appear opposite "1." the fifth time it appears in the second column.

7. On page 40375, in § 141.89(a), in the table, under Chapter 64, in the second column, in 6 a., "or" the first time it appears should read "of".

BILLING CODE 1505-01-D

federal register

Tuesday
September 29, 1992

Part II

Department of Education

34 CFR Parts 300 and 301

Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 300 and 301

RIN 1820-AA89

Assistance to States for the Education of Children with Disabilities Program and Preschool Grants for Children with Disabilities

AGENCY: Department of Education.

ACTION: Final regulations with comments invited.

SUMMARY: The Secretary issues final regulations for the Assistance to States for the Education of Children with Disabilities Program under part B of the Individuals with Disabilities Education Act (part B). The regulations are needed (1) to implement the amendments to part B that were made by the Handicapped Programs Technical Amendments Act of 1988, the Education of the Handicapped Act Amendments of 1990 (1990 Amendments), the National Literacy Act of 1991, and the Individuals with Disabilities Education Act Amendments of 1991 (1991 Amendments), and (2) to make changes based on the Department's experience in administering part B. The Secretary also amends existing regulations to implement the amendments to the Preschool Grants Program under section 619 of the Individuals with Disabilities Education Act that were made by the 1991 Amendments.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments, with the exception of the following sections: § 300.110; §§ 300.121–300.123; §§ 300.1253–300.134; § 300.136; §§ 300.138–300.141; § 300.144; § 300.146;§ 300.148; § 300.149; § 300.152; § 300.153; § 300.180; § 300.192; § 300.220; § 300.222–300.227; § 300.231; § 300.235; § 300.238; § 300.240; § 300.280; § 300.281; § 300.284; § 300.341; § 300.343; § 300.345; § 300.346: § 300.349; § 300.380–300.383; § 300.402; § 300.482; § 300.483; § 300.505; § 300.510; § 300.512; § 300.532; § 300.533; § 300.543; §§ 300.561–300.563; § 300.565; § 300.569; § 300.571; § 300.572; § 300.574; § 300.575; § 300.589; § 300.600; § 300.653; §§ 300.660–300.662; § 300.750; § 300.751; and § 300.754.

These sections will become effective after the information collection requirements contained in those sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

ADDRESSES: All comments should be addressed to: Lucille Sledger, Department of Education, 400 Maryland Avenue, SW., (Switzer Building, room 3615), Washington, DC 20202–2720.

FOR FURTHER INFORMATION CONTACT: Thomas B. Irvin, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW., (Switzer Building, room 3615), Washington, DC. 20202–2720. Telephone: (202) 205–8825. Individuals with deafness or hearing impairments may call (202) 205–9090 for TDD services.

SUPPLEMENTARY INFORMATION:

I. Part B Program

Part B authorizes formula grants to States and, through the State educational agencies (SEAs), to local educational agencies (LEAs) and intermediate educational units (IEUs) to assist them in meeting the special educational needs of children with disabilities. In order to be eligible for funding under this program, SEAs, LEAs, and IEUs are responsible for ensuring that all children with disabilities have available to them a free appropriate public education (FAPE), and that the procedural protections in part B and the implementing regulations are extended to these children and their parents.

These final regulations implement the changes made to part B by the Handicapped Programs Technical Amendments Act of 1988, the 1990 Amendments (Pub. L. 101–476, enacted October 30, 1990), the National Literacy Act of 1991 (Pub. L. 102–73, enacted July 25, 1991), and the 1991 Amendments (Pub. L. 102–119, enacted October 7, 1991). In addition, these regulations make changes based on the Department's experience in administering part B.

On August 19, 1991, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (56 FR 41266). The NPRM proposed to make the following changes to implement the 1990 Amendments:

(1) Add "autism" and "traumatic brain injury" as separate disability categories in the definition of children with disabilities, and include definitions of those terms.

(2) Delete "in schools" from "social work services in schools" in the list of eligible related services in § 300.13(a) of the current regulations for this part and delete "in schools" from the definition of "social work services in schools" included at § 300.13(b)(11) of the current regulations for this part.

(3) Add a definition of "rehabilitation counseling services" to implement the statutory amendment to the definition of "related services" in section 602(a)(17) of the Act.

(4) Add the statutory definitions of "assistive technology device" and "assistive technology service" and include a requirement that if a child with a disability requires these devices and services in order to receive FAPE, the public agency must ensure that they are made available.

(5) Add provisions on transition services, including (a) a definition of "transition services" in § 300.18; (b) a provision specifying that the public agency must ensure that certain transition services personnel participate in meetings to develop, review, or revise a student's individualized education program (IEP) if transition services are being considered; (c) a Note, based on § 300.344(a)(4) of the current regulations, stating that, if appropriate, the public agency must include the student in IEP meetings concerning transition services; (d) a requirement that the content of the IEP must include a statement of needed transition services and of interagency responsibilities or linkages if other State agencies have responsibility for providing or paying for those services; and (e) a provision specifying that if a participating agency fails to provide agreed upon transition services, the public agency must reconvene the IEP team to identify alternative strategies to be implemented to meet the transition objectives in the student's IEP.

(6) Replace the current regulations on the comprehensive system of personnel development (CSPD) in §§ 300.380–300.387 with new provisions reflecting changes made by the 1990 Amendments, and make other changes to simplify and update the CSPD provisions of the regulations.

The NPRM also proposed to make other changes in the current regulations for this part, including (1) deleting the data collection reporting provisions in § 300.124 and portions of §§ 300.125–300.127 of the current regulations; (2) deleting the current regulation in § 300.382 regarding inservice training, and at § 300.321(c) prohibiting the use of part B funds for preservice training; (3) adding a Note following § 300.128 to clarify the responsibility of the SEA and the State's part H lead agency for child find activities for infants and toddlers with disabilities if those agencies are different; (4) adding a provision to

§ 300.504 to clarify the conditions that must be met if a State adds consent requirements beyond those in the Federal regulations; (5) specifying that findings of fact and decisions in due process hearings must be made available to the public, after deleting personally identifiable information; (6) adding a provision to § 300.510 regarding which officials may not conduct State-level reviews; and (7) transferring requirements on State complaint procedures from the Education Department General Administrative Regulations (EDGAR) (34 CFR §§ 76.780–76.782) to this part in §§ 300.660–300.662, and making some modifications to those requirements.

These final regulations incorporate technical changes made to part B, including changes made by the 1990 Amendments, to update the terminology and references used in the current regulations. Examples of these technical changes include: (1) Deleting all references to "handicapped children" in the regulations and substituting "children with disabilities;" (2) deleting all references to "annual program plan" and substituting "State plan;" (3) revising the list of other regulations that apply to this program in § 300.3 to include all currently applicable provisions of EDGAR; and (4) abbreviating certain frequently used terms and adding a new note following the heading in subpart A, "Definitions," to specify that abbreviations will be used in place of certain terms in the regulations (e.g., "IEP" for "individualized education program" and "SEA" for "State educational agency").

These final regulations also implement changes to part B made by the National Literacy Act, by amending the list of jurisdictions eligible to participate in the part B program (i.e., by deleting the Trust Territory of the Pacific Islands and adding the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau).

In addition, these final regulations incorporate certain technical changes to part B made by the 1991 Amendments. These changes conform the regulations to the statutory changes and are implemented as final regulations. The Secretary, however, invites comment on these changes and on whether additional regulatory changes are needed with respect to the statutory changes made by the 1991 Amendments.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 280 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes that have been made in the regulations since publication of the NPRM is published as an appendix to these final regulations.

Major Changes in the Regulations

The following discussion in section A, Technical Changes, identifies the changes made to reflect statutory amendments to Part B made by the National Literacy Act. Section B, Substantive Changes, identifies all major changes made in the regulations based on the NPRM published on August 19, 1991. Additional changes made in the regulations in this document as a result of the 1991 Amendments are identified separately in section C.

A. Technical Changes

In accordance with changes made by the National Literacy Act, § 300.700 has been revised to reflect the current names of the successor entities to the Trust Territories of the Pacific Islands. Similarly, § 300.711 (previously numbered § 300.710) now lists the current names of these entities, consistent with a statutory change made by the National Literacy Act as amended by the 1991 Amendments.

B. Substantive Changes

Below is a summary of the major substantive changes in these final regulations based on the August 19, 1991 NPRM. References to section numbers are to the final regulations.

1. Changes in Subpart A—General

• The proposed definition of "autism" (§ 300.7(b)(1)) has been revised to clarify that the characteristics listed as generally associated with autism are not an exhaustive list of characteristics necessary for a child to be considered as having autism.

• The proposed definition of "traumatic brain injury" (§ 300.7(b)(12)) has been revised to describe this disability category more appropriately, and to clarify that the term "traumatic brain injury" refers to injuries acquired after birth.

• The proposed definition of "rehabilitation counseling services" (§ 300.16(b)(10)) has been revised to change the term "qualified counseling professional" to "qualified personnel."

• The phrase "in schools" has been retained in the definition of "social work services in schools" (§ 300.16(b)(12)), and the phrase "to receive maximum benefit" in the statement concerning mobilizing school and community resources has been changed.

• The last sentence of the proposed Note following the definition of "transition services" at § 300.18 has been revised to delete the statement that the listed activities are only examples.

2. Changes in Subpart B—State Plans and Local Applications

• Proposed Note 2 following § 300.128 ("Identification, location, and evaluation of children with disabilities") has been revised to clarify that where the part H lead agency is different from the SEA, actual implementation of the child find activities for infants and toddlers with disabilities by the part H lead agency does not alter or diminish the SEA's responsibility for ensuring compliance with child find and evaluation requirements.

3. Changes in Subpart C—Services

• Proposed § 300.308 ("Assistive technology") has been revised to specify that assistive technology devices and services must be provided if required as part of special education under § 300.17, related services under § 300.16, or supplementary aids and services under § 300.550(b)(2).

• Section 300.344 ("Participants in meetings") has been revised (1) to specify that if a purpose of a student's IEP meeting is the consideration of transition services to the student, the public agency must invite the student and a representative of any other agency that is likely to be responsible for providing or paying for transition services, and (2) to clarify what the public agency must do if either the student or the agency representative does not attend.

• Section 300.345 ("Parent participation") has been revised to provide that if a purpose of the IEP meeting is the consideration of transition services, the notice to the parents about the meeting must indicate this purpose and indicate that the student will be invited.

• Section 300.346 ("Content of IEP") has been revised to specify that the statement of needed transition services in a student's IEP must include the three areas listed in the definition of "transition services" in § 300.18(b), unless the IEP team determines that services are not needed in one or more of those areas and includes in the IEP a statement to that effect and the basis for making the determination.

• Proposed § 300.347 ("Agency responsibility for transition services") has been revised (1) to clarify that, if a participating agency does not provide agreed-upon services, the public agency must initiate another IEP meeting "as soon as possible"; (2) to delete the phrase "to be implemented," following "alternative strategies"; and (3) to add

"and if necessary, revising the student's IEP."

• The proposed provision requiring States to describe procedures for enabling teacher aides to acquire the necessary credentials for teaching special education has been deleted from § 300.381 ("Adequate supply of qualified personnel").

• The proposed definition of "regular education personnel," which would have limited the regular education personnel that a State's continuing education system would need to address, has been deleted from § 300.382 ("Personnel preparation and continuing education").

4. Changes in Subpart E—Procedural Safeguards

• Section 300.504 ("Prior notice; parent consent") has been revised (1) to delete the proposed provision requiring States to establish and use informal and formal procedures to deal with parental withholding of consent for services and activities beyond those required in § 300.504(b); and (2) to clarify that if a State has additional parental consent requirements, the State must determine the procedures it will use to ensure that a parent's failure to consent does not result in a failure to provide FAPE to the child. Proposed Note 3 has been revised to reflect these changes. The preexisting provision concerning the circumstances under which a public agency can condition a benefit on parent consent has been moved and modified to accommodate additional State parent consent provisions.

• Section 300.510 ("Administrative appeal; impartial review") has been revised to add a new provision requiring the SEA to transmit review findings and decisions to the State advisory panel and to make those findings and decisions available to the public. The proposed provisions regarding the impartiality of State-level review officials have been deleted.

5. Changes in Subpart F—State Administration

On July 8, 1992, the Department published final regulations making certain amendments to EDGAR and conforming changes in program regulations (57 FR 30328). That regulatory action removed the State complaint procedures (§§ 76.780–76.782) from EDGAR and amended part 300 by adding identical requirements in §§ 300.670–300.672. These final regulations make changes, as described below, to those regulations based on the comments received on the August 19, 1991 NPRM. The State complaint procedures also are renumbered as §§ 300.660–300.662.

• Proposed § 300.660 (Adoption of State complaint procedures) has been revised to clarify that, while the State complaint procedures must provide for filing complaints with the SEA, the SEA may expand its procedures to provide for (1) the filing of a complaint directly with a public agency in lieu of the SEA; and (2) the right to have the SEA review the public agency's decision on the complaint.

• Proposed § 300.661 ("Minimum State complaint procedures") has been revised to clarify that a public agency also has the right to request Secretarial review.

C. Changes Made to Part B by the 1991 Amendments

The primary purpose of the 1991 Amendments was to amend and reauthorize part H of the Act (the Infants and Toddlers with Disabilities program). However, the 1991 Amendments also included revisions to other parts of the Act, including part B.

The following discussion includes descriptions of the revisions to part B made by the 1991 Amendments that have been incorporated into these final regulations:

1. Permitting Children, Aged 3–5, with Developmental Delays to be Included by States in the Definition of "Children with Disabilities"

The 1991 Amendments revised the definition of "children with disabilities" in section 602(a)(1) of the IDEA. In accordance with that change, § 300.7(b)(2) provides that the term "children with disabilities" may, at a State's discretion, include children, aged 3–5, "(i) who are experiencing developmental delays* * *and (ii) who, for that reason, need special education and related services." (Throughout this document, age ranges referred to in the text are inclusive.) The legislative history of the 1991 Amendments makes clear that the purpose of permitting a State to include these children in its definition of children with disabilities, "is not to expand or diminish the population of children eligible under part B, but rather to provide a State with the discretion to ensure that all eligible preschoolers are served and that children are not inappropriately labeled." (House Report No. 102–198, 4 (1991); Senate Report No. 102–84, 15 (1991).)

The legislative history further clarifies that, although the 1991 revision to the definition of "children with disabilities" in section 602(a)(1) of the IDEA is comparable to a component of the part H definition of "infants and toddlers with disabilities," the amendment should not be construed as requiring a State to use the same criteria for children aged 3–5 as it uses for infants and toddlers. A State may develop different or more stringent criteria for children aged 3–5, inclusive, than it uses for infants and toddlers so long as the criteria do not deny eligibility to a child who would otherwise be eligible under other categories included in section 602(a)(1) of the Act. (House Report No. 102–198, 4 (1991); Senate Report No. 102–84, 15 (1991).)

2. Transition of Individuals from Part H to Part B

The 1991 Amendments added a new provision at section 613(a)(15) that requires that each State plan set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program under part H who will participate in preschool programs under part B. This would include a method of ensuring that when a child turns age three an IEP or, if consistent with sections 614(a)(5) and 677(d) of the Act, an individualized family service plan (IFSP) has been developed and is being implemented by the child's third birthday. This change is reflected in a new § 300.154.

3. Permitting LEAs to use IFSPs for Children Aged 3–5

To assist in the transition of children from the part H program to the part B program, the 1991 Amendments added a provision to section 614(a)(5) to permit LEAs to use IFSPs, in lieu of IEPs, for children with disabilities aged 3–5 if consistent with State policy and with the concurrence of the parents. This change is reflected in revised § 300.343 of the regulations. The Secretary notes that the "content of IFSP" provision in the part H regulations (34 CFR 303.344) is more detailed than section 677(d) of the Act. States are encouraged to implement the requirements in 34 CFR 303.344 for the IFSPs that they develop and implement for children aged 3–5.

4. Comprehensive System of Personnel Development (CSPD)

Consistent with a revision of section 613(a)(3) made by the 1991 Amendments, § 300.380 of the regulations has been amended to require that a State's CSPD under part B be consistent with the CSPD for the part H program described in § 303.360. (The 1991 Amendments also add a companion provision to the part H CSPD provision in section 676(b)(8) of the Act.)

5. State Administrative Set-Aside for Small States

The 1991 Amendments revised section 611(c)(2) of the IDEA to increase from $350,000 to $450,000 the minimum amount that each State may reserve from its part B allocation for administrative expenses. This change is reflected in § 300.620.

6. Part B Services for Indian Children with Disabilities

The 1991 Amendments significantly revised section 611(f), which authorizes payments to the Secretary of the Interior under part B for the education of certain Indian children with disabilities. Section 300.709 has been revised in its entirety, consistent with the new section 611(f)(1) of the IDEA. Section 300.709 now provides that, subject to meeting the requirements in § 300.260, the Secretary makes payments to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations, aged 5–21, who are enrolled in elementary and secondary schools for Indian children operated by the Secretary of the Interior, and for Indian students aged 3–5 who are enrolled in programs affiliated with Bureau of Indian Affairs (BIA) schools that are required by the States in which the schools are located to attain or maintain State accreditation and which schools had such accreditation before the enactment of the 1991 Amendments. Previously, the Secretary of the Interior had been responsible for the education of all Indian children with disabilities, aged 3–21, on reservations (1) served by elementary and secondary schools operated by the Department of the Interior, and (2) for whom services were provided through contract with an Indian tribe or organization prior to FY 1989. The amount of payment is one percent of the aggregate amount of funds available to all States for that fiscal year.

In accordance with the new section 611(f)(3) of the IDEA, and in light of the revised responsibilities of the Secretary of the Interior for the education of Indian children with disabilities aged 3–21 as specified in section 611(f)(1) of the IDEA, § 300.260 also has been revised. That section identifies the specific provisions of sections 612, 613, and 614 of the IDEA that the Secretary has determined continue to be appropriate to applications from the Secretary of the Interior. Similarly, § 300.263 has been revised to reflect the regulatory requirements that continue to apply to the Secretary of the Interior in the implementation of the program supported by part B.

While the 1991 Amendments limited the responsibilities of the Secretary of the Interior for the education of Indian children with disabilities, it expanded the responsibilities of SEAs for Indian children with disabilities on reservations. Consistent with the requirements of the new section 611(f)(2) of the IDEA, § 300.300 (Timelines for FAPE) has been revised by adding a new paragraph (c) to specify that, with the exception of children identified in § 300.709(a) (1) and (2), the SEA shall be responsible for ensuring that all of the requirements of part B are implemented for all children aged 3–21 on reservations.

In addition, in accordance with the new section 611(f)(4) of the IDEA, a new § 300.710 has been added to provide that the Secretary make payments to the Secretary of the Interior to be distributed to tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities, aged 3–5, on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of the payment is .25 percent of the aggregate amount of funds available to all States under this part for that fiscal year. These funds are to be used for child find, screening, and other procedures for the early identification of children, aged 3–5, parent training, and for direct services.

The Secretary believes that those statutory changes resulting from the 1991 Amendments can be effectively implemented by incorporation into existing regulations without additional regulatory guidance. However, if experience in the implementation of these provisions indicates that additional regulatory guidance is needed, the Secretary will undertake additional rulemaking at a future date.

II. Preschool Grants Program

The Preschool Grants program under section 619 of part B of the Act provides additional Federal financial assistance to States for providing special education and related services to children with disabilities aged 3–5 and, at a State's discretion, for providing FAPE to two-year-old children with disabilities who will reach age three during the school year. The Preschool Grants regulations in 34 CFR part 301 establish the administrative procedures for applying for and distributing Preschool Grants funds.

The substantive rights and protections established under part B of the Act and its implementing regulations at 34 CFR part 300 apply to 3–5 year old children with disabilities. Therefore, these rights and protections, which include the right to FAPE, placement in the least restrictive environment, and the availability of due process procedures, are not repeated in the part 301 regulations.

The 1991 Amendments included several revisions to section 619. The following is a summary of those revisions:

• The 1991 Amendments expanded the age range for which SEAs and LEAs may use Preschool Grants funds to include two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under part H of the Act. These children are entitled to receive FAPE.

The use of Preschool Grants funds to provide FAPE to two-year-old children with disabilities is at a State's discretion and must be consistent with State policy. This is not a requirement to provide FAPE to all two-year-old children with disabilities who will reach age three during the school year. Rather, this provision increases States' options for use of Preschool Grants funds to meet the needs of children with disabilities and their families during the transition from early intervention services under part H of the Act to preschool special education under part B of the Act. Although children below age 3 cannot be included in the annual part B child count, States are permitted to use their part B funds to serve these children.

• Part H of the Act does not apply to any two-year-old child with disabilities receiving FAPE, in accordance with part B of the Act, with Preschool Grants funds. However, part H of the Act continues to apply to all other two-year-old children with disabilities, including those receiving FAPE with other sources of funds, such as part B funds under section 611 of the Act.

These statutory amendments are incorporated into these final regulations in §§ 301.1, 301.3, 301.6, 301.10, and 301.30.

Waiver of Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)) and the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on all changes proposed to be made in the Department's regulations. However, since the additional changes made in

these final regulations that were not included in the NPRM published for public comment merely incorporate statutory amendments and do not establish new substantive policy, further public comment could have no effect on the content of the final regulations. Therefore, the Secretary has determined under 5 U.S.C. 553(b)(B) that proposed rulemaking on these changes is unnecessary and contrary to public interest.

Invitation to Comment on Provisions Added to Part B by the 1991 Amendments

Although the Secretary publishes these regulations as final, the Secretary invites comments on whether additional guidance is required with respect to the regulatory changes made to part 300 and described above that reflect statutory changes made by the 1991 Amendments. In addition, the Secretary invites comments on whether other regulatory changes are desirable to implement the provisions of the 1991 Amendments relating to the transition of children from the part H program to the part B program.

Interested parties may send comments to Ms. Lucille Sleger at the address given at the beginning of this document until November 30, 1992.

All comments submitted in response to this document will be available for public inspection, during and after the comment period, in room 3615, 300 C Street, SW., Washington, DC, between the hours of 8:30 a.m and 4 p.m., Monday through Friday of each week, except Federal holidays.

Executive Order 12291

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

Paperwork Reduction Act of 1980

The following sections contain information collection requirements: § 300.110; §§ 300.121–300.123; §§ 300.125–300.134; § 300.136; §§ 300.138–300.141; § 300.144; § 300.146; § 300.148; § 300.149; § 300.152; § 300.153; § 300.180; § 300.192; § 300.220; §§ 300.222–300.227; § 300.231; § 300.235; § 300.238; § 300.240; § 300.280; § 300.281; § 300.284; § 300.341; § 300.343; § 300.345; § 300.346: § 300.349; §§ 300.380–300.383; § 300.402; § 300.482; § 300.483; § 300.505; § 300.510; § 300.512; § 300.532; § 300.533; § 300.543; §§ 300.561–300.563; § 300.565; § 300.569; § 300.571; § 300.572; § 300.574; § 300.575; § 300.589; § 300.600; § 300.653; §§ 300.660–300.662; § 300.750; § 300.751; and § 300.754. 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))

The 50 States, the District of Columbia, Puerto Rico, 7 territories, and the Department of the Interior are eligible to apply for grants under this part. The Department needs and uses information submitted by these entities to determine whether they meet the regulatory requirements listed above. The 60 eligible entities under this program submit triennial State plans in order to receive part B grant awards. The annual public reporting burden for this information collection for the year of an entity's submission is estimated at 29 hours, including the time for gathering 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, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on the processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

List of Subjects

34 CFR Part 300

Administrative practice and procedures, Education, Education of individuals with disabilities, Grant programs—education, Privacy, Private schools, Reporting and record keeping requirements.

34 CFR Part 301

Education, Education of children with disabilities, Grant programs—education, Reporting and record keeping requirements.

Dated: August 18, 1992.

(Catalog of Federal Domestic Assistance number 84.027, Assistance to States for Education of Children with Disabilities; 84.173, Preschool Grants Program)

Lamar Alexander,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by revising part 300 and amending part 301 as follows:

1. Part 300 is revised to read as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

Subpart A—General

Purpose, Applicability, and Regulations that Apply to this Program

Sec.
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300.2 Applicability to State, local, and private agencies.
300.3 Regulations that apply.
300.4 Act.
300.5 Assistive technology device.
300.6 Assistive technology service.
300.7 Children with disabilities.
300.8 Free appropriate public education.
300.9 Include.
300.10 Intermediate educational unit.
300.11 Local educational agency.
300.12 Native language.
300.13 Parent.
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State Plans—General

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State Plans—Contents

300.121 Right to a free appropriate public education.
300.122 Timelines and ages for free appropriate public education.
300.123 Full educational opportunity goal.
300.124 [Reserved]
300.125 Full educational opportunity goal—timetable.
300.126 Full educational opportunity goal—facilities, personnel, and services.
300.127 Priorities.
300.128 Identification, location, and evaluation of children with disabilities.
300.129 Confidentiality of personally identifiable information.
300.130 Individualized education programs.
300.131 Procedural safeguards.
300.132 Least restrictive environment.
300.133 Protection in evaluation procedures.
300.134 Responsibility of State educational agency for all educational programs.
300.135 [Reserved]
300.136 Implementation procedures—State educational agency.
300.137 Procedures for consultation.
300.138 Other Federal programs.

300.139 Comprehensive system of personnel development.
300.140 Private schools.
300.141 Recovery of funds for misclassified children.
300.142–300.143 [Reserved]
300.144 Hearing on application.
300.145 Prohibition of commingling.
300.146 Annual evaluation.
300.147 State advisory panel.
300.148 Policies and procedures for use of Part B funds.
300.149 Description of use of Part B funds.
300.150 State-level nonsupplanting.
300.151 Additional information if the State educational agency provides direct services.
300.152 Interagency agreements.
300.153 Personnel standards.
300.154 Transition of individuals from Part H to Part B.

Local Educational Agency Applications—General

300.180 Submission of application.
300.181 [Reserved]
300.182 The excess cost requirement.
300.183 Meeting the excess cost requirement.
300.184 Excess costs—computation of minimum amount.
300.185 Computation of excess costs—consolidated application.
300.186 Excess costs—limitation on use of Part B funds.
300.187–300.189 [Reserved]
300.190 Consolidated applications.
300.191 [Reserved]
300.192 State regulation of consolidated applications.
300.193 State educational agency approval; disapproval.
300.194 Withholding.

Local Educational Agency Applications—Contents

300.220 Child identification.
300.221 Confidentiality of personally identifiable information.
300.222 Full educational opportunity goal—timetable.
300.223 Facilities, personnel, and services.
300.224 Personnel development.
300.225 Priorities.
300.226 Parent involvement.
300.227 Participation in regular education programs.
300.228 [Reserved]
300.229 Excess cost.
300.230 Nonsupplanting.
300.231 Comparable services.
300.232–300.234 [Reserved]
300.235 Individualized education programs.
300.236 [Reserved]
300.237 Procedural safeguards.
300.238 Use of Part B funds.
300.239 [Reserved]
300.240 Other requirements.

Application from Secretary of the Interior

300.260 Submission of application; approval.
300.261 Public participation.
300.262 Use of Part B funds.
300.263 Applicable regulations.

Public Participation

300.280 Public hearings before adopting a State plan.
300.281 Notice.
300.282 Opportunity to participate; comment period.
300.283 Review of public comments before adopting plan.
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300.301 Free appropriate public education—methods and payments.
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Priorities in the Use of Part B Funds

300.320 Definitions of "first priority children" and "second priority children."
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Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

Subpart A—General

Purpose, Applicability, and Regulations That Apply to this Program

§ 300.1 Purpose.

The purpose of this part is—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States and localities to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. 1401 Note)

§ 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The State plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:

(1) The State educational agency;

(2) Local educational agencies and intermediate educational units;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency. (See §§ 300.400–300.402)

(Authority: 20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Note: The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.780–76.782.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act— Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(h) 34 CFR part 86 (Drug-Free Schools and Campuses).

(i) The regulations in this part—34 CFR part 300 (Assistance to States for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e-3(a)(1))

Definitions

Note 1: Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections in which they are defined:

Appropriate professional requirements in the State (§ 300.153(a)(1))
Average per pupil expenditure in public elementary and secondary schools in the United States (§ 300.701(c))
Consent (§ 300.500)
Destruction (§ 300.560)

Direct services (§ 300.370(b)(1))
Education records (§ 300.560)
Evaluation (§ 300.500)
First priority children (§ 300.320(a)) Highest requirements in the State applicable to a specific profession or discipline (§ 300.153(a)(2))
Independent educational evaluation (§ 300.503(a)(3)(i))
Individualized education program (§ 300.340)
Participating agency, as used in the IEP requirements in §§ 300.346 and 300.347 (§ 300.340(b))
Participating agency, as used in the confidentiality requirements in §§ 300.560–300.576 (§ 300.560)
Party or parties (§ 300.584(a))
Personally identifiable (§ 300.500)
Private school children with disabilities (§ 300.450)
Profession or discipline (§ 300.153(a)(3))
Public expense (§ 300.503(a)(3)(ii))
Second priority children (§ 300.320(b))
Special definition of "State" (§ 300.700)
State-approved or recognized certification, licensing, registration, or other comparable requirements (§ 300.153(a)(4))
Support services (§ 300.370(b)(2))

Note 2: Below are abbreviations for selected terms that are used throughout these regulations:

"FAPE" means "free appropriate public education."
"IEP" means "individualized education program."
"IEU" means "intermediate educational unit."
"LEA" means "local educational agency."
"LRE" means "least restrictive environment."
"SEA" means "State educational agency."

As appropriate, each abbreviation is used interchangeably with its nonabbreviated term.

§ 300.4 Act.

As used in this part, "Act" means the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act.

(Authority: 20 U.S.C. 1400)

§ 300.5 Assistive technology device.

As used in this part, "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.

(Authority: 20 U.S.C. 1401(a)(25))

§ 300.6 Assistive technology service.

As used in this part, "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes —

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, retaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of children with disabilities.

(Authority: 20 U.S.C. 1401(a)(26))

Note: The definitions of "assistive technology device" and "assistive technology service" used in this part are taken directly from section 602(a)(25)–(26) of the Act, but in accordance with Part B, the statutory reference to "individual with a disability" has been replaced with "child with a disability." The Act's definitions of "assistive technology device" and "assistive technology service" incorporate verbatim the definitions of these terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988.

§ 300.7 Children with disabilities.

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with §§ 300.530–300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

(2) The term "children with disabilities" for children aged 3 through 5 may, at a State's discretion, include children—

(i) Who are experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) Who, for that reason, need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance, as defined in paragraph (b)(9) of this section.

(2) "Deaf-blindness" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) "Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) "Hearing impairment" means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(5) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

(6) "Multiple disabilities" means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(7) "Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital

anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(8) "Other health impairment" means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's educational performance.

(9) "Serious emotional disturbance" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

(10) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) "Speech or language impairment" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance.

(12) "Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(13) "Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(a)(1))

Note: If a child manifests characteristics of the disability category "autism" after age 3, that child still could be diagnosed as having "autism" if the criteria in paragraph (b)(1) of this section are satisfied.

§ 300.8 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340–300.350.

(Authority: 20 U.S.C. 1401(a)(18))

§ 300.9 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1417(b))

§ 300.10 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than an LEA, that—

(a) Is under the general supervision of an SEA;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to children with disabilities within that State.

(Authority: 20 U.S.C. 1401(a)(23))

§ 300.11 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(Authority: 20 U.S.C. 1401(a)(8))

§ 300.12 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language," when used with reference to an individual of limited English proficiency, means the language normally used by that individual, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 3283(a)(2); 1401(a)(22))

Note: Section 602(a)(22) of the Act states that the term "native language" has the same meaning as the definition from section 703(a)(2) of the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 300.505(b)(2) and § 300.532(a)(1).) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) For individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, braille, or oral communication).

§ 300.13 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. 1415)

Note: The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 300.14 Public agency.

As used in this part, the term "public agency" includes the SEA, LEAs, IEUs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

§ 300.15 Qualified.

As used in this part, the term "qualified" means that a person has met SEA approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1417(b))

§ 300.16 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes—

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(a)(17))

Note: With respect to related services, the Senate Report states:

The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(S. Rep. No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and

supervisory activities that are necessary for program planning, management, and evaluation.

§ 300.17 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adaptive physical education, movement education, and motor development.

(Authority: 20 U.S.C. 1401(a)(16))

(3) "Vocational education" means organized educational programs offering a sequence of courses that are directly related to the preparation of individuals in paid or unpaid employment in current or emerging occupations requiring other than a baccalaureate or advanced degree. Such programs shall include competency-based applied learning that contributes to an individual's academic knowledge, higher-order reasoning, and problem-solving skills, work attitudes, general employability skills, and the occupation-specific skills necessary for economic independence as a productive and contributing member of society. Such term also includes applied technology education.

(Authority: 20 U.S.C. 1401(16))

Note 1: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under this part unless he or she needs special education. (See the definition of children with disabilities in § 300.7.) The definition of related services (§ 300.16) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

Note 2: The above definition of vocational education is taken from the Carl D. Perkins Vocational and Applied Technology Education Act (Pub. L. 98–524, as amended by Pub. L. 101–392). Section 118(a)(3)(A)–(B) of this statute further provides—

Vocational education programs and activities for individuals with handicaps will be provided in the least restrictive environment in accordance with section 612(5)(B) of the Individuals with Disabilities Education Act and will, whenever appropriate, be included as a component of the individualized education program developed under section 614(a)(5) of such Act. Students with handicaps who have individualized education programs developed under section 614(a)(5) of the Individuals with Disabilities Education Act shall, with respect to vocational education programs, be afforded the rights and protections guaranteed such students under sections 612, 614, and 615 of such Act.

§ 300.18 Transition services.

(a) As used in this part, "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

(b) The coordinated set of activities described in paragraph (a) of this section must—

(1) Be based on the individual student's needs, taking into account the student's preferences and interests; and

(2) Include needed activities in the areas of—

(i) Instruction;

(ii) Community experiences;

(iii) The development of employment and other post-school adult living objectives; and

(iv) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(Authority: 20 U.S.C. 1401(a)(19))

Note: Transition services for students with disabilities may be special education, if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education. The list of activities in paragraph (b) is not intended to be exhaustive.

Subpart B—State Plans and Local Educational Agency Applications

State Plans—General

§ 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit a State plan to the Secretary through its SEA, which plan shall be effective for a period of 3 fiscal years.

(Authority: 20 U.S.C. 1231g, 1412, 1413)

§ 300.111 Contents of plan.

Each State plan must contain the provisions required in §§ 300.121–300.153.

(Authority: 20 U.S.C. 1412, 1413)

State Plans—Contents

§ 300.121 Right to a free appropriate public education.

(a) Each State plan must include information that shows that the State has in effect a policy that ensures that all children with disabilities have the right to FAPE within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the policy.

(c) The information must show that the policy—

(1) Applies to all public agencies in the State;

(2) Applies to all children with disabilities;

(3) Implements the priorities established under §§ 300.320–300.324; and

(4) Establishes timelines for implementing the policy, in accordance with § 300.122.

(Authority: 20 U.S.C. 1412(1), (2)(B), (6); 1413(a)(1))

§ 300.122 Timelines and ages for free appropriate public education.

(a) *General.* Each State plan must include in detail the policies and procedures that the State will undertake or has undertaken in order to ensure that FAPE is available for all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and for all children with disabilities aged 3 through 21

within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each State plan must include a copy of each State statute, court order, Attorney General decision, and other State documents that demonstrate that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each State plan must—

(1) Describe in detail the extent that the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other documents that provide a basis for the exception.

(Authority: 20 U.S.C. 1412(2)(B))

§ 300.123 Full educational opportunity goal.

Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure that the State has a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(2)(A))

§ 300.124 [Reserved]

§ 300.125 Full educational opportunity goal—timetable.

Each State plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(2)(A))

§ 300.126 Full educational opportunity goal—facilities, personnel, and services.

Each State plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(2)(A))

§ 300.127 Priorities.

Each State plan must include information that shows that —

(a) The State has established priorities that meet the requirements of §§ 300.320–300.324;

(b) The State priorities meet the timelines under § 300.122; and

(c) The State has made progress in meeting those timelines.

(Authority: 20 U.S.C. 1412(3))

§ 300.128 Identification, location, and evaluation of children with disabilities.

(a) *General requirement.* Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, to ensure that—

(1) All children with disabilities, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each State plan must:

(1) Designate the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section.

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation.

(3) Describe the extent that—

(i) The activities described in paragraph (a) of this section have been achieved under the current State plan; and

(ii) The resources named for these activities in that plan have been used.

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes.

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures.

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(Authority: 20 U.S.C. 1412(2)(C))

Note 1: The State is responsible for ensuring that all children with disabilities are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements of §§ 300.560–300.576.

Note 2: Under both Parts B and H of the Act, States are responsible for identifying, locating, and evaluating infants and toddlers from birth through 2 years of age who have disabilities or who are suspected of having disabilities. In States where the SEA and the State's lead agency for the Part H program are different and the Part H lead agency will be participating in the child find activities described in paragraph (a) of this section, the nature and extent of the Part H lead agency's participation must, under paragraph (b)(2) of this section, be included in the State plan. With the SEA's agreement, the Part H lead agency's participation may include the actual implementation of child find activities for infants and toddlers. The use of an interagency agreement or other mechanism for providing for the Part H lead agency's participation would not alter or diminish the responsibility of the SEA to ensure compliance with all child find requirements, including the requirement in paragraph (a)(1) of this section that all children with disabilities who are in need of special education and related services are evaluated.

§ 300.129 Confidentiality of personally identifiable information.

(a) Each State plan must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560–300.576 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: The confidentiality regulations were published in the **Federal Register** in final form on February 27, 1976 (41 FR 8603–8610), and met the requirements of Part B of the Act. Those regulations are incorporated in §§ 300.560–300.576.

§ 300.130 Individualized education programs.

(a) Each State plan must include information that shows that each public agency in the State maintains records of the IEP for each child with disabilities, and each public agency establishes, reviews, and revises each program as provided in §§ 300.340–300.350.

(b) Each State plan must include—

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those programs.

(Authority: 20 U.S.C. 1412(4), 1413(a)(1))

§ 300.131 Procedural safeguards.

Each State plan must include procedural safeguards that ensure that the requirements of §§ 300.500–300.514 are met.

(Authority: 20 U.S.C. 1412(5)(A))

§ 300.132 Least restrictive environment.

(a) Each State plan must include procedures that ensure that the requirements of §§ 300.550–300.556 are met.

(b) Each State plan must include the following information:

(1) The number of children with disabilities in the State, within each disability category, who are participating in regular education programs, consistent with §§ 300.550–300.556.

(2) The number of children with disabilities who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(Authority: 20 U.S.C. 1412(5)(B))

§ 300.133 Protection in evaluation procedures.

Each State plan must include procedures that ensure that the requirements of §§ 300.530–300.534 are met.

(Authority: 20 U.S.C. 1412(5)(C))

§ 300.134 Responsibility of State educational agency for all educational programs.

(a) Each State plan must include information that shows that the requirements of § 300.600 are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

(Authority: 20 U.S.C. 1412(6))

§ 300.135 [Reserved]

§ 300.136 Implementation procedures—State educational agency.

Each State plan must describe the procedures the SEA follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(6))

§ 300.137 Procedures for consultation.

Each State plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents of children with disabilities.

(Authority: 20 U.S.C. 1412(7)(A))

§ 300.138 Other Federal programs.

Each State plan must provide that programs and procedures are established to ensure that funds received by the State or any public agency in the State under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, under which there is specific authority for assistance for the education of children with disabilities, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing FAPE for all children with disabilities, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(Authority: 20 U.S.C. 1413(a)(2))

§ 300.139 Comprehensive system of personnel development.

Each State plan must include the procedures required under §§ 300.380–300.383.

(Authority: 20 U.S.C. 1413(a)(3))

§ 300.140 Private schools.

Each State plan must include policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.452 are met.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.141 Recovery of funds for misclassified children.

Each State plan must include policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(Authority: 20 U.S.C. 1413(a)(5))

§§ 300.142–300.143 [Reserved]

§ 300.144 Hearing on application.

Each State plan must include procedures to ensure that the SEA does not take any final action with respect to an application submitted by an LEA before giving the LEA reasonable notice and an opportunity for a hearing under § 76.401(d) of this title.

(Authority: 20 U.S.C. 1413(a)(6))

§ 300.145 Prohibition of commingling.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under part B of the Act are not commingled with State funds.

(Authority: 20 U.S.C. 1413(a)(9))

Note: This assurance is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the part B funds. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

§ 300.146 Annual evaluation.

Each State plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities, including evaluation of IEPs.

(Authority: 20 U.S.C. 1413(a)(11))

§ 300.147 State advisory panel.

Each State plan must provide that the requirements of §§ 300.650–300.653 are met.

(Authority: 20 U.S.C. 1413(a)(12))

§ 300.148 Policies and procedures for use of Part B funds.

Each State plan must set forth policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(Authority: 20 U.S.C. 1413(a)(1))

§ 300.149 Description of use of Part B funds.

(a) State allocation. Each State plan must include the following information about the State's use of funds under § 300.370 and § 300.620:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the SEA will carry out during the next school year with those funds.

(4) A description of each direct service and each support service that the SEA will provide during the next period covered by the State plan with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) Local educational agency allocation. Each State plan must include—

(1) An estimate of the number and percent of LEAs in the State that will receive an allocation under this part (other than LEAs that submit a consolidated application);

(2) An estimate of the number of LEAs that will receive an allocation under a consolidated application;

(3) An estimate of the number of consolidated applications and the average number of LEAs per application; and

(4) A description of direct services that the SEA will provide under § 300.360.

(Authority: 20 U.S.C.1412(6))

§ 300.150 State-level nonsupplanting.

Each State plan must provide assurance satisfactory to the Secretary that funds provided under this part will be used so as to supplement and increase the level of Federal (other than funds available under this part), State, and local funds—including funds that are not under the direct control of the SEA or LEAs — expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal (other than funds available under this part), State, and local funds unless a waiver is granted in accordance with § 300.589.

(Authority: 20 U.S.C. 1413(a)(9))

Note: This requirement is distinct from the LEA nonsupplanting provision already contained in these regulations at § 300.230. Under this State-level provision, the State must assure that Part B funds distributed to LEAs and IEUs will be used to supplement and not supplant other Federal, State, and local funds (including funds not under the control of educational agencies) that would have been expended for special education and related services provided to children with disabilities in the absence of the Part B funds. The portion of Part B funds that are not distributed to LEAs or IEUs under the statutory formula (20 U.S.C. 1411(d)) are not subject to this nonsupplanting provision. See 20 U.S.C. 1411(c)(3). States may not permit LEAs or IEUs to use Part B funds to satisfy a financial commitment for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in the IEPs of children with disabilities.

(H.R. Rep. No. 860, 99th Cong., 21–22 (1986))

§ 300.151 Additional information if the State educational agency provides direct services.

If an SEA provides FAPE for children with disabilities or provides them with direct services, its State plan must include the information required under §§ 300.226, 300.227, 300.231, and 300.235.

(Authority: 20 U.S.C. 1413(b))

§ 300.152 Interagency agreements.

(a) Each State plan must set forth policies and procedures for developing and implementing interagency agreements between—

(1) The SEA; and

(2) All other State and local agencies that provide or pay for services required under this part for children with disabilities.

(b) The policies and procedures referred to in paragraph (a) of this section must—

(1) Describe the role that each of those agencies plays in providing or paying for services required under this part for children with disabilities; and

(2) Provide for the development and implementation of interagency agreements that—

(i) Define the financial responsibility of each agency for providing children with disabilities with FAPE;

(ii) Establish procedures for resolving interagency disputes among agencies that are parties to the agreements; and

(iii) Establish procedures under which LEAs may initiate proceedings in order to secure reimbursement from agencies that are parties to the agreements or otherwise implement the provisions of the agreements.

(Authority: 20 U.S.C. 1413(a)(13))

§ 300.153 Personnel standards.

(a) As used in this part:

(1) "Appropriate professional requirements in the State" means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under this part to children and youth with disabilities who are served by State, local, and private agencies (see § 300.2).

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that—

(i) Provides special education and related services to children with disabilities under this part;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each State plan must include policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State plan must include the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the SEA, and available to the public.

(e) In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children and youth with disabilities must be considered.

(Authority: 20 U.S.C. 1413(a)(14))

Note: The regulations require that the State use its own existing highest requirements to determine the standards appropriate to personnel who provide special education and

related services under this part. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under this part. In some instances, States will be required to show that they are taking steps to retrain or to hire personnel to meet the standards adopted by the SEA that are based on requirements for practice in a specific profession or discipline that were established by other State agencies. States in this position need not, however, require personnel providing services under this part to apply for and obtain the license, registration, or other comparable credential required by other agencies of individuals in that profession or discipline. The regulations permit each State to determine the specific occupational categories required to provide special education and related services and to revise or expand these categories as needed. The professions or disciplines defined by the State need not be limited to traditional occupational categories.

§ 300.154 Transition of individuals from Part H to Part B.

Each State plan must set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program under Part H of the Act who will participate in preschool programs assisted under this part, including a method of ensuring that when a child turns age 3 an IEP, or, if consistent with sections 614(a)(5) and 677(d) of the Act, an individualized family service plan, has been developed and implemented by the child's third birthday.

(Authority: 20 U.S.C. 1413(a)(15))

Local Educational Agency Applications—General

§ 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year, an LEA must submit an application to the SEA.

(Authority: 20 U.S.C. 1414(a))

§ 300.181 [Reserved]

§ 300.182 The excess cost requirement.

An LEA may only use funds under part B of the Act for the excess costs of providing special education and related services for children with disabilities.

(Authority: 20 U.S.C. 1414(a)(1), (a)(2)(B)(i))

§ 300.183 Meeting the excess cost requirement.

(a) An LEA meets the excess cost requirement if it has on the average spent at least the amount determined under § 300.184 for the education of each of its children with disabilities. This amount may not include capital outlay or debt service.

(Authority: 20 U.S.C. 1402(20); 1414(a)(1))

Note: The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before part B funds are used. This ensures that children served with part B funds have at least the same average amount spent on them, from sources other than part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of children with disabilities is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services that exceed the minimum amount. Therefore, if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of part B (priorities, etc.). In the Note under § 300.184, there is an example of how the minimum amount is computed.

§ 300.184 Excess costs—computation of minimum amount.

The minimum average amount that an LEA must spend under § 300.183 for the education of each of its children with disabilities is computed as follows:

(a) Add all expenditures of the LEA in the preceding school year, except capital outlay and debt service—

(1) For elementary school students, if the child with a disability is an elementary school student; or

(2) For secondary school students, if the child with a disability is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be—

(1) Amounts the agency spent in the preceding school year from funds awarded under part B of the Act and titles I and VII of the Elementary and Secondary Education Act of 1965; and

(2) Amounts from State and local funds that the agency spent in the preceding school year for—

(i) Programs for children with disabilities;

(ii) Programs to meet the special educational needs of educationally deprived children; and

(iii) Programs of bilingual education for limited English proficient children.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year—

(1) In its elementary schools, if the child with a disability is an elementary school student; or

(2) In its secondary schools, if the child with a disability is a secondary school student.

(Authority: 20 U.S.C. 1414(a)(1))

Note: The following is an example of how an LEA might compute the average minimum amount it must spend for the education of each of its children with disabilities, under § 300.183. This example follows the formula in § 300.184. Under the statute and regulations, the LEA must make one computation for children with disabilities in its elementary schools and a separate computation for children with disabilities in its secondary schools. The computation for elementary school students with disabilities would be done as follows:

a. First, the LEA must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: An LEA spent the following amounts last year for elementary school students (including its elementary school students with disabilities):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	−500,000
Total expenditures for elementary school students (less capital outlay and debt service)	10,000,000

b. Next, the LEA must subtract amounts spent for:

(1) Programs for children with disabilities;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for limited English proficient children.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1) From funds under Chapter 1 of title I of the Elementary and Secondary Education Act of 1965	300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of children with disabilities	500,000
(5) From a locally-funded program for children with disabilities	250,000

(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965.....	150,000
Total.....	1,600,000

(An LEA would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: Children with disabilities, educationally deprived children, and bilingual education for limited English proficient children.)

This amount is subtracted from the LEA's total expenditure for elementary school students computed above:

$10,000,000
−1,600,000
8,400,000

c. The LEA next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its students with disabilities).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph: $8,400,000/7,000 students = $1,200/student.

This figure is in the minimum amount the LEA must spend (on the average) for the education of each of its students with disabilities. Funds under Part B may be used only for costs over and above this minimum. In this example, if the LEA has 100 elementary school students with disabilities, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the LEA has secondary school students with disabilities, it must do the same computation for them. However the amounts used in the computation would be those the LEA spent last year for the education of secondary school students, rather than for elementary school students.

§ 300.185 Computation of excess costs—consolidated application.

The minimum average amount under § 300.183, if two or more LEAs submit a consolidated application, is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1414(a)(1))

§ 300.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nondisabled children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(Authority: 20 U.S.C. 1402(20); 1414(a)(1))

§ 300.187-300.189 [Reserved]

§ 300.190 Consolidated applications.

(a) [Reserved]

(b) *Required applications.* An SEA may require LEAs to submit a consolidated application for payments under Part B of the Act if the SEA determines that an individual application submitted by an LEA will be disapproved because—

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 300.360(a)(1)); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(c) *Size and scope of program.* The SEA shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1414(c)(1))

§ 300.191 [Reserved]

§ 300.192 State regulation of consolidated applications.

(a) The SEA shall issue regulations with respect to consolidated applications submitted under this part.

(b) The SEA's regulations must—

(1) Be consistent with sections 612(1)–(7) and 613(a) of the Act; and

(2) Provide participating LEAs with joint responsibilities for implementing programs receiving payments under this part.

(Authority: 20 U.S.C. 1414(c)(2)(B))

(c) If an IEU is required by State law to carry out this part, the joint responsibilities given to LEAs under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the IEU. Those administrative responsibilities must be carried out exclusively by the IEU.

(Authority: 20 U.S.C. 1414(c)(2)(C))

§ 300.193 State educational agency approval; disapproval.

(a)–(b) [Reserved]

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.506–300.513 that is adverse to the LEA involved in the decision.

(Authority: 20 U.S.C. 1414(b)(3))

§ 300.194 Withholding.

(a) If an SEA, after giving reasonable notice and an opportunity for a hearing to an LEA, decides that the LEA in the administration of an application approved by the SEA has failed to comply with any requirement in the application, the SEA, after giving notice to the LEA, shall—

(1) Make no further payments to the LEA until the SEA is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the LEA under § 300.180; or

(3) Both.

(b) [Reserved]

(Authority: 20 U.S.C. 1414(b)(2))

Local Educational Agency Applications—Contents

§ 300.220 Child identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(Authority: 20 U.S.C. 1414(a)(1)(A))

Note: The LEA is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements of §§ 300.560–300.576.

§ 300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures that ensure that the criteria in §§ 300.560–300.574 are met.

(Authority: 20 U.S.C. 1414(a)(1)(B))

§ 300.222 Full educational opportunity goal—timetable.

Each application must—(a) Include a goal of providing full educational opportunity to all children with disabilities, aged birth through 21; and

(b) Include a detailed timetable for accomplishing the goal.

(Authority: 20 U.S.C. 1414(a)(1)(C), (D))

§ 300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 300.222.

(Authority: 20 U.S.C. 1414(a)(1)(E))

§ 300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the SEA under § 300.139.

(Authority: 20 U.S.C. 1414(a)(1)(C)(i))

§ 300.225 Priorities.

Each application must include priorities that meet the requirements of §§ 300.320–300.324.

(Authority: 20 U.S.C. 1414(a)(1)(C)(ii))

§ 300.226 Parent involvement.

Each application must include procedures to ensure that, in meeting the goal under § 300.222, the LEA makes provision for participation of and consultation with parents or guardians of children with disabilities.

(Authority: 20 U.S.C. 1414(a)(1)(C)(iii))

§ 300.227 Participation in regular education programs.

(a) Each application must include procedures to ensure that to the maximum extent practicable, and consistent with §§ 300.550–300.553, the LEA provides special services to enable children with disabilities to participate in regular educational programs.

(b) Each application must describe—

(1) The types of alternative placements that are available for children with disabilities; and

(2) The number of children with disabilities within each disability category who are served in each type of placement.

(Authority: 20 U.S.C. 1414(a)(1)(C)(iv))

§ 300.228 [Reserved]

§ 300.229 Excess cost.

Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under part B of the Act only for costs that exceed the amount computed under § 300.184 and that are directly attributable to the education of children with disabilities.

(Authority: 20 U.S.C. 1414(a)(2)(B))

§ 300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the SEA that the LEA uses funds provided under part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section, the total amount or average per capita amount of State and local school funds budgeted by the LEA for expenditures in the current fiscal year for the education of children with disabilities must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of children with disabilities in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(1) Decreases in enrollment of children with disabilities; and

(2) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities.

(Authority: 20 U.S.C. 1414(a)(2)(B))

§ 300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the SEA that the LEA meets the requirements of this section.

(b) An LEA may not use funds under part B of the Act to provide services to children with disabilities unless the LEA uses State and local funds to provide services to those children that, taken as a whole, are at least comparable to services provided to other children with disabilities in that LEA.

(c) Each LEA shall maintain records that show that the LEA meets the requirement in paragraph (b) of this section.

(Authority: 20 U.S.C. 1414(a)(2)(C))

Note: Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all children with disabilities in the LEA who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 300.320–300.324.

§§ 300.232–300.234 [Reserved]

§ 300.235 Individualized education programs.

Each application must include procedures to assure that the LEA complies with §§ 300.340–300.350.

(Authority: 20 U.S.C. 1414(a)(5))

§ 300.236 [Reserved]

§ 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the SEA that the LEA has procedural safeguards that meet the requirements of §§ 300.500–300.515.

(Authority: 20 U.S.C. 1414(a)(7))

§ 300.238 Use of Part B funds.

Each application must describe how the LEA will use the funds under part B of the Act during the next school year.

(Authority: 20 U.S.C. 1414(a))

§ 300.239 [Reserved]

§ 300.240 Other requirements.

Each local application must include additional procedures and information that the SEA may require in order to meet the State plan requirements of §§ 300.121–300.153.

(Authority: 20 U.S.C. 1414(a)(6))

Application From Secretary of the Interior

§ 300.260 Submission of application; approval.

(a) In order to receive a grant under this part, the Secretary of the Interior shall submit an application that—

(1) Meets the requirements of section 612(1), 612(2)(C)–(E), 612(4), 612(5), 612(6), and 612(7) of the Act (including monitoring and evaluation activities);

(2) Meets the requirements of section 613(a), (2), (3), (4)(B), (5), (6), (7), (10), (11), (12), (13), (14), and (15), 613(b), and 613(e) of the Act;

(3) Meets the requirements of section 614(a)(1)(A)–(B), (2)(A), (C), (3), (4), (5), and (7) of the Act;

(4) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)(1)–(3) of this section.

(5) Includes a description of how the Secretary of the Interior will coordinate the provision of services under this part with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(6) Includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected

local school boards before the adoption of the policies, programs, and procedures required under paragraphs (a)(1)–(3) of this section;

(7) Includes an assurance that the Secretary of the Interior will provide such information as the Secretary may require to comply with section 618(b)(1) of the Act, including data on the number of children and youth with disabilities served and the types and amounts of services provided and needed;

(8) Includes an assurance that, by October 1, 1992, the Secretaries of the Interior and Health and Human Services will enter into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations. That agreement must provide for the apportionment of responsibilities and costs, including, but not limited to, those related to child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies, or both, as needed for a child to remain in school or a program; and

(9) Includes an assurance that the Department of the Interior will cooperate with the Department of Education in the latter's exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under the Act and will fulfill its duties under the Act.

(b) Sections 300.581–300.585 apply to grants available to the Secretary of the Interior under this part.

(Authority: 20 U.S.C. 1411(f))

§ 300.261 Public participation.

In the development of the application for the Department of the Interior, the Secretary of the Interior shall provide for public participation consistent with §§ 300.280–300.284.

(Authority: 20 U.S.C. 1411(f))

§ 300.262 Use of Part B funds.

(a)(1) The Department of the Interior may use five percent of its payment under § 300.709 in any fiscal year, or $350,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(2) The remainder of the payments to the Secretary of the Interior under § 300.709 in any fiscal year must be used in accordance with the priorities under §§ 300.320–300.324.

(b) Payments to the Secretary of the Interior under § 300.710 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(f))

§ 300.263 Applicable regulations.

The Secretary of the Interior shall comply with the requirements of §§ 300.301–300.303, §§ 300.305–300.307, and §§ 300.340–300.347, § 300.350, §§ 300.360–300.383, §§ 300.400–300.402, §§ 300.500–300.585, §§ 300.600–300.621, and §§ 300.660–300.662.

(Authority: 20 U.S.C. 1411(f)(2))

Public Participation

§ 300.280 Public hearings before adopting a State plan.

Prior to its adoption of a State plan, the SEA shall—

(a) Make the plan available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the plan.

(Authority: 20 U.S.C. 1412(7))

§ 300.281 Notice.

(a) The SEA shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about—

(1) The purpose and scope of the State plan and its relation to part B of the Act;

(2) The availability of the State plan;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the plan; and

(5) The timetable for developing the final plan and submitting it to the Secretary for approval.

(c) The notice must be published or announced—

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(Authority: 20 U.S.C. 1412(7))

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

(Authority: 20 U.S.C. 1412(7))

§ 300.283 Review of public comments before adopting plan.

Before adopting its State plan, the SEA shall—

(a) Review and consider all public comments; and

(b) Make any necessary modifications in the plan.

(Authority: 20 U.S.C. 1412(7))

§ 300.284 Publication and availability of approved plan.

After the Secretary approves a State plan, the SEA shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(Authority: 20 U.S.C. 1412(7))

Subpart C—Services

Free Appropriate Public Education

§ 300.300 Timelines for free appropriate public education.

(a) *General.* Each State shall ensure that FAPE is available to all children with disabilities aged 3 through 18 within the State not later than September 1, 1978, and to all children with disabilities aged 3 through 21 within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21:

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(4) If a public agency provides education to a child with a disability in any of these age groups, it must make

FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on reservations.* With the exception of children identified in § 300.709(a)(1) and (2), the SEA shall be responsible for ensuring that all of the requirements of Part B of the Act are implemented for all children aged 3 through 21 on reservations.

(Authority: 20 U.S.C. 1411(f); 1412(2)(B); S. Rep. No. 94–168, p. 19 (1975))

Note 1: The requirement to make FAPE available applies to all children with disabilities within the State who are in the age ranges required under § 300.300 and who need special education and related services. This includes children with disabilities already in school and children with less severe disabilities, who are not covered under the priorities under § 300.321.

Note 2: In order to be in compliance with § 300.300, each State must ensure that the requirement to identify, locate, and evaluate all children with disabilities is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 300.530–300.533. If, as a result of the evaluation, it is determined that a child needs special education and related services, an IEP must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

Note 3: The requirement to identify, locate, and evaluate children with disabilities (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93–380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to ensure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing FAPE. One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement that has the same age range as child find. Moreover, while a State is not required to provide FAPE to children with disabilities below the age ranges mandated under § 300.300, the State may, at its discretion, extend services to those children, subject to the priority requirements of §§ 300.320–300.324.

§ 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(Authority: 20 U.S.C. 1401 (18); 1412(2)(B))

§ 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn by children with hearing impairments including deafness in school are functioning properly.

(Authority: 20 U.S.C. 1412(2)(B))

Note: The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(Authority: H. R. Rep. No. 95–381, p. 67 (1977))

§ 300.304 Full educational opportunity goal.

(a) Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(b) Subject to the priority requirements of §§ 300.320–300.324, an SEA or LEA may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Note: In meeting the full educational opportunity goal, the Congress also encouraged LEAs to include artistic and cultural activities in programs supported under this part, subject to the priority requirements of §§ 300.320–300.324. This point is addressed in the following statements from the Senate Report on Public Law 94–142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Authority: S. Rep. No. 94–168, p. 13 (1975))

§ 300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Note: The above list of program options is not exhaustive, and could include any program or activity in which nondisabled students participate.

§ 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

§ 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1401(a)(16); 1412(5)(B); 1414(a)(6))

Note: The Report of the House of Representatives on Public Law 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(Authority: H. R. Rep. No. 94-332, p. 9 (1975))

§ 300.308 Assistive technology.

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5–300.6, are made available to a child with a disability if required as a part of the child's—

(a) Special education under § 300.17;

(b) Related services under § 300.16; or

(c) Supplementary aids and services under § 300.550(b)(2).

(Authority: 20 U.S.C. 1412(2), (5)(B))

Priorities in the Use of Part B Funds

§ 300.320 Definitions of first priority children and second priority children.

For the purposes of §§ 300.321–300.324, the term:

(a) "First priority children" means children with disabilities who—

(1) Are in an age group for which the State must make FAPE available under § 300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education.

(Authority: 20 U.S.C. 1412(3))

Note 1: After September 1, 1978, there should be no second priority children, since States must ensure, as a condition of receiving Part B funds for fiscal year 1979, that all children with disabilities will have FAPE available by that date.

Note 2: The term "free appropriate public education," as defined in § 300.8, means special education and related services that * * * "are provided in conformity with an IEP" * * *.

New first priority children will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all children with disabilities.

§ 300.321 Priorities.

(a) Each SEA and LEA shall use funds provided under part B of the Act in the following order of priorities:

(1) To provide FAPE to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide FAPE to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements of this part.

(b) The requirements of paragraph (a) of this section do not apply to funds that the State uses for administration under § 300.620.

(Authority: 20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

Note: SEAs as well as LEAs must use part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, part B funds may be used—

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide FAPE to newly identified first priority children;

(3) To meet the full educational opportunity goal required under § 300.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual children with disabilities; and

(4) To meet the other requirements of part B.

§ 300.322 [Reserved]

§ 300.323 Services to other children.

If a State or an LEA is providing FAPE to all of its first priority children, that State or LEA may use funds provided under part B of the Act—

(a) To provide FAPE to children with disabilities who are not receiving any education and who are in the age groups not covered under § 300.300 in that State; or

(b) To provide FAPE to second priority children; or

(c) Both.

(Authority: 20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

§ 300.324 Application of local educational agency to use funds for the second priority.

An LEA may use funds provided under part B of the Act for second priority children, if it provides assurance satisfactory to the SEA in its application (or an amendment to its application)—

(a) That all first priority children have FAPE available to them;

(b) That the LEA has a system for the identification, location, and evaluation of children with disabilities, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the LEA makes FAPE available to the child.

(Authority: 20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

Individualized Education Programs

§ 300.340 Definitions.

(a) As used in this part, the term "individualized education program" means a written statement for a child with a disability that is developed and implemented in accordance with §§ 300.341–300.350.

(b) As used in §§ 300.346 and 300.347, "participating agency" means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(a)(20))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412 (4), (6); 1413(a)(4))

Note: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare) that provide special education to a child with a disability either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a child with a disability, that agency would be responsible for ensuring that an IEP is developed for the child.

§ 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5); Pub. L. 94–142, sec. 8(c) (1975))

Note: Under paragraph (b)(2) of this section, it is expected that the IEP of a child with a disability will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances that require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) *Timeline.* A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Note: The date on which agencies must have IEPs in effect is specified in § 300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect at the beginning of the school year, agencies could hold meetings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

§ 300.344 Participants in meetings.

(a) *General.* The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a child with a disability who has been evaluated for the first time, the public agency shall ensure—

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) *Transition services participants.* (1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite—

(i) The student; and

(ii) A representative of any other agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

(Authority: 20 U.S.C. 1401(a)(19), (a)(20); 1412(2)(B), (4), (6); 1414(a)(5))

Note 1: In deciding which teacher will participate in meetings on a child's IEP, the agency may wish to consider the following possibilities:

(a) For a child with a disability who is receiving special education, the teacher could be the child's special education teacher. If the child's disability is a speech impairment, the teacher could be the speech-language pathologist.

(b) For a child with a disability who is being considered for placement in special education, the teacher could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

For a child whose primary disability is a speech or language impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Note 2: Under paragraph (c) of this section, the public agency is required to invite each student to participate in his or her IEP

meeting, if a purpose of the meeting is the consideration of transition services for the student. For all students who are 16 years of age or older, one of the purposes of the annual meeting will always be the planning of transition services, since transition services are a required component of the IEP for these students.

For a student younger than age 16, if transition services are initially discussed at a meeting that does not include the student, the public agency is responsible for ensuring that, before a decision about transition services for the student is made, a subsequent IEP meeting is conducted for that purpose, and the student is invited to the meeting.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also—

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

(Authority: 20 U.S.C. 1401(a)(20); 1412 (2)(B), (4), (6); 1414(a)(5))

Note: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Content of individualized education program.

(a) *General.* The IEP for each child must include—

(1) A statement of the child's present levels of educational performance;

(2) A statement of annual goals, including short-term instructional objectives;

(3) A statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs;

(4) The projected dates for initiation of services and the anticipated duration of the services; and

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(b) *Transition services.* (1) The IEP for each student, beginning no later than age 16 (and at a younger age, if determined appropriate), must include a statement of the needed transition services as defined in § 300.18, including, if appropriate, a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting.

(2) If the IEP team determines that services are not needed in one or more of the areas specified in § 300.18 (b)(2)(i) through (b)(2)(iii), the IEP must include a statement to that effect and the basis upon which the determination was made.

(Authority: 20 U.S.C. 1401 (a)(19), (a)(20); 1412 (2)(B), (4), (6); 1414(a)(5))

Note 1: The legislative history of the transition services provisions of the Act suggests that the statement of needed transition services referred to in paragraph (b) of this section should include a commitment by any participating agency to meet any financial responsibility it may have in the provision of transition services. See House Report No. 101–544, p. 11 (1990).

Note 2: With respect to the provisions of paragraph (b) of this section, it is generally expected that the statement of needed transition services will include the areas listed in § 300.18 (b)(2)(i) through (b)(2)(iii). If the IEP team determines that services are not needed in one of those areas, the public agency must implement the requirements in paragraph (b)(2) of this section. Since it is a part of the IEP, the IEP team must reconsider its determination at least annually.

Note 3: Section 602(a)(20) of the Act provides that IEPs must include a statement of needed transition services for students beginning no later than age 16, but permits transition services to students below age 16 (i.e., "* * * and, when determined appropriate for the individual, beginning at age 14 or younger."). Although the statute does not mandate transition services for all students beginning at age 14 or younger, the provision of these services could have a significantly positive effect on the employment and independent living outcomes for many of these students in the future, especially for students who are likely to drop out before age 16. With respect to the provision of transition services to students below age 16, the Report of the House Committee on Education and Labor on Public Law 101–476 includes the following statement:

Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical. (House Report No. 101–544, 10 (1990).)

§ 300.347 Agency responsibilities for transition services.

(a) If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. 1401 (a)(18), (a)(19), (a)(20); 1412(2)(B))

§ 300.348 Private school placements by public agencies.

(a) *Developing individualized education programs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.343.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(3) [Reserved]

(b) *Reviewing and revising individualized education programs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative:

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.349 Children with disabilities in parochial or other private schools.

If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall—

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.343; and

(b) Ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.350 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with an IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(Authority: 20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Note: This section is intended to relieve concerns that the IEP constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

Direct Service by the State Educational Agency

§ 300.360 Use of local educational agency allocation for direct services.

(a) An SEA may not distribute funds to an LEA, and shall use those funds to ensure the provision of FAPE to children with disabilities residing in the area served by the LEA, if the LEA, in any fiscal year—

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 300.220–300.240;

(3) Is unable or unwilling to establish and maintain programs of FAPE;

(4) Is unable or unwilling to be consolidated with other LEAs in order to establish and maintain those programs; or

(5) Has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements of §§ 300.182–300.186 do not apply to the SEA.

(Authority: 20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

Note: Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The SEA, as a recipient of Part B funds, is responsible for ensuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If an LEA elects not to apply for its Part B entitlement, the State would be required to use those funds to ensure that FAPE is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to ensure that FAPE and the other requirements of the Act are met.

Moreover, if the LEA is the recipient of any other Federal funds, it would have to be in compliance with 34 CFR §§ 104.31–104.39 of the regulations implementing Section 504 of the Rehabilitation Act of 1973. It should be noted that the term "FAPE" has different meanings under Part B and Section 504. For example, under Part B, FAPE is a statutory term that requires special education and related services to be provided in accordance with an IEP. However, under Section 504, each recipient must provide an education that includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the FAPE requirement.

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550–300.556).

(Authority: 20 U.S.C. 1414(d))

§ 300.370 Use of State agency allocations.

(a) The State may use the portion of its allocation that it does not use for administration under §§ 300.620–300.621—

(1) For support services and direct services in accordance with the priority requirements of §§ 300.320–300.324; and

(2) For the administrative costs of the State's monitoring activities and complaint investigations, to the extent that these costs exceed the administrative costs for monitoring and complaint investigations incurred during fiscal year 1985.

(b) For the purposes of paragraph (a) of this section—

(1) "Direct services" means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) "Support services" includes implementing the comprehensive system of personnel development of §§ 300.380–300.383, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(Authority: 20 U.S.C. 1411 (b)(2), (c)(2))

§ 300.371 State matching.

Beginning with the period July 1, 1978-June 30, 1979, and for each following fiscal year, the funds that a State uses for direct and support services under § 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 300.360.

(Authority: 20 U.S.C. 1411 (c)(2)(B), (c)(4)(B))

Note: The requirement in § 300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 300.706(a) for administration, direct services, or support services.

(Authority: 20 U.S.C. 1411(c)(3))

Comprehensive System of Personnel Development

§ 300.380 General.

Each State shall—

(a) Develop and implement a comprehensive system of personnel development that—

(1) Is consistent with the purposes of the Act and with the comprehensive system of personnel development described in 34 CFR § 303.360;

(2) Meets the requirements in §§ 300.381–300.383; and

(3) Is consistent with the provisions on personnel standards in § 300.153; and

(b) Include in its State plan a description of the personnel development system required in paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1413 (a)(3), (a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified personnel (as the term "qualified" is defined at § 300.15), including special education and related services personnel and leadership personnel, necessary to carry out the purposes of this part. The procedures and activities must include the development, updating, and implementation of a plan that—

(a) Addresses current and projected special education and related services personnel needs, including the need for leadership personnel; and

(b) Coordinates and facilitates efforts among SEA and LEAs, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities.

(Authority: 20 U.S.C. 1413(a)(3)(A))

§ 300.382 Personnel preparation and continuing education.

Each State plan must include a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared. The procedures and activities must include—

(a) A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part;

(b) Procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(c) Procedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration.

(Authority: 20 U.S.C. 1413(a)(3)(B))

§ 300.383 Data system on personnel and personnel development.

(a) *General.* The procedures and activities required in §§ 300.381 and 300.382 must include the development and maintenance of a system for determining, on an annual basis, the data required in paragraphs (b) and (c) of this section.

(b) *Data on qualified personnel.* (1) The system required by paragraph (a) of this section must enable each State to determine, on an annual basis—

(i) The number and type of personnel, including leadership personnel, employed in the provision of special education and related services, by profession or discipline;

(ii) The number and type of personnel who are employed with emergency, provisional, or temporary certification in each profession or discipline who do not hold appropriate State certification, licensure, or other credentials comparable to certification or licensure for that profession or discipline; and

(iii) The number and type of personnel, including leadership personnel, in each profession or discipline needed, and a projection of the numbers of those personnel that will be needed in five years, based on projections of individuals to be served, retirement and other departures of personnel from the field, and other relevant factors.

(2) The data on special education and related services personnel required in paragraph (b)(1) of this section must include audiologists, counselors, diagnostic and evaluation personnel, home-hospital teachers, interpreters for students with hearing impairments including deafness, occupational therapists, physical education teachers, physical therapists, psychologists, rehabilitation counselors, social workers, speech-language pathologists, teacher aides, recreation and therapeutic recreation specialists, vocational education teachers, work-study coordinators, and other instructional and noninstructional staff.

(3) The data on leadership personnel required by paragraph (b)(1) of this section must include administrators and supervisors of State or local agencies who are involved in the provision or supervision of services or activities necessary to carry out the purposes of this part.

(c) *Data on personnel development.* The system required in paragraph (a) of this section must enable each State to determine, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including—

(1) The numbers of students enrolled in programs for the preparation of special education and related services personnel administered by these institutions of higher education; and

(2) The numbers of students who graduated during the past year with certification or licensure, or with credentials to qualify for certification or licensure, from programs for the preparation of special education and related services personnel administered by institutions of higher education.

(Authority: 20 U.S.C. 1413(a)(3)(A))

§§ 300.384–300.387 [Reserved].

Subpart D—Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

§ 300.400 Applicability of §§ 300.400–300.402.

Sections 300.401–300.402 apply only to children with disabilities who are or have been placed in or referred to a

private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.340–300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements of this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450–300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500–300.515.

(Authority: 20 U.S.C. 1412(2)(B); 1415)

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400–300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.451 State educational agency responsibility.

The SEA shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements of 34 CFR §§ 76.651–76.662 are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.452 Local educational agency responsibility.

Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

(Authority: 20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

Procedures for By-Pass

§ 300.480 By-pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by §§ 300.451–300.452.

(b) The Secretary waives the requirement of section 613(a)(4)(A) of the Act and of §§ 300.451–300.452 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1413(d)(1))

§ 300.481 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as—

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 613(a)(4)(A) of the Act, §§ 300.451–300.452, and 34 CFR §§ 76.651–76.662.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 613(a)(4)(A) of the Act and §§ 300.451–300.452 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount that may not exceed the amount per child provided by the Secretary under this part for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under this part the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. 1413(d)(2))

Due Process Procedures

Source: Sections 300.482 through 300.486 appear at 49 FR 48526, Dec. 12, 1984, unless otherwise noted.

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to

submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(d)(3)(A))

§ 300.486 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located. The procedures for judicial review are described in section 613(d)(3)(B)–(D) of the Act.

(Authority: 20 U.S.C. 1413(d)(3)(B)–(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

(a) As used in this part: "Consent" means that—

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(b) "Evaluation" means procedures used in accordance with §§ 300.530–300.534 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

(c) "Personally identifiable" means that information includes—

(1) The name of the child, the child's parent, or other family member;

(2) The address of the child;

(3) A personal identifier, such as the child's social security number or student number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415, 1417(c))

§ 300.501 General responsibility of public agencies.

Each SEA shall ensure that each public agency establishes and implements procedural safeguards that meet the requirements of §§ 300.500–300.515.

(Authority: 20 U.S.C. 1415(a))

§ 300.502 Opportunity to examine records.

The parents of a child with a disability shall be afforded, in accordance with the procedures of §§ 300.562–300.569, an opportunity to inspect and review all education records with respect to—

(a) The identification, evaluation, and educational placement of the child; and

(b) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(1)(A))

§ 300.503 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 300.506 to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must be considered by the public agency in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(Authority: 20 U.S.C. 1415(b)(1)(A))

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice that meets the requirements of § 300.505 must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Consent; procedures if a parent refuses consent.* (1) Parental consent must be obtained before—

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a child with a disability in a program providing special education and related services.

(2) If State law requires parental consent before a child with a disability is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(3) If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 300.506–300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510–300.513.

(c) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (b) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(d) *Limitation.* A public agency may not require parental consent as a condition of any benefit to the parent or the child except for the service or activity for which consent is required under paragraphs (b) or (c) of this section.

(Authority: 20 U.S.C. 1415(b)(1)(C), (D); 1412(2), (6))

Note 1: Any changes in a child's special education program after the initial placement are not subject to the parental consent requirements in paragraph (b)(1) of this section, but are subject to the prior notice requirement in paragraph (a) of this section and the IEP requirements of §§ 300.340–300.350.

Note 2: Paragraph (b)(2) of this section means that if State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures of §§ 300.506–300.508 to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Note 3: If a State adopts a consent requirement in addition to those described in paragraph (b) of this section and consent is refused, paragraph (d) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services identified in an IEP and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

If the parent refuses to consent and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, paragraph (c) of this section requires that the agency must implement its procedures to override the refusal. This section does not preclude the agency from reconsidering its proposal if it believes that circumstances warrant.

§ 300.505 Content of notice.

(a) The notice under § 300.504 must include—

(1) A full explanation of all of the procedural safeguards available to the parents under § 300.500, §§ 300.502–300.515, and §§ 300.562–300.569;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors that are relevant to the agency's proposal or refusal.

(b) The notice must be—

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the SEA or LEA shall take steps to ensure—

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice; and

(3) That there is written evidence that the requirements in paragraphs (c)(1) and (2) of this section have been met.

(Authority: 20 U.S.C. 1415(b)(1)(D))

§ 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504(a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1415(b)(2))

Note: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of children with disabilities, and

the provision of FAPE to those children. Mediations have been conducted by members of SEAs or LEA personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under §§ 300.500–300.515.

§ 300.507 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of a public agency that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1414(b)(2))

§ 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing.

(5) Obtain written findings of fact and decisions. The public agency, after deleting any personally identifiable information, shall—

(i) Transmit those findings and decisions to the State advisory panel established under § 300.650; and

(ii) Make those findings and decisions available to the public.

(b) Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(Authority: 20 U.S.C. 1415(d))

§ 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under § 300.506 is final, unless a party to the hearing appeals the decision under § 300.510 or § 300.511.

(Authority: 20 U.S.C. 1415(c))

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(b) If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record.

(2) Ensure that the procedures at the hearing were consistent with the requirements of due process.

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in 300.508 apply.

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official.

(5) Make an independent decision on completion of the review.

(6) Give a copy of written findings and the decision to the parties.

(c) The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(6) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(d) The decision made by the reviewing official is final unless a party brings a civil action under § 300.511.

(Authority: 20 U.S.C. 1415(c), (d); H. R. Rep. No. 94–664, at p. 49 (1975))

Note 1: The SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review.

Note 2: All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.508 relating to hearings also apply.

§ 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510, and any party aggrieved by the decision of a reviewing officer under § 300.510, has the right to bring a civil action under section 615(e)(2) of the Act.

(Authority: 20 U.S.C. 1415)

§ 300.512 Timelines and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415)

§ 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(Authority: 20 U.S.C. 1415(e)(3))

Note: Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 300.514 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected when—

(1) No parent (as defined in § 300.13) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for

the parents. This must include a method: (1) For determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate—

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills that ensure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency that is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(1)(B))

§ 300.515 Attorneys' fees.

Each public agency shall inform parents that in any action or proceeding under section 615 of the Act, courts may award parents reasonable attorneys' fees under the circumstances described in section 615(e)(4) of the Act.

(Authority: 20 U.S.C. 1415(b)(1)(D); 1415(e)(4))

Protection in Evaluation Procedures

§ 300.530 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.530–300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of children with disabilities must be selected and administered so as not to be racially or culturally discriminatory.

(Authority: 20 U.S.C. 1412(5)(C))

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 300.532.

(Authority: 20 U.S.C. 1412(5)(C))

§ 300.532 Evaluation procedures.

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials—

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(Authority: 20 U.S.C. 1412(5)(C))

Note: Children who have a speech or language impairment as their primary disability may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would: (1) Evaluate each child with a speech or language impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall—

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in §§ 300.550–300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340–300.350.

(Authority: 20 U.S.C. 1412(5)(C); 1414(a)(5))

Note: Paragraph (a)(1) of this section includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to ensure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other children with disabilities, such as a child who has a severe articulation impairment as his primary disability. For such a child, the speech-language pathologist, in complying with the multiple source requirement, might use: (1) A standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 300.534 Reevaluation.

Each SEA and LEA shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340–300.350; and

(b) That an evaluation of the child, based on procedures that meet the requirements of § 300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation.

(Authority: 20 U.S.C. 1412(5)(c))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 300.532, each public agency shall include on the multidisciplinary evaluation team—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: 20 U.S.C. 1411 note)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas—

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(Authority: 20 U.S.C. 1411 note)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1411 note)

§ 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1411 note)

Least Restrictive Environment

§ 300.550 General.

(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.550–300.556.

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(5)(B))

§ 300.552 Placements.

Each public agency shall ensure that:

(a) The educational placement of each child with a disability—

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at § 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Section 300.552 includes some of the main factors that must be considered in determining the extent to which a child with a disability can be educated with children who are nondisabled. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.

The requirements of § 300.552, as well as the other requirements of §§ 300.550–300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Public agencies that provide preschool programs for nondisabled preschool children must ensure that the requirements of § 300.552(c) are met. Public agencies that do not operate programs for nondisabled preschool children are not required to initiate such programs solely to satisfy the requirements regarding placement in the LRE embodied in §§ 300.550–300.556. For these public agencies, some alternative methods for meeting the requirements of §§ 300.550–300.556 include—

(1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

(2) Placing children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and

(3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based upon the child's IEP, and meets all of the other requirements of §§ 300.340–300.350 and §§ 300.550–300.556.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR part 104—Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Section 300.553 is taken from a requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[This paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions.

Each SEA shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to ensure that § 300.550 is effectively implemented.

(Authority: 20 U.S.C. 1412(5)(B))

Note: Under section 612(5)(B) of the statute, the requirement to educate children with disabilities with nondisabled children also applies to children in public and private institutions or other care facilities. Each SEA must ensure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(5)(B))

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550, the SEA shall—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(5)(B))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560–300.576—

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of education records in part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.128, including—

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in part 99 of this title.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.570 Hearing procedures.

(1) A hearing held under § 300.568 must be conducted according to the procedures under § 99.23 of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99 of this title.

(c) The SEA shall include policies and procedures in its State plan that are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.129 and part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: Under § 300.573, the personally identifiable information on a child with a disability may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b) of this section.

§ 300.574 Children's rights.

The SEA shall include policies and procedures in its State plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Note: Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 300.575 Enforcement.

The SEA shall describe in its State plan the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.576 Department.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Secretary shall apply the requirements of 5 U.S.C. section 552a (b)(1)–(2), (4)–(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)–(10); (h); (m); and (n), and the regulations implementing those provisions in part 5b of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Department Procedures

§ 300.580 [Reserved]

§ 300.581 Disapproval of a State plan.

Before disapproving a State plan, the Secretary gives the SEA written notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

§ 300.582 Content of notice.

(a) In the written notice, the Secretary—

(1) States the basis on which the Secretary proposes to disapprove the State plan;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 calendar days after it receives the notice of proposed disapproval; and

(4) Provides information about the procedures followed for a hearing.

(b) The Secretary sends the written notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1413(c))

§ 300.583 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. 1413(c))

§ 300.584 Hearing procedures.

(a) As used in §§ 300.581–300.586 the term *party or parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of its State plan under this part.

(2) The Department of Education official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 calendar days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m) (1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counsel—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p) (1) The Hearing Official or Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. 1413(c))

§ 300.585 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.582.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 calendar days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven calendar days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 calendar days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 calendar days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

§ 300.586 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to its State plan, the State may, within 60 calendar days after notice of that action, file a petition for review with the United States court of appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 1416(b)(1))

§§ 300.587–300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, SEAs and LEAs must ensure that Federal funds provided under this part are used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under this part and in no case to supplant those Federal, State, and local funds. The nonsupplanting requirement applies only to funds allocated to LEAs (See § 300.372).

(b) If the State provides clear and convincing evidence that all children with disabilities have FAPE available to them, the Secretary may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Secretary in writing. The Secretary then provides the State with a finance and membership report form that provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of FAPE to all children with disabilities. The special study must include statements by a representative sample of organizations that deal with children with disabilities, and parents and teachers of children with disabilities, relating to the following areas—

(1) The adequacy and comprehensiveness of the State's system for identifying, locating, and evaluating children with disabilities;

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions; and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of FAPE for all children with disabilities, including—

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year; and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Secretary considers the information that the State provides under paragraphs (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have FAPE available to them, and if so, the extent of the waiver.

(g) The State may request a hearing with regard to any final action by the Secretary under this section.

(Authority: 20 U.S.C. 1411(c)(3); 1413(a)(9)(B))

Subpart F—State Administration

General

§ 300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other public agency—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) This part may not be construed to limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(Authority: 20 U.S.C. 1412(6))

Note: The requirement in § 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of children with disabilities within each State. With respect to SEA responsibility, the Senate Report on Pub. L. 94–142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (S. Rep. No. 94–168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options that may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning SEA standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the SEA responsibility.

(3) State law, regulation, or policy designates the SEA as responsible for establishing standards for all educational programs for individuals with disabilities, and includes responsibility for monitoring.

(4) State law mandates that the SEA is responsible for all educational programs.

§ 300.601 Relation of part B to other Federal programs.

This part may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. 1413(e))

Use of Funds

§ 300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under part B of the Act, or $450,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than twenty-five percent of the State's total allotment for the fiscal year under part B of the Act.

(Authority: 20 U.S.C. 1411(b), (c))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of the State plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. 1411(b), (c))

State Advisory Panel

§ 300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of §§ 300.650–300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650–300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. 1413(a)(12))

§ 300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of children with disabilities. The membership must include at least one person representative of each of the following groups—

(1) Individuals with disabilities;

(2) Teachers of children with disabilities;

(3) Parents of children with disabilities;

(4) State and local educational officials; and

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(Authority: 20 U.S.C. 1413(a)(12))

Note: The membership of the State advisory panel, as listed in paragraphs (a)(1)–(5) of this section, is required in section 613(a)(12) of the Act. As indicated in paragraph (b) of this section, the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having—

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and individuals with disabilities);

(2) Broad representation within the consumer-advocate groups, to ensure that the interests and points of view of various parents, advocates and individuals with disabilities are appropriately represented;

(3) Broad representation within professional groups (e.g., regular education personnel; special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of

children with disabilities; and appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10–15 members), the panel itself could take steps to ensure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 300.652 Advisory panel functions.

The State advisory panel shall—

(a) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(b) Comment publicly on the State plan and rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Secretary in the performance of his responsibilities under section 618 of the Act.

(Authority: 20 U.S.C. 1413(a)(12))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

(Authority: 20 U.S.C. 1413(a)(12))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

Each SEA shall adopt written procedures for:

(a) Resolving any complaint that meets the requirements of § 300.662 by—

(1) Providing for the filing of a complaint with the SEA; and

(2) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint.

(b) Informing parents and other interested individuals about the procedures in §§ 300.660–300.662.

(Authority: 20 U.S.C. 2831(a))

§ 300.661 Minimum State complaint procedures.

Each SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 300.660(a) to—

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the SEA's final decision.

(Authority: 20 U.S.C. 2831(a))

§ 300.662 Filing a complaint.

An organization or individual may file a signed written complaint under the procedures described in §§ 300.600–300.661. The complaint must include—

(a) A statement that a public agency has violated a requirement of part B of the Act or of this part; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

Subpart G—Allocation of Funds; Reports

Allocations

§ 300.700 Special definition of the term State.

For the purposes of § 300.701, § 300.702, and §§ 300.704–300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.

(Authority: 20 U.S.C. 1411(a)(2))

§ 300.701 State entitlement; formula.

(a) The Secretary calculates the maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year as follows:

(1) If the State is eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 3 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(2) If the State is not eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of children with disabilities aged 6 through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a)(1))

(b) [Reserved]

(c) For the purposes of this section, the *average per pupil expenditure in public elementary and secondary schools in the United States*, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the United States (which, for the purpose of this section, means the 50 States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the

source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. 1411(a)(4))

§ 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 300.701:

(1) If a State serves all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 3 through 17 in the State to the extent that the number of those children is greater than 12 percent of the number of all children aged 3 through 17 in the State.

(2) If a State does not serve all children with disabilities aged 3 through 5 in the State, the Secretary does not count children with disabilities aged 5 through 17 to the extent that the number of those children is greater than 12 percent of the number of all children aged 5 through 17 in the State.

(3) The Secretary does not count children with disabilities who are counted under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged 3 through 17 and 5 through 17 in any State is determined by the Secretary on the basis of the most recent satisfactory data available.

(Authority: 20 U.S.C. 1411(a)(5))

§ 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts that all States are entitled to receive for that fiscal year, the maximum amount that all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(Authority: 20 U.S.C. 1411(g)(1))

(b) *Reporting dates for Local educational agencies and reallocations.* (1) In any fiscal year that the State entitlement has been ratably reduced, and that additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the SEA shall fix dates before which each LEA shall report to the State the amount of funds available to it under this part that it estimates it will expend.

(2) The amounts available under paragraph (a) of this section, or any amount that would be available to any other LEA if it were to submit an application meeting the requirements of this part, that the SEA determines will not be used for the period of its availability shall be available for allocation to those LEAs, in the manner provided in § 300.707, that the SEA determines will need and be able to use additional funds to carry out approved programs.

(Authority: 20 U.S.C. 1411(g)(2))

§ 300.704 Hold harmless provision.

No State shall receive less than the amount it received under part B of the Act for fiscal year 1977.

(Authority: 20 U.S.C. 1411(a)(1))

§ 300.705 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700–300.703 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451–300.486, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1411(a)(1)(A), 1411(a)(3), 1413(d))

§ 300.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979—

(a) 25 percent may be used by the State in accordance with § 300.620 and § 300.370; and

(b) 75 percent shall be distributed to the LEAs in the State in accordance with § 300.707.

(Authority: 20 U.S.C. 1411(c)(1))

§ 300.707 Local educational agency entitlement; formula.

From the total amount of funds available to all LEAs, each LEA is entitled to an amount that bears the same ratio to the total amount as the number of children with disabilities aged 3 through 21 in that agency who are receiving special education and related services bears to the aggregate number of children with disabilities aged 3 through 21 receiving special education and related services in all LEAs that apply to the SEA for funds under part B of the Act.

(Authority: 20 U.S.C. 1411(d))

§ 300.708 Reallocation of local educational agency funds.

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the local agency with State and local funds otherwise available to the local agency, the SEA may reallocate funds (or portions of those funds that are not required to provide special education and related services) made available to the local agency under § 300.707, to other LEAs within the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by the other LEAs.

(Authority: 20 U.S.C. 1414(e))

§ 300.709 Payments to the Secretary of the Interior for the education of Indian children.

(a) *General.* (1) The Secretary makes payments to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations, aged 5 through 21, who are enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior.

(2) In the case of Indian students aged 3 through 5 who are enrolled in programs affiliated with Bureau of Indian Affairs (BIA) schools that are required by the States in which the schools are located to attain or maintain State accreditation and had State accreditation prior to October 7, 1991, the schools may count those children for the purpose of distribution of the funds provided under paragraph (a)(1) of this section to the Secretary of the Interior.

(3) The amount of the payment under paragraph (a)(1) of this section for any fiscal year is one percent of the aggregate amounts available to all States under this part for that fiscal year.

(b) *Responsibility for meeting the requirements of part B.* The Secretary of the Interior shall be responsible for meeting all of the requirements of part B of the Act for the children described in paragraph (a) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. 1411(f))

§ 300.710 Payments to the Secretary of the Interior for Indian tribes or tribal organizations.

(a) *General.* (1) Beginning with funds appropriated under part B of the Act for fiscal year 1992, the Secretary, subject to this section, makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortiums of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities, aged 3 through 5, on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior.

(2) The amount of the payment under paragraph (b)(1) of this section for any fiscal year is .25 percent of the aggregate amounts available for all States under this part for that fiscal year.

(3) None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count, and the provision of technical assistance.

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the .25 percent under paragraph (a) of this section in accordance with section 611(f)(4) of the Act.

(Authority: 20 U.S.C. 1411(f))

§ 300.711 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, (until the Compact of Free Association with Palau takes effect pursuant to section 101(a) of Pub. L. 99-658).

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged 3 through 21 in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to ensure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(Authority: 20 U.S.C. 1411(e))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(Authority: 20 U.S.C. 1411(a)(3))

(b) The SEA shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(a)(3))

Note: It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make FAPE available. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged 3 through 17 (in States that serve all children with disabilities aged 3 through 5) or 5 through 17 (in States that do not serve all children with disabilities aged 3 through 5), a State might find that 14 percent (or some other percentage) of its children have disabilities. In that case, the State must make FAPE available to all of those children with disabilities.

§ 300.751 Annual report of children served—information required in the report.

(a) In its report, the SEA shall include a table that shows—

(1) The number of children with disabilities receiving special education and related services on December 1 of that school year;

(2) The number of children with disabilities aged 3 through 5 who are receiving FAPE;

(3) The number of those children with disabilities aged 6 through 21 within each disability category, as defined in the definition of "children with disabilities" in § 300.7; and

(4) The number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(c) The SEA may not report a child aged 6 through 21 under more than one disability category.

(d) If a child with a disability aged 6 through 21 has more than one disability, the SEA shall report that child in accordance with the following procedure:

(1) A child with deaf-blindness must be reported under the category "deaf-blindness."

(2) A child who has more than one disability (other than deaf-blindness) must be reported under the category "multiple disabilities."

(Authority: 20 U.S.C. 1411(a)(3); (5)(A)(ii); 1418(b))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that either—

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The SEA may not include children with disabilities in its report who—

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under subpart 2 of part D of chapter 1 of Title I of the Elementary and Secondary Education Act of 1965; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.186(b).

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Note 1: Under paragraph (a) of this section, the State may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

Note 2: Special education, by statutory definition, must be at no cost to parents. As

of September 1, 1978, under the FAPE requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech services is the only special education required by the child. For example, the child's parents may have enrolled the child in a regular program in a private school, but the child might be receiving speech services in a program funded by the LEA. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children enrolled by their parents in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that if a public agency places or refers a child with a disability to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 300.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements of §§ 300.750–300.753, the SEA shall—

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.750–300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Note: States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

Appendix A to Part 300—[Reserved]

Appendix B to Part 300—[Reserved]

Appendix C to Part 300—Notice of Interpretation

I. Purpose of the IEP
II. IEP Requirements

§ 300.340 Definition

§ 300.341 State educational agency responsibility

1. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

2. For a child placed out of State by a public agency, is the placing or receiving State responsible for the child's IEP?

§ 300.342 When individualized education programs must be in effect

3. In requiring that an IEP be in effect before special education and related services are provided, what does "be in effect" mean?

4. How much of a delay is permissible between the time an IEP of a child with a disability is finalized and when special education is provided?

5. For a child with a disability receiving special education for the first time, when must an IEP be developed—before placement or after placement?

6. If a child with a disability has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?

§ 300.343 Meetings

7. What is the purpose of the 30 day timeline in § 300.343(c)?

8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?

9. Must IEPs be reviewed or revised at the beginning of each school year?

10. How frequently must IEP meetings be held and how long should they be?

11. Who can initiate IEP meetings?

12. May IEP meetings be tape-recorded?

§ 300.344 Participants in meetings

(Agency representative)

13. Who can serve as the representative of the public agency at an IEP meeting?

14. Who is the representative of the public agency if a child with a disability is served by a public agency other than the SEA or LEA?

(The child's teacher)

15. For a child with a disability being considered for initial placement in special education, which teacher should attend the IEP meeting?

16. If a child with a disability is enrolled in both regular and special education classes, which teacher should attend the IEP meeting?

17. If a child with a disability in high school attends several regular classes, must all of the child's regular teachers attend the IEP meeting?

18. If a child's primary disability is a speech impairment, must the child's regular teacher attend the IEP meeting?

19. If a child is enrolled in a special education class because of a primary disability and also receives speech-language pathology services, must both specialists attend the IEP meeting?

(The child, parents, other individuals)

20. When may representatives of teacher organizations attend IEP meetings?

21. When may a child with a disability attend an IEP meeting?

22. Do the parents of a student with a disability retain the right to attend the IEP meeting when the student reaches the age of majority?

23. Must related services personnel attend IEP meetings?

24. Are agencies required to use a case manager in the development of an IEP for a child with a disability?

25. For a child with a suspected speech impairment, who must represent the evaluation team at the IEP meeting?

§ 300.345 Parent participation

26. What is the role of the parents at an IEP meeting?

27. What is the role of a surrogate parent at an IEP meeting?

28. Must the public agency let the parents know who will be at the IEP meeting?

29. Are parents required to sign IEPs?

30. If the parent signs the IEP, does the signature indicate consent for initial placement?

31. Do parents have the right to a copy of their child's IEP?

32. Must parents be informed at the IEP meeting of their right to appeal?

33. Does the IEP include ways for parents to check the progress of their children?

34. Must IEPs include specific checkpoint intervals for parents to confer with teachers and to revise or update their children's IEPs?

35. If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?

§ 300.346 Content of the individualized education program (Present levels of educational performance)

36. What should be included in the statement of the child's present levels of educational performance?

(Annual goals and short term instructional objectives)

37. Why are goals and objectives required in the IEP?

38. What are annual goals in an IEP?

39. What are short term instructional objectives in an IEP?

40. Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?

41. Should there be a relationship between the goals and objectives in the IEP and those that are in the instructional plans of special education personnel?

42. When must IEP objectives be written—before placement or after placement?

43. Can short term instructional objectives be changed without initiating another IEP meeting?

(Specific special education and related services)

44. Must the IEP include all special education and related services needed by the child or only those available from the public agency?

45. Is the IEP a commitment to provide services—i.e., must a public agency provide all of the services listed in the IEP?

46. Must the public agency itself directly provide the services set out in the IEP?

47. Does the IEP include only special education and related services or does it describe the total education of the child?

48. If modifications are necessary for a child with a disability to participate in a regular education program, must they be included in the IEP?

49. When must physical education (PE) be described or referred to in an IEP?

50. If a child with a disability is to receive vocational education, must it be described or referred to in the student's IEP?

51. Must the IEP specify the amount of services or may it simply list the services to be provided?

52. Must an IEP for a child with a disability indicate the extent that the child will be educated in the regular educational program?

(Projected dates/Evaluation)

53. Can the anticipated duration of services be for more than twelve months?

54. Must the evaluation procedures and schedules be included as a separate item in the IEP?

(Other IEP content questions)

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

56. Is there a prescribed format or length for an IEP?

57. Is it permissible to consolidate the IEP with the individualized service plan developed under another Federal program?

58. What provisions on confidentiality of information apply to IEPs?

§ 300.348 Private school placements by Public Agencies

59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?

§ 300.349 Children with Disabilities Enrolled in Parochial or Other Private Schools

§ 300.350 Individualized education programs—accountability

60. Is the IEP a performance contract?

Authority: Part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411–1420), unless otherwise noted.

Individualized Education Programs (IEPs)

Interpretation of Requirements of Part B of the Individuals With Disabilities Education Act

I. Purpose of the IEP

There are two main parts of the IEP requirement, as described in the Act and regulations: (1) The IEP meeting(s), where parents and school personnel jointly make decisions about an educational program for a child with a disability, and (2) the IEP document itself, that is, a written record of the decisions reached at the meeting. The overall IEP requirement, comprised of these two parts, has a number of purposes and functions:

a. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be.

b. The IEP process provides an opportunity for resolving any differences between the parents and the agency concerning the special education needs of a child with a disability; first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents.

c. The IEP sets forth in writing a commitment of resources necessary to enable a child with a disability to receive needed special education and related services.

d. The IEP is a management tool that is used to ensure that each child with a disability is provided special education and related services appropriate to the child's special learning needs.

e. The IEP is a compliance/monitoring document that may be used by authorized monitoring personnel from each governmental level to determine whether a child with a disability is actually receiving the FAPE agreed to by the parents and the school.

f. The IEP serves as an evaluation device for use in determining the extent of the child's progress toward meeting the projected outcomes.

Note: The Act does not require that teachers or other school personnel be held accountable if a child with a disability does not achieve the goals and objectives set forth in the IEP. See § 300.350, Individualized education program—accountability.

II. IEP Requirements

This part (1) repeats the IEP requirements in §§ 300.340–300.350 of the regulations (boxed material), (2) provides additional clarification, as necessary, on sections or paragraphs of the regulations on which such clarification is needed, and (3) answers some questions regarding implementation of the IEP requirements that are not expressly addressed in the regulations. These questions and clarifying information are presented in a question and answer format immediately after the particular section of the regulations that is presented.

1. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

The answer will vary from State to State, depending upon State law, policy, or practice. In each State, however, the SEA is ultimately responsible for ensuring that each agency in the State is in compliance with the IEP requirements and the other provisions of the Act and regulations. (See § 300.600 regarding SEA responsibility for all education programs.)

The SEA must ensure that every child with a disability in the State has FAPE available, regardless of which agency, State or local, is responsible for the child. While the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency agreements), there can be no failure to provide FAPE due to jurisdictional disputes among agencies.

Note: Section 300.2(b) states that the requirements of the Act and regulations apply to all political subdivisions of the State that are involved in the education of children with disabilities, including (1) the SEA, (2) LEAs, (3) other State agencies (such as Departments of Mental Health and Welfare, and State schools for students with deafness or students with blindness), and (4) State correctional facilities.

The following paragraphs outline (1) some of the SEA's responsibilities for developing policies or agreements under a variety of interagency situations, and (2) some of the responsibilities of an LEA when it initiates the placement of a child with a disability in a school or program operated by another State agency:

a. *SEA POLICIES OR INTERAGENCY AGREEMENTS.* The SEA, through its written policies or agreements, must ensure that IEPs are properly written and implemented for all children with disabilities in the State. This applies to each interagency situation that exists in the State, including any of the following:

(1) When an LEA initiates the placement of a child in a school or program operated by another State agency (see "LEA-Initiated Placements" in paragraph "b", below); (2) when a State or local agency other than the SEA or LEA places a child in a residential facility or other program; (3) when parents initiate placements in public institutions; and (4) when the courts make placements in correctional facilities.

Note: This is not an exhaustive list. The SEA's policies must cover any other interagency situation that is applicable in the State, including placements that are made for both educational and non-educational purposes.

Frequently, more than one agency is involved in developing or implementing an IEP of a child with a disability (e.g., when the LEA remains responsible for the child, even though another public agency provides the special education and related services, or when there are shared cost arrangements). It is important that SEA policies or agreements define the role of each agency involved in the situations described above, in order to resolve any jurisdictional problems that could delay the provision of FAPE to a child with a disability. For example, if a child is placed in a residential facility, any one or all of the following agencies might be involved in the development and/or implementation of the child's IEP: The child's LEA, the SEA, another State agency, an institution or school under that agency, and the LEA where the institution is located.

Note: The SEA must also ensure that any agency involved in the education of a child with a disability is in compliance with the LRE provisions of the Act and regulations,

and, specifically, with the requirement that the placement of each child with a disability (1) be determined at least annually, (2) be based on the child's IEP, and (3) be as close as possible to the child's home (§ 300.552(a), Placements.)

b. *LEA-INITIATED PLACEMENTS.* When an LEA is responsible for the education of a child with a disability, the LEA is also responsible for developing the child's IEP. The LEA has this responsibility even if development of the IEP results in placement in a State-operated school or program.

Note: The IEP must be developed before the child is placed. (See Question 5, below.) When placement in a State-operated school is necessary, the affected State agency or agencies must be involved by the LEA in the development of the IEP. (See response to Question 59, below, regarding participation of a private school representative at the IEP meeting.)

After the child enters the State school, meetings to review or revise the child's IEP could be conducted by either the LEA or the State school, depending upon State law, policy, or practice. However, both agencies should be involved in any decisions made about the child's IEP (either by attending the IEP meetings, or through correspondence or telephone calls). There must be a clear decision, based on State law, as to whether responsibility for the child's education is transferred to the State school or remains with the LEA, since this decision determines which agency is responsible for reviewing or revising the child's IEP.

2. For a child placed out of State by a public agency, is the placing or receiving State responsible for the child's IEP?

The "placing" State is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, as indicated in Question 1, above, the SEA in the placing State is responsible for ensuring that the child has FAPE available.

3. In requiring that an IEP be in effect before special education and related services are provided, what does "be in effect" mean?

As used in the regulations, the term "be in effect" means that the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, if appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

4. How much of a delay is permissible between the time an IEP of a child with a disability is finalized and when special education is provided?

In general, no delay is permissible. It is expected that the special education and related services set out in a child's IEP will be provided by the agency beginning immediately after the IEP is finalized. The Note following § 300.342 identifies some exceptions ((1) when the meetings occur during the summer or other vacation period, or (2) when there are circumstances that require a short delay, such as working out transportation arrangements). However, unless otherwise specified in the IEP, the IEP services must be provided as soon as possible following the meeting.

Note: Section 300.346(e) requires that the IEP include the projected dates for initiation of services.

5. For a child with a disability receiving special education for the first time, when must an IEP be developed—before placement or after placement?

An IEP must *be in effect* before special education and related services are provided to a child. (§ 300.342(b)(1), emphasis added.) The appropriate placement for a given child with a disability cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement. The above requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process—before the IEP is finalized—to aid in determining the most appropriate placement for the child. It is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an interim IEP for the child that sets out the specific conditions and timelines for the trial placement. (See paragraph "c", below.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation and making judgments about the most appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

Note: Once the IEP of the child with a disability is in effect and the child is placed in a special education program, the teacher might develop detailed lesson plans or objectives based on the IEP. However, these lesson plans and objectives are not required to be a part of the IEP itself. (See Questions 37–43, below, regarding IEP goals and objectives.)

6. If a child with a disability has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?

It would not be necessary for the new LEA to conduct an IEP meeting if:

(1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new LEA determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the LEA or the parent believes that it is not appropriate, an IEP meeting would have to be conducted. This meeting should take place within a short time after the child enrolls in the new LEA (normally, within one week).

Note: The child must be placed in a special education program immediately after the IEP is finalized. (See Question 4, above.)

If the LEA or the parents believe that additional information is needed (e.g., the school records from the former LEA) or that a new evaluation is necessary before a final placement decision can be made, it would be permissible to temporarily place the child in an interim program before the IEP is finalized. (See Question 5, above.)

7. What is the purpose of the 30 day timeline in § 300.343(c)?

The 30 day timeline in § 300.343(c) ensures that there will not be a significant delay between the time a child is evaluated and when the child begins to receive special education. Once it is determined—through the evaluation—that a child has a disability, the public agency has up to 30 days to hold an IEP meeting.

Note: See Questions 4 and 5, above, regarding finalization of IEP and placement of the child.

8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?

Paragraph (e) of § 300.532 (Evaluation procedures) provides that the evaluation of each child with a disability must be "made by a multidisciplinary team or group of persons * * *". The decisions regarding (1) whether the team members actually meet together, and (2) whether such meetings are separate from the IEP meeting are matters that are left to the discretion of State or local agencies.

In practice, some agencies hold separate eligibility meetings with the multidisciplinary team before the IEP meeting.

Note: When separate meetings are conducted, placement decisions would be made at the IEP meeting. However, placement options could be discussed at the eligibility meeting.

Other agencies combine the two steps into one. If a combined meeting is conducted, the public agency must include the parents as participants at the meeting. (See § 300.345 for requirements on parent participation.)

Note: If, at a separate eligibility meeting, a decision is made that a child is not eligible for special education, the parents should be notified about the decision.

9. Must IEPs be reviewed or revised at the beginning of each school year?

No. The basic requirement in the regulations is that IEPs must be in effect at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise the IEP of each child with a disability. However, the meetings may be held anytime during the year, including (1) at the end of the school year, (2) during the summer, before the new school year begins, or (3) on the anniversary date of the last IEP meeting on the child.

10. How frequently must IEP meetings be held and how long should they be?

Section 614(a)(5) of the Act provides that each public agency must hold meetings periodically, but not less than annually, to review each child's IEP and, if appropriate, revise its provisions. The legislative history of the Act makes it clear that there should be as many meetings a year as any one child may need. (121 Cong. Rec. S20428–29 (Nov. 19, 1975) (remarks of Senator Stafford))

There is no prescribed length for IEP meetings. In general, meetings (1) will be longer for initial placements and for children who require a variety of complex services, and (2) will be shorter for continuing placements and for children who require only a minimum amount of services. In any event, however, it is expected that agencies will allow sufficient time at the meetings to ensure meaningful parent participation.

11. Who can initiate IEP meetings?

IEP meetings are initiated and conducted at the discretion of the public agency. However, if the parents of a child with a disability believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. The public agency should grant any reasonable request for such a meeting.

Note: Under § 300.506(a), the parents or agency may initiate a due process hearing at any time regarding any matter related to the child's IEP.

If a child's teacher(s) feels that the child's placement or IEP services are not appropriate to the child, the teacher(s) should follow agency procedures with respect to (1) calling or meeting with the parents and/or (2) requesting the agency to hold another meeting to review the child's IEP.

12. May IEP meetings be tape-recorded?

The use of tape recorders at IEP meetings is not addressed by either the Act or the regulations. Although taping is clearly not required, it is permissible at the option of either the parents or the agency. However, if the recording is maintained by the agency, it is an education record, within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR part 99) and Part B (34 CFR §§ 300.560–300.575).

13. Who can serve as the representative of the public agency at an IEP meeting?

The representative of the public agency could be any member of the school staff, other than the child's teacher, who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities. (Section 602(a)(20) of the Act.) Thus, the agency representative could be (1) a qualified special education administrator, supervisor, or teacher (including a speech-language pathologist), or (2) a school principal or other administrator—if the person is qualified to provide, or supervise the provision of, special education.

Each State or local agency may determine which specific staff member will serve as the agency representative. However, the representative should be able to ensure that whatever services are set out in the IEP will actually be provided and that the IEP will not be vetoed at a higher administrative level within the agency. Thus, the person selected should have the authority to commit agency resources (i.e., to make decisions about the specific special education and related services that the agency will provide to a particular child).

For a child with a disability who requires only a limited amount of special education, the agency representative able to commit appropriate resources could be a special education teacher, or a speech-language pathologist, other than the child's teacher. For a child who requires extensive special education and related services, the agency representative might need to be a key administrator in the agency.

Note: IEP meetings for continuing placements could be more routine than those for initial placements, and, thus, might not require the participation of a key administrator.

14. Who is the representative of the public agency if a child with a disability is served by a public agency other than the SEA or LEA?

The answer depends on which agency is responsible, under State law, policy, or practice, for any one or all of the following: (1) The child's education, (2) placing the child, and (3) providing (or paying for the provision of) special education and related services to the child.

In general, the agency representative at the IEP meeting would be a member of the agency or institution that is responsible for the child's education. For example, if a State agency (1) places a child in an institution, (2) is responsible under State law for the child's education, and (3) has a qualified special education staff at the institution, then a member of the institution's staff would be the agency representative at the IEP meetings.

Sometimes there is no special education staff at the institution, and the children are served by special education personnel from the LEA where the institution is located. In this situation, a member of the LEA staff would usually serve as the agency representative.

Note: In situations where the LEA places a child in an institution, paragraph "b" of the response to Question 1, above, would apply.

15. For a child with a disability being considered for initial placement in special education, which teacher should attend the IEP meeting?

The teacher could be either (1) a teacher qualified to provide special education in the child's area of suspected disability, or (2) the child's regular teacher. At the option of the agency, both teachers could attend. In any event, there should be at least one member of the school staff at the meeting (e.g., the agency representative or the teacher) who is qualified in the child's area of suspected disability.

Note: Sometimes more than one meeting is necessary in order to finalize a child's IEP. If, in this process, the special education teacher who will be working with the child is identified, it would be useful to have that teacher participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. When this is not possible, the agency should ensure that the teacher is given a copy of the child's IEP as soon as possible after the IEP is finalized and before the teacher begins working with the child.

16. If a child with a disability is enrolled in both regular and special education classes, which teacher should attend the IEP meeting?

In general, the teacher at the IEP meeting should be the child's special education teacher. At the option of the agency or the parent, the child's regular teacher also might attend. If the regular teacher does not attend, the agency should either provide the regular teacher with a copy of the IEP or inform the regular teacher of its contents. Moreover, the agency should ensure that the special education teacher, or other appropriate support person, is able, as necessary, to consult with and be a resource to the child's regular teacher.

17. If a child with a disability in high school attends several regular classes, must all of the child's regular teachers attend the IEP meeting?

No. Only one teacher must attend. However, at the option of the LEA, additional teachers of the child may attend. The following points should be considered in making this decision:

a. Generally, the number of participants at IEP meetings should be small. Small meetings have several advantages over large ones. For example, they (1) allow for more open, active parent involvement, (2) are less costly, (3) are easier to arrange and conduct, and (4) are usually more productive.

b. While large meetings are generally inappropriate, there may be specific circumstances where the participation of additional staff would be beneficial. When the participation of the regular teachers is considered by the agency or the parents to be beneficial to the child's success in school (e.g., in terms of the child's participation in the regular education program), it would be appropriate for them to attend the meeting.

c. Although the child's regular teachers would not routinely attend IEP meetings, they should either (1) be informed about the child's IEP by the special education teacher or agency representative, and/or (2) receive a copy of the IEP itself.

18. If a child's primary disability is a speech impairment, must the child's regular teacher attend the IEP meeting?

No. A speech-language pathologist would usually serve as the child's teacher for purposes of the IEP meeting. The regular teacher could also attend at the option of the school.

19. If a child is enrolled in a special education class because of a primary disability, and also receives speech-language pathology services, must both specialists attend the IEP meeting?

No. It is not required that both attend. The special education teacher would attend the meeting as the child's teacher. The speech-language pathologist could either (1) participate in the meeting itself, or (2) provide a written recommendation concerning the nature, frequency, and amount of services to be provided to the child.

20. When may representatives of teacher organizations attend IEP meetings?

Under the Family Educational Rights and Privacy Act ' ("FERPA"; 20 U.S.C. 1232g) and implementing regulations (34 CFR part 99) and the confidentiality requirements of part B, officials of teacher organizations may not attend IEP meetings if personally identifiable information from the student's education records is discussed—except with the prior written consent of the parents. (See 34 CFR §§ 99.30(a)(1) and 300.571(a)(1).)

In addition, part B does not provide for the participation of representatives of teacher organizations at IEP meetings. The legislative history of the Act makes it clear that attendance at IEP meetings should be limited to those who have an intense interest in the child. (121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).) Since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, it would be inappropriate for such an official to attend an IEP meeting.

21. When may a child with a disability attend an IEP meeting?

Generally, a child with a disability should attend the IEP meeting whenever the parent decides that it is appropriate for the child to do so. Whenever possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP and/or (2) directly beneficial to the child. The agency should inform the parents before each IEP meeting—as part of the notice of meeting required under § 300.345(b)—that they may invite their child to participate.

Note: The parents and agency should encourage older children with disabilities (particularly those at the secondary school level) to participate in their IEP meetings.

22. Do the parents of a student with a disability retain the right to attend the IEP meeting when the student reaches the age of majority?

The Act is silent concerning any modification of the rights of the parents of a student with a disability when the student reaches the age of majority.

23. Must related services personnel attend IEP meetings?

No. It is not required that they attend. However, if a child with a disability has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

Note: This written recommendation could be a part of the evaluation report.

24. Are agencies required to use a case manager in the development of the IEP of a child with a disability?

No. However, some agencies have found it helpful to have a special educator or some other school staff member (e.g., a social worker, counselor, or psychologist) serve as coordinator or case manager of the IEP process for an individual child or for all children with disabilities served by the agency. Examples of the kinds of activities that case managers might carry out are (1) coordinating the multidisciplinary evaluation; (2) collecting and synthesizing the evaluation reports and other relevant information about a child that might be needed at the IEP meeting; (3) communicating with the parents; and (4) participating in, or conducting, the IEP meeting itself.

25. For a child with a suspected speech impairment, who must represent the evaluation team at the IEP meeting?

No specific person must represent the evaluation team. However, a speech-language pathologist would normally be the most appropriate representative. For many children whose primary disability is a speech impairment, there may be no other evaluation personnel involved. The note following § 300.532 (Evaluation procedures) states:

Children who have a speech impairment as their primary disability may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each child with a speech impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if necessary, make referrals for additional assessments needed to make an appropriate placement decision.

26. What is the role of the parents at an IEP meeting? The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

Note: In some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside of the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.)

27. What is the role of a surrogate parent at an IEP meeting?

A surrogate parent is a person appointed to represent the interests of a child with a disability in the educational decision-making process when that child has no other parent representation. The surrogate has all of the rights and responsibilities of a parent under Part B. Thus, the surrogate parent is entitled to (1) participate in the child's IEP meeting, (2) see the child's education records, and (3) receive notice, grant consent, and invoke due process to resolve differences. (See § 300.514, Surrogate parents.)

28. Must the public agency let the parents know who will be at the IEP meeting?

Yes. In notifying parents about the meeting, the agency "must indicate the purpose, time, and location of the meeting, and *who will be in attendance*." (§ 300.345(b), emphasis added.) If possible, the agency should give the name and position of each person who will attend. In addition, the agency should inform the parents of their right to bring other participants to the meeting. (See Question 21, above, regarding participation of the child.) It is also appropriate for the agency to ask whether the parents intend to bring a participant to the meeting.

29. Are parents required to sign IEPs?

Parent signatures are not required by either the Act or regulations. However, having such signatures is considered by parents, advocates, and public agency personnel to be useful.

The following are some of the ways that IEPs signed by parents and/or agency personnel might be used:

a. A signed IEP is one way to document who attended the meeting.

Note: This is useful for monitoring and compliance purposes.

If signatures are not used, the agency must document attendance in some other way.

b. An IEP signed by the parents is one way to indicate that the parents approved the child's special education program.

Note: If, after signing, the parents feel that a change is needed in the IEP, it would be appropriate for them to request another meeting. See Question 11, above.

c. An IEP signed by an agency representative provides the parents a signed record of the services that the agency has agreed to provide.

Note: Even if the school personnel do not sign, the agency still must provide, or ensure the provision of, the services called for in the IEP.

30. If the parent signs the IEP, does the signature indicate consent for initial placement?

The parent's signature on the IEP would satisfy the consent requirement concerning initial placement of the child (§ 300.504(b)(1)(ii)) only if the IEP includes a statement on initial placement that meets the definition of consent in § 300.500:

Consent means that: (a) the parent has been fully informed of all information relevant to the activity for which consent is sought * * *

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary * * * and may be revoked at any time.

31. Do parents have the right to a copy of their child's IEP?

Yes. Section 300.345(f) states that the public agency shall give the parent, on request, a copy of the IEP. In order that parents may know about this provision, it is recommended that they be informed about it at the IEP meeting and/or receive a copy of the IEP itself within a reasonable time following the meeting.

32. Must parents be informed at the IEP meeting of their right to appeal?

If the agency has already informed the parents of their right to appeal, as it is required to do under the prior notice provisions of the regulations (§§ 300.504–300.505), it would not be necessary for the agency to do so again at the IEP meeting.

Section 300.504(a) of the regulations states that "written notice that meets the requirements under § 300.505 must be given to parents a reasonable time" before the public agency proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child."

Section 300.505(a) states that the notice must include "(1) A full explanation of all of the procedural safeguards available to the parents under § 300.500, §§ 300.502–300.515, and §§ 300.562–300.569."

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide upon what the child's needs are, what will be provided, and what the anticipated outcomes may be. If, during the IEP meeting, parents and school staff are unable to reach agreement, the agency should remind the parents that they may seek to resolve their differences through the due process procedures under the Act.

Note: Section 300.506(a) states that "a parent or public educational agency may initiate a hearing on any matters described in § 300.504(a) (1) and (2)."

Every effort should be made to resolve differences between parents and school staff without resort to a due process hearing (i.e., through voluntary mediation or some other informal step). However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing. (See § 300.506. Impartial due process hearing.)

33. Does the IEP include ways for parents to check the progress of their children?

In general, the answer is yes. The IEP document is a written record of decisions jointly made by parents and school personnel at the IEP meeting regarding the special education program of a child with a disability. That record includes agreed upon items, such as goals and objectives, and the specific special education and related services to be provided to the child.

The goals and objectives in the IEP should be helpful to both parents and school personnel, in a general way, in checking on a child's progress in the special education program. (See Questions 37–43, below, regarding goals and objectives in the IEP.) However, since the IEP is not intended to include the specifics about a child's total educational program that are found in daily, weekly, or monthly instructional plans, parents will often need to obtain more specific, on-going information about the child's progress—through parent-teacher conferences, report cards and other reporting procedures ordinarily used by the agency.

34. Must IEPs include specific checkpoint intervals for parents to confer with teachers and to revise or update their children's IEPs?

No. The IEP of a child with a disability is not required to include specific "checkpoint intervals" (i.e., meeting dates) for reviewing the child's progress. However, in individual situations, specific meeting dates could be designated in the IEP, if the parents and school personnel believe that it would be helpful to do so.

Although meeting dates are not required to be set out in the IEP itself, there are specific provisions in the regulations and in this document regarding agency responsibilities in initiating IEP meetings, including the following:

(1) Public agencies must hold meetings periodically, but not less than annually, to review, and if appropriate, revise, each child's IEP (§ 300.343(d)); (2) there should be as many meetings a year as the child needs (see Question 10, above); and (3) agencies should grant any reasonable parental request for an IEP meeting (see Question 11, above).

In addition to the above provisions, it is expected that, through an agency's general reporting procedures for all children in school, there will be specific designated times for parents to review their children's progress (e.g., through periodic parent-teacher conferences, and/or the use of report cards, letters, or other reporting devices).

35. If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?

As a general rule, the agency and parents would agree to an interim course of action for serving the child (i.e., in terms of placement and/or services) to be followed until the area of disagreement over the IEP is resolved. The manner in which this interim measure is developed and agreed to by both parties is left to the discretion of the individual State or local agency. However, if the parents and agency cannot agree on an interim measure, the child's last agreed upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved. The following may be helpful to agencies if there are disagreements:

a. There may be instances where the parents and agency are in agreement about the basic IEP services (e.g., the child's placement and/or the special education services), but disagree about the provision of a particular related service (i.e., whether the service is needed and/or the amount to be provided). In such cases, it is recommended (1) that the IEP be implemented in all areas where there is agreement, (2) that the document indicate the points of disagreement, and (3) that procedures be initiated to resolve the disagreement.

b. Sometimes the disagreement is with the placement or kind of special education to be provided (e.g., one party proposes a self-contained placement, and the other proposes resource room services). In such cases, the agency might, for example, carry out any one or all of the following steps:

(1) Remind the parents that they may resolve their differences through the due process procedures under part B; (2) work with the parents to develop an interim course of action (in terms of placement and/or services) that both parties can agree to until resolution is reached; and (3) recommend the use of mediation, or some other informal procedure for resolving the differences without going to a due process hearing. (See Question 32, above, regarding the right to appeal.)

c. If, because of the disagreement over the IEP, a hearing is initiated by either the parents or agency, the agency may not change the child's placement unless the parents and agency agree otherwise. (See § 300.513, Child's status during proceedings.) The following two examples are related to this requirement:

(1) A child in the regular fourth grade has been evaluated and found to be eligible for special education. The agency and parents agree that the child has a specific learning disability. However, one party proposes placement in a self-contained program, and the other proposes placement in a resource room. Agreement cannot be reached, and a due process hearing is initiated. Unless the parents and agency agree otherwise, the child would remain in the regular fourth grade until the issue is resolved.

On the other hand, since the child's need for special education is not in question, both parties might agree—as an interim measure—(1) to temporarily place the child in either one of the programs proposed at the meeting (self-contained program or resource room), or (2) to serve the child through some other temporary arrangement.

(2) A child with a disability is currently receiving special education under an existing IEP. A due process hearing has been initiated regarding an alternative special education placement for the child. Unless the parents and agency agree otherwise, the child would remain in the current placement. In this situation, the child's IEP could be revised, as necessary, and implemented in all of the areas agreed to by the parents and agency, while the area of disagreement (i.e., the child's placement) is being settled through due process.

Note: If the due process hearing concerns whether or not a particular service should continue to be provided under the IEP (e.g., physical therapy), that service would continue to be provided to the child under the IEP that was in effect at the time the hearing was initiated, (1) unless the parents and agency agree to a change in the services, or (2) until the issue is resolved.

36. What should be included in the statement of the child's present levels of educational performance?

The statement of present levels of educational performance will be different for each child with a disability. Thus, determinations about the content of the statement for an individual child are matters that are left to the discretion of participants in the IEP meetings. However, the following are some points that should be taken into account in writing this part of the IEP:

a. The statement should accurately describe the effect of the child's disability on the child's performance in any area of education that is affected, including (1) academic areas (reading, math, communication, etc.), and (2) non-academic areas (daily life activities, mobility, etc.).

Note: Labels such as mental retardation or deafness may not be used as a substitute for the description of present levels of educational performance.

b. The statement should be written in objective measurable terms, to the extent possible. Data from the child's evaluation would be a good source of such information. Test scores that are pertinent to the child's diagnosis might be included, if appropriate. However, the scores should be (1) self-explanatory (i.e., they can be interpreted by all participants without the use of test manuals or other aids), or (2) an explanation should be included. Whatever test results are used should reflect the impact of the disability on the child's performance. Thus, raw scores would not usually be sufficient.

c. There should be a direct relationship between the present levels of educational performance and the other components of the IEP. Thus, if the statement describes a problem with the child's reading level and points to a deficiency in a specific reading skill, this problem should be addressed under both (1) goals and objectives, and (2) specific special education and related services to be provided to the child.

37. Why are goals and objectives required in the IEP?

The statutory requirements for including annual goals and short term instructional objectives (Section 602(a)(20)(B)), and for having at least an annual review of the IEP of a child with a disability (Section 614(a)(5)) provide a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these requirements provide a way for the child's teacher(s) and parents to be able to track the child's progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans.

38. What are annual goals in an IEP?

The annual goals in the IEP are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period in the child's special education program. As indicated under Question 36, above, there should be a direct relationship between the annual goals and the present levels of educational performance.

39. What are short term instructional objectives in an IEP?

Short term instructional objectives (also called IEP objectives) are measurable, intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. For example, both kinds of objectives are used (1) to describe what a given child is expected to accomplish in a particular area within some specified time period, and (2) to determine the extent that the child is progressing toward those accomplishments.

In other respects, objectives in IEPs are different from those used in instructional plans, primarily in the amount of detail they provide. IEP objectives provide general benchmarks for determining progress toward meeting the annual goals. These objectives should be projected to be accomplished over an extended period of time (e.g., an entire school quarter or semester). On the other hand, the objectives in classroom instructional plans deal with more specific outcomes that are to be accomplished on a daily, weekly, or monthly basis. Classroom instructional plans generally include details not required in an IEP, such as the specific methods, activities, and materials (e.g., use of flash cards) that will be used in accomplishing the objectives.

40. Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?

IEP goals and objectives are concerned primarily with meeting the needs of a child with a disability for special education and related services, and are not required to cover other areas of the child's education. Stated another way, the goals and objectives in the IEP should focus on offsetting or reducing the problems resulting from the child's disability that interfere with learning and educational performance in school. For example, if a child with a learning disability is functioning several grades below the child's indicated ability in reading and has a specific problem with word recognition, the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning, and (2) helping the child increase the ability to use word attack skills effectively (or to find some other approach to increase independence in reading).

For a child with a mild speech impairment, the IEP objectives would focus on improving the child's communication skills, by either (1) correcting the impairment, or (2) minimizing its effect on the child's ability to communicate. On the other hand, the goals and objectives for a child with severe mental retardation would be more comprehensive and cover more of the child's school program than if the child has only a mild disability.

41. Should there be a relationship between the goals and objectives in the IEP and those that are in instructional plans of special education personnel?

Yes. There should be a direct relationship between the IEP goals and objectives for a given child with a disability and the goals and objectives that are in the special education instructional plans for the child. However, the IEP is not intended to be detailed enough to be used as an instructional plan. The IEP, through its goals and objectives, (1) sets the general direction to be taken by those who will implement the IEP, and (2) serves as the basis for developing a detailed instructional plan for the child.

Note: See Question 56, below, regarding the length of IEPs.

42. When must IEP objectives be written—before placement or after placement?

IEP objectives must be written before placement. Once a child with a disability is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. Can short term instructional objectives be changed without initiating another IEP meeting?

No. Section 300.343(a) provides that the agency "is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and *revising* the IEP of a child with a disability" (emphasis added). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see § 300.504(a)(1)), and (2) initiate an IEP meeting. Note, however, that if the parents are unable or unwilling to attend such a meeting, their participation in the revision of the IEP objectives can be obtained through other means, including individual or conference telephone calls (see § 300.345(c)).

44. Must the IEP include all special education and related services needed by the child or only those available from the public agency?

Each public agency must provide FAPE to all children with disabilities under its jurisdiction. Therefore, the IEP for a child with a disability must include all of the specific special education and related services needed by the child—as determined by the child's current evaluation. This means that the services must be listed in the IEP even if they are not directly available from the local agency, and must be provided by the agency through contract or other arrangements.

45. Is the IEP a commitment to provide services—i.e., must a public agency provide all of the services listed in the IEP?

Yes. The IEP of each child with a disability must include all services necessary to meet the child's identified special education and related services needs; and all services in the IEP must be provided in order for the agency to be in compliance with the Act.

46. Must the public agency itself directly provide the services set out in the IEP?

The public agency responsible for the education of a child with a disability could provide IEP services to the child (1) directly, through the agency's own staff resources, or (2) indirectly, by contracting with another public or private agency, or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)). However, the services must be at no cost to the parents, and responsibility for ensuring that the IEP services are provided remains with the public agency.

47. Does the IEP include only special education and related services or does it describe the total education of the child?

The IEP is required to include only those matters concerning the provision of special education and related services and the extent that the child can participate in regular education programs.

(Note: The regulations define special education as specially designed instruction to meet the unique needs of a child with a

disability, and related services as those services that are necessary to assist the child to benefit from special education.) (See §§ 300.17 and 300.16, respectively.)

For some children with disabilities, the IEP will only address a very limited part of their education (e.g., for a child with a speech impairment, the IEP would generally be limited to the child's speech impairment). For other children (e.g., those with profound mental retardation), the IEP might cover their total education. An IEP for a child with a physical disability with no mental or emotional disability might consist only of specially designed physical education. However, if the child also has a mental or emotional disability, the IEP might cover most of the child's education.

Note: The IEP is not intended to be detailed enough to be used as an instructional plan. See Question 41, above.

48. If modifications are necessary for a child with a disability to participate in a regular education program, must they be included in the IEP?

Yes. If modifications (supplementary aids and services) to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP (e.g., for a child with a hearing impairment, special seating arrangements or the provision of assignments in writing). This applies to any regular education program in which the student may participate, including physical education, art, music, and vocational education.

49. When must physical education (PE) be described or referred to in the IEP?

Section 300.307(a) provides that physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE. The following paragraphs (1) set out some of the different PE program arrangements for students with disabilities, and (2) indicate whether, and to what extent, PE must be described or referred to in an IEP:

a. Regular PE with nondisabled students. If a student with a disability can participate fully in the regular PE program without any special modifications to compensate for the student's disability, it would not be necessary to describe or refer to PE in the IEP. On the other hand, if some modifications to the regular PE program are necessary for the student to be able to participate in that program, those modifications must be described in the IEP.

b. Specially designed PE. If a student with a disability needs a specially designed PE program, that program must be addressed in all applicable areas of the IEP (e.g., present levels of educational performance, goals and objectives, and services to be provided). However, these statements would not have to be presented in any more detail than the other special education services included in the student's IEP.

c. PE in separate facilities. If a student with a disability is educated in a separate facility, the PE program for that student must be described or referred to in the IEP. However, the kind and amount of information to be included in the IEP would depend on the physical-motor needs of the student and the type of PE program that is to be provided.

Thus, if a student is in a separate facility that has a standard PE program (e.g., a residential school for students with deafness), and if it is determined—on the basis of the student's most recent evaluation—that the student is able to participate in that program without any modifications, then the IEP need only note such participation. On the other hand, if special modifications to the PE program are needed for the student to participate, those modifications must be described in the IEP. Moreover, if the student needs an individually designed PE program, that program must be addressed under all applicable parts of the IEP. (See paragraph "b", above.)

50. If a student with a disability is to receive vocational education, must it be described or referred to in the student's IEP?

The answer depends on the kind of vocational education program to be provided. If a student with a disability is able to participate in the regular vocational education program without any modifications to compensate for the student's disability, it would not be necessary to include vocational education in the student's IEP. On the other hand, if modifications to the regular vocational education program are necessary in order for the student to participate in that program, those modifications must be included in the IEP. Moreover, if the student needs a specially designed vocational education program, then vocational education must be described in all applicable areas of the student's IEP (e.g., present levels of educational performance, goals and objectives, and specific services to be provided). However, these statements would not have to be presented in any more detail than the other special education services included in the IEP.

51. Must the IEP specify the amount of services or may it simply list the services to be provided?

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to that specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.

Note: The parents should be notified whenever this occurs.

52. Must the IEP of a child with a disability indicate the extent that the child will be educated in the regular educational program?

Yes. Section 300.346(c) provides that the IEP for each child with a disability must include a "statement of * * * the extent that the child will be able to participate in regular educational programs." One way of meeting this requirement is to indicate the percent of time the child will be spending in the regular education program with nondisabled students. Another way is to list the specific regular education classes the child will be attending.

Note: If a child with a severe disability, for example, is expected to be in a special classroom setting most of the time, it is recommended that, in meeting the above requirement, the IEP include any non-curricular activities in which the child will be participating with nondisabled students (e.g., lunch, assembly periods, club activities, and other special events).

53. Can the anticipated duration of services be for more than twelve months?

In general, the anticipated duration of services would be up to twelve months. There is a direct relationship between the anticipated duration of services and the other parts of the IEP (e.g., annual goals and short term instructional objectives), and each part of the IEP would be addressed whenever there is a review of the child's program. If it is anticipated that the child will need a particular service for more than one year, the duration of that service could be projected beyond that time in the IEP. However, the duration of each service must be reconsidered whenever the IEP is reviewed.

54. Must the evaluation procedures and schedules be included as a separate item in the IEP?

No. The evaluation procedures and schedules need not be included as a separate item in the IEP, but they must be presented in a recognizable form and be clearly linked to the short term instructional objectives.

Note: In many instances, these components are incorporated directly into the objectives.

Other Questions About the Content of an IEP

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(a)(20) of the Act defines the IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and, if appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94–142 makes it clear that parents must be given the opportunity to be active participants in all major decisions affecting the education of their children with disabilities. (See, e.g., S.

Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47–50 (1975).)

56. Is there a prescribed format or length for an IEP?

No. The format and length of an IEP are matters left to the discretion of State and local agencies. The IEP should be as long as necessary to adequately describe a child's program. However, as indicated in Question 41, above, the IEP is not intended to be a detailed instructional plan. The Federal IEP requirements can usually be met in a one to three page form.

57. Is it permissible to consolidate the IEP with an individualized service plan developed under another Federal program?

Yes. In instances where a child with a disability must have both an IEP and an individualized service plan under another Federal program, it may be possible to develop a single, consolidated document only if: (1) it contains all of the information required in an IEP, and (2) all of the necessary parties participate in its development.

Examples of individualized service plans that might be consolidated with the IEP are: (1) The Individualized Care Plan (Title XIX of the Social Security Act (Medicaid)), (2) the Individualized Program Plan (Title XX of the Social Security Act (Social Services)), (3) the Individualized Service Plan (Title XVI of the Social Security Act (Supplemental Security Income)), and (4) the Individualized Written Rehabilitation Plan (Rehabilitation Act of 1973).

58. What provisions on confidentiality of information apply to IEPs?

IEPs are subject to the confidentiality provisions of both (1) Part B (Section 617(c) of the Act; §§ 300.560–300.576 of the regulations), and (2) the Family Educational Rights and Privacy Act ("FERPA", 20 U.S.C. 1232g) and implementing regulations in 34 CFR part 99. An IEP is an education record as that term is used in the FERPA and implementing regulations (34 CFR § 99.3) and is, therefore, subject to the same protections as other education records relating to the student.

Note: Under Section 99.31(a) of the FERPA regulations, an educational agency may disclose personally identifiable information from the education records of a student without the written consent of the parents "if the disclosure is—(1) To other school officials, including teachers, within the educational institution or LEA who have been determined by the agency or institution to have legitimate educational interests * * *" in that information. Insert illus. 01788

59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed—by either the parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

60. Is the IEP a performance contract?

No. Section 300.350 makes it clear that the IEP is not a performance contract that imposes liability on a teacher or public agency if a child with a disability does not meet the IEP objectives. While the agency must provide special education and related services in accordance with the IEP of each child with a disability, the Act does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

PART 301—PRESCHOOL GRANTS FOR CHILDREN WITH DISABILITIES

2. The authority citation for part 301 continues to read as follows:

Authority: 20 U.S.C. 1419, unless otherwise noted.

3. Section 301.1 is amended by revising paragraph (a) to read as follows:

§ 301.1 What is the Preschool Grants for Children with Disabilities program?

* * * * *

(a) Providing special education and related services to children with disabilities aged three through five years, and, at a State's discretion, providing a free appropriate public education to two-year-old children with disabilities who will reach age three during the school year;

* * * * *

§ 301.2 [Amended]

4. The heading for § 301.2 in the table of contents is revised to read "Who is eligible for an award?".

5. Section 301.3 is amended by revising paragraphs (a) and (c) to read as follows:

§ 301.3 What kinds of activities may be assisted?

* * * * *

(a) Provide subgrants to LEAs and IEUs to assist them in providing special education and related services to children with disabilities aged three through five years, and, if consistent with State policy, provide a free appropriate public education to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under Part H of the Act.

* * * * *

(c) Provide direct and support services from the SEA to children with disabilities aged three through five years, and, at the State's discretion, provide a free appropriate public education, in accordance with the Act, to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under Part H.

(Authority: 20 U.S.C. 1419)

6. A new § 301.6 is added to Subpart A to read as follows:

§ 301.6 Does Part H of the Act apply to two-year-old children with disabilities?

Part H of the Act does not apply to any child with disabilities receiving a free appropriate public education, in accordance with Part B of the Act, with funds received under the Preschool Grants program.

(Authority: 20 U.S.C. 1419(g))

7. Section 301.10 is amended by revising paragraph (b)(2) to read as follows:

§ 301.10 How does a State become eligible to receive a grant?

* * * * *

(b) * * *

(2) The State has policies and procedures in its State plan under 34 CFR part 300 that assure the provision of a free appropriate public education—

(i) For all children with disabilities aged three through five years in accordance with the requirements in 34 CFR part 300; and

(ii) For any two-year-old children, provided services by the State under 301.30(b)(3) or by a LEA or IEU under 301.30(a)(2); and

* * * * *

8. Section 301.30 is amended by revising paragraphs (a), (b)(2), and (d), and adding a new paragraph (b)(3) to read as follows:

§ 301.30 How does a State distribute the grant money?

(a) A state shall distribute at least 75 percent of its grant to LEAs and IEUs to be used to provide:

(1) Special education and related services to children with disabilities aged three through five years; and

(2) If consistent with State policy, a free appropriate public education, in accordance with Part B, to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving or have received, services under Part H of the Act.

(b) * * *

(2) The provision of direct and support services for children with disabilities aged three through five years; and

(3) At the State's discretion, the provision of a free appropriate public education to two-year-old children with disabilities who will reach age three during the school year, whether or not those children are receiving, or have received, services under Part H of the Act.

* * * * *

(d) If a State provides services to preschool children with disabilities because some or all LEAs and IEUs are unable or unwilling to provide appropriate programs, the SEA may use payments that would have been available to those LEAs or IEUs to provide special education and related services to children with disabilities aged three through five years, and to two-year-old children with disabilities in accordance with paragraph (b)(3) of this section, residing in the area served by those LEAs and IEUs.

(Authority: 20 U.S.C. 1414(d), 1419(c)(2), 1419(f))

Appendix

(Not to be Codified in the Code of Federal Regulations)

Appendix

Analysis of Comments and Changes

(Note: This appendix will not be codified in the Code of Federal Regulations.)

The following is an analysis of the comments and of the changes in the regulations since publication of the NPRM on August 19, 1991 (56 FR 41266). Substantive issues are discussed under the section of the regulations to which they pertain. Minor changes made to the language published in the NPRM—and suggested changes the Secretary is not legally authorized to make under applicable statutory authority—are not addressed. References to section numbers in this appendix are to the final regulations.

Assistive Technology Device; Assistive Technology Service (§§ 300.5 and 300.6)

Comment: One commenter requested that the proposed definitions of "assistive technology device" and "assistive technology service" be modified to make them as educationally relevant as possible. Another commenter stated that, in the definition of "assistive technology service" (§ 300.6(f)), the term "children" should be used in lieu of "individuals." Another commenter suggested that each State be required to include in the State plan its system for providing information and technological assistance for LEAs regarding assistive technology acquisition.

A commenter requested that procedures for determining when a child needs assistive technology be added to the final regulations. Another commenter requested that evaluations be done by personnel qualified to assess the technological needs of children with disabilities. Another commenter was concerned that school personnel would not have the training and knowledge to provide required services.

Discussion: The definitions of "assistive technology device" and assistive technology service" are taken from sections 602(a)(25) and 602(a)(26) of the Act, and there is no authority to change the substance of those definitions. However, the requirement in § 300.308 limits the provision of assistive technology to educational relevancy—i.e., an assistive technology device or service is only required if it is determined, through the IEP process, to be (1) special education, as defined in § 300.17, (2) a related service, as defined in § 300.16, or (3) supplementary aids and services required to enable a child to be educated in the least restrictive environment. The Secretary believes that the effect of § 300.308 is to limit the provision of assistive technology devices and services to those situations in which they are required in order for a child to receive FAPE.

The Note following "assistive technology service" in the NPRM explained that, except for replacing "child" for "individual," the definition is taken directly from section 602(a)(25)–(26) of the Act. The term "individuals" was inadvertently included in paragraph (f) of that definition. Therefore, that term is being changed to "children" in these final regulations.

The Secretary believes that while an SEA, at its discretion, might choose to provide technical assistance to LEAs about assistive technology or other provisions required in this part, it would be inappropriate and burdensome to require that a State include a description of a technical assistance system on assistive technology in the State plan.

It is not necessary to add procedures for determining the need for assistive technology services because this determination is made as part of the individual evaluation of each child required in §§ 300.530–300.534. These evaluations must be done by qualified individuals, as specified in § 300.532(a)(3).

In instances where LEA personnel do not have the knowledge to provide assistive technology services, funds under this part may be used to obtain the necessary expertise, and, if appropriate, to train existing school personnel. The Secretary does not believe that further guidance is needed on the matters raised by these commenters.

Changes: In § 300.6(f), the clause "or are otherwise substantially involved in the major life functions of individuals with disabilities" has been revised to substitute the term "children" for "individuals."

Autism (§ 300.7(b)(1))

Comment: Some commenters proposed that the phrase "generally evident before the age of three" be eliminated because it may result in excluding children who exhibit those characteristics after age three. One commenter requested that the regulations clarify that autism is a medical diagnosis, while another commenter asked if a medical diagnosis would be required for this disability.

Discussion: The reference to age three is not an age limitation, but merely indicates that children identified as having autism generally exhibit characteristics of this disability before age three. The Secretary does not agree that a medical diagnosis is required to determine whether a child falls within the disability category of "autism." The definition of "children with disabilities" in § 300.7(a)(1) states that the term means "those children evaluated in accordance with §§ 300.530–300.534 * * *." The required procedures in those sections are broad enough to ensure that diagnostic and placement decisions are based on comprehensive information about the child, including medical information that may be needed to determine whether the child has a disability and is in need of special education and related services.

Changes: None.

Comment: Several commenters raised issues regarding the characteristics listed in the definition of "autism." For example, some commenters stated that the proposed definition implies that a child must exhibit all of the characteristics listed to be considered to have autism. In addition, a commenter asked that impairments in the development of social relationships be added to the list of characteristics. Commenters raised two concerns about the term "stereotyped movements"—that the term is too vague and that, in some instances, older children may not exhibit stereotyped movements.

One commenter proposed that the phrase "that markedly restricts activities and interests" be included after "generally evident before age three" to be consistent with the

definition of "Pervasive Developmental Disorder" in the Diagnostic and Statistical Manual of Mental Disorders (DSM–III–R). Several commenters requested that the term "Pervasive Developmental Disorder" be included to ensure that the definition is not restrictive. One commenter requested that a statement be added noting that the term "autistic" does not include children with "autistic-like tendencies."

Discussion: The definition in the NPRM was not intended to require the presence of all of the characteristics listed, nor to be an exhaustive list of characteristics. Children with autism must have impairments in both communication and social interaction. In addition, there are other characteristics that are often, but not always, associated with autism. The term "stereotyped movements" is used by most special educators and medical and health professionals to describe behaviors of many children with autism. The phrase "that markedly restricts activities and interests" does not need to be added because it is implicit in the definition. Children with "autistic-like tendencies" are included if they meet the definition of "autism." Inclusion of the definition of "Pervasive Developmental Disorder" is not needed because the definition of "autism" is sufficiently broad to encompass children who exhibit a range of characteristics of autism.

Changes: The definition has been revised to (1) include, in the first sentence, characteristics generally common to children with autism, and (2) list, in the second sentence, "Other characteristics often associated with autism * * *."

Comment: Several commenters requested that the last sentence in the definition of "autism" regarding the exclusion of children with characteristics of the disability "serious emotional disturbance" be eliminated. They indicated that some characteristics of autism are similar to some characteristics of serious emotional disturbance. A few commenters stated that, in the past, autism was classified under the definition of "serious emotional disturbance."

Discussion: A clarifying change has been made in the definition. However, the Secretary believes that it is important that the regulations distinguish between serious emotional disturbance and autism because children may exhibit characteristics of both disabilities. While the commenters are correct that, in the past, autism was included in the category of "serious emotional disturbance," the current regulations include "autism" in the category of "other health impaired." The legislative history of Public Law 101–476 indicates that autism has suffered from an inaccurate identification with mental illness, and that the designation of autism as a disability category is meant to clarify it as a developmental disability and not as a form of mental illness. (See House Report No. 101–544, 5 (1990).)

Changes: The last sentence of the definition of "autism" has been modified to clarify that the term does not apply if a child's educational performance is adversely affected primarily because the child has a serious emotional disturbance.

Traumatic Brain Injury (§ 300.7(b)(12))

Comment: A commenter suggested that the first sentence of the proposed definition of "traumatic brain injury" be amended by adding "acquired" before "injury," and substituting "impairment" for "maladjustment". The commenter also pointed out that "functional disability" and "psychosocial impairment" resulting from an injury to the brain are not always mutually exclusive, and recommended that the definition be amended to allow for both. One commenter requested the inclusion of adverse effects on social-emotional development, not just academic performance.

Discussion: The Secretary agrees that the definition of "traumatic brain injury" should clarify that the injury (1) occurs after birth, and (2) results in total or partial functional disability, or psychosocial impairment, or both, to provide a more accurate and comprehensive description of children in this disability category. It is not necessary to include a statement of adverse effects on social-emotional development in the definition because social-emotional developmental consequences may be reflected in adverse effects on educational performance.

Changes: The definition has been revised to incorporate the commenter's suggestions, to the extent indicated in the above discussion.

Comment: Some commenters requested clarification as to whether medical verification or physician documentation would be required. In addition, a few commenters requested that specific assessment procedures be developed and required. One commenter stated that LEAs do not have individuals skilled in assessing children with traumatic brain injury and expressed concern about assessment costs.

Discussion: The definition of "children with disabilities" in § 300.7(a)(1) states that the term means "those children evaluated in accordance with §§ 300.530–300.534 * * *." The required procedures in those sections are broad enough to ensure that diagnostic and placement decisions are based on comprehensive information about the child, including medical information if it is needed to determine whether the child has a disability and is in need of special education and related services. There should not be a significant increase in the cost of assessing children with traumatic brain injury, since these children are being currently assessed and are receiving special education, although they are identified as having other disabling conditions. The establishment of a separate category should facilitate the development of improved assessment and program planning efforts. These efforts, together with improved personnel training, should help to ensure that required personnel in LEAs are appropriately skilled in the identification, evaluation, and placement of children with traumatic brain injury. (See House Report No. 101–544, 5 (1990).)

Changes: None.

Comment: Several commenters requested clarification as to whether there is any overlap between the definitions of "traumatic brain injury" and "other health impaired." The commenters asked if an injury resulting from infection, tumor, fever, exposure to a toxic substance, or near-drowning would be considered a traumatic brain injury. A commenter also requested that the definition not exclude other acquired brain injuries when the resulting functional areas of disability are similar to the disabilities resulting from traumatic brain injury.

Discussion: The term "traumatic brain injury," as used in professional practice, applies only to children with acquired brain injuries caused by an external physical force. It does not apply to injuries caused by internal occurrences, such as infections, tumors, fever, and exposure to toxic substances. Children whose educational performance is affected as a result of acquired injuries to the brain caused by internal occurrences may meet the criteria of one of the other disability categories, such as "other health impaired," "specific learning disabilities," or "multiple disabilities." The definition of "traumatic brain injury" does include an acquired injury to the brain caused by the external physical force of near-drowning.

Changes: The phrase "or by an internal occurrence such as a stroke or

aneurysm" has been deleted from the first sentence of the definition.

Comment: A commenter suggested that the word "mild" be deleted from the second sentence of the definition of "traumatic brain injury." Another commenter asked that descriptions of the degree of a child's impairment be eliminated from the definition.

Discussion: The Secretary believes that the degree of impairment is not a factor in determining whether a child has a "traumatic brain injury." Therefore, the terms "mild," "moderate," and "severe" should be deleted from this definition. The factors for determining whether a child is eligible under this disability category for services under part B are (1) an acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment that adversely affects educational performance, and (2) a need for special education and related services because of that disability or impairment. The particular services provided to the child are determined on an individual basis. Thus, as long as the factors described above are met, children are eligible whether or not they have mild, moderate, or severe impairments.

Changes: The descriptions of degree of impairment (mild, moderate, and severe) have been deleted from the definition.

Rehabilitation Counseling Services (§ 300.16(b)(10))

Comment: Some commenters indicated that rehabilitation counseling services should be provided by State vocational rehabilitation agencies under title I of the Rehabilitation Act of 1973, and not be a requirement under this part. Commenters also expressed concern regarding the potential responsibility and the financial burden to LEAs to provide services that were previously the responsibility of other agencies, as well as the inability of LEAs to commit the resources of other agencies. Two commenters requested that the definition of "rehabilitation counseling services" be broadened to mention additional services. A commenter requested clarification about the intent of the new requirement, especially with respect to services provided under the Rehabilitation Act of 1973.

Discussion: Public Law 101–476 added "rehabilitation counseling" as a type of "counseling service" in the list of related services in part B. The Report of the House Committee on Education and Labor on Public Law 101–476 describes rehabilitation counseling as an important related service in special education, as well as an important transition service in preparing students with disabilities for employment or postsecondary education. In addition, the report states, "It is the intent of the Committee that rehabilitation counseling * * * be provided to all students with disabilities for whom this service is necessary for the achievement of the individualized education program." (See House Report No. 101–544, 7–8 (1990).)

"Rehabilitation counseling services," as defined in § 300.16(b)(10), includes a variety of services, such as career development, employment counseling, and employment preparation. The term also includes vocational rehabilitation services provided to students with disabilities under the Rehabilitation Act of 1973. The Secretary believes that the definition is broad enough not to require the listing of additional services.

Because "rehabilitation counseling services" is a type of related service under "counseling services" in part B, public agencies must provide that service to any student with a disability, if the IEP team determines that the service is required to assist the student to benefit from special education. As indicated in the discussion to the comment that follows, rehabilitation counseling may be provided by existing LEA staff, if they are qualified under § 300.15 to provide those services in areas appropriate to their disciplines.

The Secretary recognizes that LEAs do not have the authority to commit the resources of another agency. However, the SEA is responsible—through the use of interagency agreements required under § 300.151, or other means—to ensure that services that would have been provided by other agencies will continue to be provided, either by those agencies, or by the LEA responsible for providing FAPE to the child. In accordance with § 300.150, States may not permit LEAs to use funds under this part to provide or pay for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in a student's IEP.

Changes: None.

Comment: Many commenters requested that the term "qualified counseling professional" be deleted from the definition of "rehabilitation counseling services." They were concerned that it would add a new personnel category that would require States to adopt new certification or licensure standards, and preclude the continued provision of services by existing school staff, who are otherwise qualified. A few commenters suggested that "certified" be used in lieu of "qualified."

Discussion: The Secretary believes that existing school staff (e.g., prevocational counselors, work-study coordinators, or special education teachers), who are qualified under § 300.15, should be permitted to provide rehabilitation counseling services appropriate to their disciplines. The qualifications of personnel providing those services, like the qualifications of personnel providing other services, is a matter to be determined by each State. The method used to specify the qualifications of personnel (e.g., certification, licensure, or registration) is also a matter that is left to State discretion.

Changes: The term "a qualified counseling professional" has been changed to "qualified personnel."

Social Work Services in Schools (300.16(b)(12))

Comment: A large number of commenters did not support the proposed deletion of "in schools" from the definition of "social work services," and requested that the current term "social work services in schools" be retained in the final regulations. These commenters stated, among other reasons, that the existing term helps to ensure that the services provided will be educationally relevant and directly linked to the IEP. Some commenters requested that the term be changed to "school social work services."

A few commenters supported the deletion of "in schools" from the defined term, asserting that the change would enable broader services to be provided. One commenter stated that the proposed change would allow schools and other public and private agencies to work together in providing appropriate mental health services to children with serious emotional disturbance.

Another commenter requested the following changes: (1) Substituting developmental "history" for developmental "assessment," (2) adding the phrase "making home visits," to be consistent with the definition in 34 CFR 303.12(d)(11), and (3) changing "mobilizing" to "identifying and coordinating." A few commenters requested that the qualifications of social workers be clarified. Commenters also urged that services be provided by credentialed school social workers.

Discussion: The phrase "in schools" was proposed to be omitted from the defined term because the Secretary believed that public agencies understood that phrase to limit the

setting in which social work could be provided as a related service. The comments received make clear that this is not the case. The substance of the definition, which was not proposed to be amended, permits these services to be provided in any environment, including a child's home, if they are required to assist the child to benefit from special education.

Because the term "social work services in schools" has been used in this part since 1977 and is commonly accepted by LEAs and other public agencies throughout the Nation, the Secretary does not believe that it is necessary to change the term to "school social work services" or to make other changes to the substance of the definition.

Social work services in schools must be provided by personnel who are qualified under § 300.15. The qualifications of personnel providing those services is a matter to be determined by each State. The method used to specify the qualifications of personnel (e.g., certification, licensure, or registration) is also a matter that is left to State discretion.

Changes: The phrase "in schools" has been retained in the defined term.

Comment: Several commenters requested that, in § 300.16(b)(12)(iv), the goal of receiving "maximum benefit" be deleted. These commenters asserted that "maximum benefit" exceeds the legally required standard for providing FAPE. Some of the commenters stated that the phrase "to receive maximum benefit from his or her educational program" is inconsistent with the decision of the United States Supreme Court in *Board of Education* v. *Rowley*, 458 U.S. 176 (1982)—that part B does not entitle children to maximization of their educational potential, but only to educational benefit.

Discussion: The definition of "social work services in schools," included at § 300.12(b)(12) of the current regulations has remained unchanged since 1977. The phrase "to receive maximum benefit," as used in that definition, was intended only to provide that one activity carried out by personnel qualified to provide social work services in schools is to mobilize resources so that a child can learn as effectively as possible in his or her educational program. This provision did not set a legal standard for that program or entitle the child to a particular educational benefit. However, because of the commenters' concerns that the phrase "to receive maximum benefit" appears to be inconsistent with the Rowley decision, the Secretary believes that the phrase should be revised.

Changes: Section 300.16(b)(12)(iv) has been revised to read: "Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program."

Transition Services (§ 300.18)

Comment: A large number of comments were received on the proposed Note following the definition of transition services. The majority of commenters requested that the last sentence of the Note be revised to delete the statement that the listed activities in the definition are only examples of different types of post-school activities, and, instead, to specify that the listed activities are the minimum that must be provided. Other commenters requested that the listed activities be permissive and not mandatory. One commenter requested that the final regulations define the limits of transition services. (See other comments on transition services relating to §§ 300.344–300.347 in this appendix.)

Discussion: The Secretary agrees with commenters that the statement in the Note—that the listed activities are only examples—must be deleted. The statute defines both "transition services" and "individualized education program." 20 U.S.C. 1401(a)(19) and 1401(a)(20). Paragraph (D) of the definition of IEP provides that an IEP must include a statement of the needed transition services for students with disabilities who are 16 years of age or older, and for certain students below age 16. The Secretary interprets these provisions to require that, at a minimum, the IEP team for each student must address each of the areas listed in § 300.18(b)(2)(i) through § 300.18(b)(2)(iii) (as incorporated from section 602(a)(19) of the Act), and determine what services are needed by the student in each area. If the IEP team determines that no services within a particular area are needed by the student, the IEP must include a statement to this effect, and the basis upon which that determination was made. See § 300.346(b).

Although the definition of transition services in § 300.18 includes a specific list of activities, that list is not intended to be exhaustive. The Secretary does not believe that further guidance is needed regarding the limits of transition services.

Changes: The last sentence of the Note following § 300.18 has been revised to delete the statement that the listed activities are only examples of different types of post-school activities.

Comment: One commenter requested clarification of what is meant by the term "outcomes," as used in "outcome-oriented process." Some commenters requested clarification of the term "coordinated," as used in "a coordinated set of activities." A few commenters requested that recreation and leisure, and orientation and mobility, be added to the coordinated set of activities.

A few commenters requested that the term "if appropriate" be deleted as a modifier of the phrases "acquisition of daily living skills" and "functional evaluation," stating that these activities are needed by all students. Another commenter requested deletion of "if appropriate," stating that the IEP is already individualized.

One commenter requested an emphasis on the responsibility of schools to prepare students with severe disabilities to work and live in the community. Another commenter requested that the definition emphasize the importance of involving the student, parents, other family members, employers, and other community representatives earlier in the student's educational process. One commenter requested a definition of "functional vocational evaluation."

Discussion: The term "outcome," as used in the phrase "outcome-oriented process," refers to the results, or intended effect, of the activities on a student. The Secretary interprets the term "coordinated" to mean both (1) the linkage between each of the component activities that comprise transition services, and (2) the interrelationship between the various agencies that are involved in the provision of transition services to a student. With respect to the comment on "outcomes and the request to clarify the term "coordinated," the Secretary does not believe that further guidance is needed in these regulations. It also is not necessary to specify recreation and leisure, and orientation activities because they could be included under other post-school adult living objectives. As used in § 300.18, the term "if appropriate" is incorporated from the statutory definition of transition services.

It is not necessary to emphasize the responsibility of schools in preparing students with severe disabilities for postschool activities, since transition services are to be provided to each student who is eligible for those services.

The Secretary agrees with the commenter that it is important to involve students, their parents, and appropriate community representatives as early as possible in the educational process—to facilitate a smooth transition from school to employment.

However, it is not appropriate to add this as a requirement in the definition under § 300.18. It also is not necessary to add a definition of "functional vocational evaluation." The term is intended to be sufficiently broad to enable States and LEAs to include whatever services or activities are determined appropriate for individual students.

Changes: None.

Full Educational Opportunity Goal—Data Requirement (§ 300.124)

Comment: Two commenters requested clarification regarding whether the effect of the removal of this section was simply to require data to be submitted separately from the State plan or whether the data requirements would be less specific or otherwise substantively different.

Discussion: When the original regulations in this part were published in 1977, States were required to submit State plans on an annual basis. State plans are now submitted on a triennial basis; but the data for the Part B program are required to be submitted each year as part of the Department's Annual Data Report under section 618 of the Act. This change does not affect the substance of the data requirements.

Changes: None.

Child Identification (§ 300.128, Note 2)

Comment: One commenter felt that the issue of coordination between the Part B and Part H programs was so important that it should be addressed in the regulation rather than a note. The commenter requested clarification regarding the responsibility of the Part H lead agency when it is not the SEA. Another commenter suggested that the two agencies be required to coordinate child find activities with other agencies. Other commenters requested clarification of the components of these activities and applicable procedural safeguards. One commenter questioned whether Part B requires child find activities for children from birth to two years of age.

Discussion: A specific provision requiring the lead agency for Part H to coordinate its child find system with all other child find efforts in the State, including those under Part B, is contained in 34 CFR 303.321(c). Therefore, a Note following § 300.128 is sufficient to address the importance of effective coordination between the two programs.

The Secretary believes that, in States where the SEA and the lead agency for Part H are different, effective coordination between the two agencies is essential to the implementation of the child find activities. The nature and extent of that participation must be included in the State plan. With the agreement of the SEA, the Part H lead agency may undertake the actual implementation of child find efforts for infants and toddlers with disabilities. However, the SEA remains responsible in all events for ensuring compliance with all child find requirements, including those relating to the evaluation of children.

With respect to the scope of the child find requirements under this part, the Secretary interprets those requirements to apply to all children from birth through twenty-one.

Changes: Note 2 has been revised to reflect the above discussion.

Assistive Technology (§ 300.308)

Comment: A few commenters questioned the Department's authority to require assistive technology devices and services under § 300.308, stating that the only new statutory provisions affecting Part B are the definitions of these terms in 20 U.S.C. 1401 (a)(25) and (a)(26).

Several commenters requested that the provisions on assistive technology devices and services be amended to clarify that the cost of personal or medical devices should be borne by parents or other public agencies and not educational agencies. A few commenters requested that the final regulations clarify that an assistive technology device can be taken home by a child if it is needed to complete a homework assignment; other commenters stated that devices should be used only at school. One commenter suggested that, with respect to a child's need for assistive technology devices and services, the phrase "following evaluation of such needs" be added to proposed § 300.308(a).

Discussion: The Secretary believes that the requirements for assistive technology in this part are fully authorized by law. The report of the House Committee on Education and Labor on Public Law 101–476 states:

> * * * The Committee is aware that since the passage of the Education of the Handicapped Act, advances in the development and use of assistive technology have provided new opportunities for children with many disabilities to participate in educational programs. For many children and youth with disabilities, the provision of assistive technology devices and services will redefine "an appropriate placement in the least restrictive environment" and allow greater independence and productivity * * *.
>
> The Committee bill incorporates definitions for assistive technology service and assistive technology device in order * * * (2) to increase the awareness of assistive technology as an important component of meeting the special education and related service needs of many students with disabilities, and thus enable them to participate in, and benefit from, educational programs * * *. (House Report No. 101–544, 8–9 (1990).)

The Secretary believes that assistive technology devices and services may be essential to the provision of FAPE to certain children with disabilities. Section 300.308 provides only that these devices and services must be made available if they are required under current provisions of the regulations relating to special education, related services, and supplementary aids and services.

A determination as to whether an assistive technology device or service is required in order for a child to receive FAPE must be made on an individual basis using the evaluation procedures, the procedures for developing IEPs, and the procedures for placement described in these regulations. Similarly, a decision as to whether a child may use a device or service in settings other than the child's school (e.g., the child's home or other parts of the community) also must be made on an individual basis.

Under § 300.301, a public agency may use whatever State, local, Federal, and private sources of support are available to provide or pay for services, including assistive technology services or devices. These services and devices must be provided at no cost to the child or parent under §§ 300.8 and 300.300.

The Secretary does not believe that it is necessary to add the phrase "following evaluation of such needs" because the concept of determining needs based on evaluation is central to these regulations.

Changes: None.

Comment: Several commenters objected to proposed § 300.308(b), regarding the provision of supplementary aids and services for children who are educated in regular classes, because the proposed language implied that assistive technology devices and services under this part must be provided to children who do not receive special education and related services.

Discussion: Under § 300.550(b)(2), "supplementary aids and services" must be provided to children with disabilities who have been determined to be eligible under Part B and are able to be educated in regular classes with the use of those aids and services. Assistive technology can be a form of "supplementary aids and services."

Changes: Section 300.308 has been revised to make it clear that assistive

technology devices and services must be provided only if they are required under current regulations as part of a child's special education (§ 300.17), related services (§ 300.16), or supplementary aids and services (§ 300.550(b)(2)).

Priorities (§ 300.321(c))

Comment: A few commenters requested that the prohibition against the use of Part B funds for preservice training in § 300.321(c) of the current regulations be retained. These commenters expressed concern about duplication of effort, noting that preservice training is currently the responsibility of institutions of higher education. Another commenter expressed concern that public agencies would be required to use Part B funds for preservice education, thus diverting funds away from the provision of direct services. One commenter expressed support for deleting the provision if the change would provide LEAs more flexibility in using Federal funds for preservice training, but not if it would mean that universities would have increased availability of Part B funds for preservice training previously funded from other sources.

Discussion: The Secretary believes that the prohibition against using funds under this part for preservice training should be deleted, as proposed in the NPRM. Deleting the prohibition will give States and LEAs the flexibility to use funds under this part for preservice training if they choose to do so.

Changes: None.

Participants in Meetings; Parent Participation (§§ 300.344(c) and 300.345(b)(2))

Comment: Several commenters requested that the term "if appropriate" be deleted from the Note following § 300.344(c), and that inclusion of students in their IEP meetings be required. Other commenters requested that the Note reflect a preference for student inclusion and clarify who makes the determination of the appropriateness. These commenters stressed the importance of students having direct involvement in determining their own programs and services.

Discussion: The Secretary agrees with commenters that "if appropriate" should be deleted, and that students should be afforded the opportunity to participate and have a voice in their own transition planning. Providing for the inclusion of older students in their IEP meetings is consistent with the current provisions of this part. Section 300.344(a)(4) states that each public agency "shall ensure that the meeting includes * * * the child, where appropriate." The Note following question 21 of Appendix C of these regulations states that "[t]he parents and the agency should encourage older children with disabilities (particularly those at the secondary level) to participate in their IEP meetings." The Secretary believes that, if a purpose of the IEP meeting is the consideration of transition services for a student, the public agency has a responsibility to (1) invite the student to attend the meeting, and (2) consistent with Executive Order 12606, entitled "The Family," inform the parents, in the notice required at § 300.345(a)(1), that the student will be invited. Also, if the student does not attend, the public agency must use other methods to ensure that the student's preferences and interests are taken into account at the meeting.

The Secretary believes that it is important to add a Note to clarify when the public agency is required to invite students to attend their IEP meetings. All students who are 16 years of age, or older, must be invited, since one of the purposes of the annual IEP meeting will always be the planning of transition services. Also, any student younger than age 16 must be invited before a decision about transition services for the student is made.

Changes: The following changes have been made: (1) the title of § 300.344(c) has been changed to "Transition services participants"; (2) that paragraph has been revised to specify that if a purpose of the meeting is the consideration of transition services for a student, the public agency must invite the student, and, if the student does not attend, take steps to ensure that the student's preferences and interests are considered; (3) proposed Note 2 following § 300.344 in the NPRM has been revised to clarify when public agencies must invite students to their IEP meetings; and (4) § 300.345 (Parent participation) has been revised at paragraph (b)(2) to provide that, if a purpose of the IEP meeting is the consideration of transition services, the notice of the meeting must indicate this purpose, and indicate that the student will be invited.

Comment: Several commenters expressed concern about the requirement in § 300.344(c)(2) of the NPRM that public agencies must ensure that IEP meetings include, "if appropriate, a representative of each other participating agency providing the transition services * * *." The commenters stated that public agencies do not have the authority to require the attendance of personnel from other agencies, and requested that the requirement be deleted, or modified to provide guidance on alternatives for the public agency to follow if other agencies fail to participate (e.g., to require documentation of efforts to involve agencies, or to use other methods to ensure participation).

A commenter requested clarification of the term "a representative of the public agency," as used in § 300.344(a)(1) of the current regulations and proposed § 300.344(c)(1) of the NPRM, noting that the terms appear to be duplicative. Another commenter requested the inclusion of agency representatives who are needed to assist in planning (e.g., case managers or advocates), but whose agencies are not necessarily providing or paying for transition services. One commenter requested that the regulation address the need for providing information on accommodations in postsecondary education and employment that are required under section 504 of the Rehabilitation Act and the Americans With Disabilities Act.

Discussion: The Secretary believes that LEAs need the involvement of, and commitment from, the various agencies that will participate in the provision of transition services to students with disabilities, but agrees with the commenters that LEAs cannot compel the attendance of representatives of transition agencies at IEP meetings. Therefore, the Secretary believes that LEAs need to adopt other methods to ensure the involvement of those agencies (e.g., through individual or conference telephone calls, or correspondence).

The Secretary agrees with the commenter that the provision at proposed § 300.344(c)(1) of the NPRM that requires each IEP meeting to include "a representative of the public agency responsible for providing or supervising the provision of transition services" duplicates the statutory requirement in the current regulations at § 300.344(a)(1) (i.e., "a representative of the public agency * * * who is qualified to provide or supervise the provision of special education").

Under § 300.344(a)(5), participants at IEP meetings are not limited to representatives of agencies that provide or pay for the provision of transition services, but may include, at the discretion of the agency or parents, other individuals who can be helpful in planning transition services. Because § 300.344(a)(5) already provides for the kind of participation requested by the commenter, no further clarification is needed in these regulations. Considering an individual student's need for

reasonable accommodation in post-school environments is an inherent part of transition planning, and is implicit in these regulations. Therefore, it is not necessary to add a requirement on this point.

Changes: Section 300.344(c)(1) of the NPRM has been deleted. The requirement at § 300.344(c)(2) of the NPRM (designated as § 300.344(c)(1)(ii) in these final regulations) has been modified to specify that the public agency must invite "a representative of any other agency that is likely to be responsible for providing or paying for transition services." A provision has been added to specify that if a transition agency fails to send a representative to the IEP meeting, the public agency must take other steps to obtain the participation of that agency.

Content of IEP (§ 300.346).

Comment: A few commenters requested that a note be added to clarify that the statement of needed transition services must be based on current academic, vocational, and functional assessment and evaluation information. Some commenters requested that the regulations specify that the "statement of needed transition services" include (a) goals and objectives, including short-term transitional objectives, and (b) the specific special education services to be provided to the student.

A few commenters requested that the regulations refer to a "plan" rather than a "statement" because this would provide a fully developed schemata for implementation of services. One commenter requested that an exit planning meeting be held prior to graduation to determine if transition goals have been met and if appropriate services are being provided.

Several commenters expressed concern that other agencies would abandon their commitment to provide transition services, and suggested that the regulations require that participating agencies must provide the transition services agreed to in the IEP. Many of these commenters, citing the legislative history of the 1990 Amendments, requested that the Note following § 300.346 be amended to clarify that the statement of agency responsibilities is intended to address shared financial and programmatic responsibility. One commenter suggested deleting the language regarding participating agencies' responsibilities, since that concept is already covered in other areas of the Part B regulations.

Discussion: The Secretary agrees with commenters that it is important to base transition services on current evaluation and assessment information about a student that is derived from a current evaluation that meets the requirements of §§ 300.532 and 300.533.

Nothing in Part B excludes goals and objectives for transition services. However, given that the IEP content requirements in § 300.346(a) do not appear to be appropriate for all types of transition services, the Secretary has determined not to regulate further on this point at this time.

With respect to the request to use the term "plan" in lieu of "statement," the regulation uses the terminology of section 602(a)(20) of the Act. The Secretary believes that it is not necessary to require that an exit planning meeting be held because exit planning should be discussed as a matter of course in IEP meetings on transition services.

The Secretary believes that it is important to ensure that other agencies continue to provide or pay for those transition services for which they are financially and legally responsible. This position is stated in § 300.347(b) of these final regulations (§ 300.347(c) in the NPRM). The Secretary agrees with commenters that the Note following § 300.346 should reflect the legislative history of the Act regarding shared financial responsibilities for transition services.

Changes: A new heading for paragraph (a) ("General") has been added, and the five components of the IEP, as contained in § 300.346 of the current regulations, have been included under that heading. A new paragraph (b) ("Transition services") has been added. The transition services requirements under paragraph (b) have been revised to specify that the IEP for a student must include the three areas listed in § 300.18(b)(2)(i) through § 300.18(b)(2)(iii), unless (1) the IEP team determines that services are not needed in one of those areas, and (2) the IEP includes information to that effect, including the basis for the determination. (The comments and discussion related to these changes are included under § 300.18.)

The Note following § 300.346 in the NPRM (designated as Note 1 in these final regulations) has been revised consistent with the above discussion. A new Note 2 has been added to clarify the requirement in paragraph (b) related to including in a student's IEP the three transition services areas specified in § 300.18(b)(2)(i) through § 300.18(b)(2)(iii).

Comment: Some commenters recommended decreasing the age criterion to "no later than age 14," and requiring a statement of explanation for any 14 or 15-year old student not receiving such services. Another commenter recommended that the required age for providing transition services be lowered to age 15.

Discussion: Section 602(a)(20) of the Act provides that IEPs must include a statement of needed transition services for students beginning no later than age 16, but adds qualifying language related to students below 16 (i.e., "* * * and, when determined appropriate for the individual, beginning at age 14 or younger."). The Secretary believes that it would be inconsistent with the Act to mandate services for all students beginning at age 14 or 15, or to require public agencies to include a statement in a student's IEP explaining why the IEP team determined that transition services were not appropriate.

Although there is no statutory base to mandate transition services for all students beginning at age 14 or younger, the Secretary believes that the provision of these services could have a significantly positive effect on the employment and independent living outcomes of these students in the future, especially for students who are likely to drop out before age 16. As indicated in the Report of the House Committee on Education and Labor on Public Law 101-476:

> Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical. (House Report No. 101-544, 10 (1990).)

Therefore, the Secretary encourages public agencies to provide transition services to students below age 16 when there is a need for those services.

Changes: A new Note 3 has been added to reflect the above discussion.

Agency responsibilities for transition services (§ 300.347).

Comment: Several commenters expressed concerns about the costs of transition services to educational agencies and requested clarification about the financial responsibilities of other agencies for these services. Two commenters suggested that the regulations require interagency agreements concerning transition

services. One commenter suggested that the requirement to reconvene the IEP team in proposed § 300.347(a) be deleted. One commenter requested that the regulations include a time limit for reconvening the IEP team when a participating agency fails to provide agreed upon services. Another commenter requested that the requirement to reconvene be revised to specify that only the agencies necessary to the particular issue attend the meeting. One commenter requested that the phrase "to be implemented" be deleted from the description of the "alternative strategies" that the reconvened team would identify.

Discussion: Comments regarding the costs of providing transition services are discussed under § 300.346. It is not necessary to add a provision requiring interagency agreements on transition services because the requirements of § 300.152 ("Interagency agreements") apply to transition services.

The Secretary agrees that, in order to ensure that there will not be any undue delay in providing needed transition services to a student, the regulation should include some time-limited standard for reconvening a meeting to identify alternative strategies. The Secretary also agrees that the phrase "to be implemented" is unnecessary. However, the Secretary believes that the statute, which requires that the IEP team be reconvened, requires the public agency to reconvene all members of the team.

When an IEP team is reconvened, an alternative strategy may be able to be identified without changing the student's IEP. In other cases, the IEP team may find it necessary to revise the IEP to include alternative ways to meet the goals that were identified.

Changes: Section 300.347(a) has been revised by (1) requiring that the meeting of the IEP team be initiated "as soon as possible," after a participating agency fails to provide agreed-upon services, (2) deleting the phrase "to be implemented," and (3) adding at the end of the paragraph "and, if necessary, revising the student's IEP."

In addition to changes made based on the comments received, the following other changes have been made: (1) the definition of IEP in § 300.340 of the current regulations is now designated § 300.340(a); (2) the definition of "participating agency" in proposed § 300.347(b) has been moved from § 300.347 and added as a definition under new § 300.340(b); and (3) proposed § 300.347(c) in the NPRM has been redesignated as § 300.347(b).

Comment: Several commenters requested that the regulations clarify that transition services can continue to be provided to students after graduation. One commenter asked for clarification of the responsibility to reconvene the IEP team after graduation.

Discussion: Part B of the Act neither requires nor prohibits the provision of services to a student after the student has completed the State's graduation requirements. Thus, if a student is still within the eligible age range for FAPE within the State, the State, at its discretion, could continue to provide needed transition services to the student and use funds under this part to pay for the transition services, or contribute to the cost of those services through a shared cost arrangement with another agency—provided that all applicable requirements of this part are met.

Changes: None.

General (§ 300.380).

Comment: A few commenters requested that the proposal to require the highest requirements in the State applicable to a specific profession or discipline be eliminated. Another commenter requested that the "highest standards" be defined, and one commenter asked if these standards applied to related services and support personnel.

Discussion: The Secretary believes that a State's CSPD should be consistent with the personnel standards requirements in § 300.153. Those standards apply to all personnel who provide special education or related services to children with disabilities. "Highest requirements in the State applicable to a specific profession or discipline" is defined in § 300.153 to be State-specific.

Changes: No change has been made in response to the comments. However, a technical change has been made by Public Law 102–119 to require that States ensure that the CSPD under Part B is consistent with the purposes of the IDEA and the CSPD for the Part H program.

Adequate supply of qualified personnel (§ 300.381).

Comments: Several commenters requested that proposed § 300.381(c) be deleted or clarified to indicate that it is not mandatory for all teacher aides to acquire credentials for teaching special education from institutions of higher education. One commenter requested that the requirement in the current § 300.381(a) that other agencies have the opportunity to participate in the development, review, and annual update of the CSPD be retained. Another commenter requested the addition of consumer and parent involvement in the plan development. One commenter requested reorganization of the section for consistency with the statute. A few commenters requested clarification of the term "leadership personnel." Some commenters requested clarification concerning whether the provisions of this section apply to personnel who are seeking advanced degrees or degrees in new areas of specialization. One commenter requested that proposed § 300.381 include a specific reference to § 300.153(a).

Discussion: The Secretary agrees that § 300.381(c) should be deleted from the regulations. While States may choose to take steps to enable teacher aides and other paraprofessionals to acquire the necessary credentials for teaching special education as one method to ensure an adequate supply of qualified personnel, it is not appropriate to require that all States use this option.

Section 300.383(b)(3) specifies the kinds of personnel that are included under "leadership personnel." With respect to whether the provisions of this section apply to personnel who are seeking advanced degrees or degrees in new areas of specialization, a State is not prohibited from using funds under this part for those purposes so long as this use is not inconsistent with the priorities in §§ 300.320–300.324.

The Secretary believes that it is not necessary to add a requirement related to the participation of parents and consumers on a State's CSPD because States are required to obtain their involvement through the State advisory panel required under § 300.650. This panel has among its functions, responsibility for advising the SEA of unmet needs within the State and commenting publicly on the State's Part B plan and regulations (see § 300.652). The membership of this panel must include "persons involved in or concerned with the education of children with disabilities," such as parents as well as representatives from a wide variety of groups. State educational agencies also have the discretion to expand the membership of this panel as needed (see § 300.651). In addition, there is nothing in the Act or this part that would preclude States from consulting with parents and consumers on their CSPDs.

The Secretary does not believe that further changes to the proposed regulations in this section are necessary. The regulations proposed in the NPRM reflect the Secretary's intention to increase States' flexibility in ensuring comprehensive personnel development.

Changes: Section 300.381(c) has been deleted.

Personnel preparation and continuing education (§ 300.382).

Comments: Commenters requested the deletion of proposed § 300.382(b) because it defined regular education personnel too narrowly and conflicted with the LRE requirements at § 300.550. Two commenters requested that § 300.382 of the current regulations, which addresses inservice training, be retained; one of the commenters also requested that the section be revised to provide for the training of hearing officers, administrative law judges, and parents. Another commenter suggested that the procedures and activities required by proposed § 300.382(a) should be explicitly tied to a specific needs assessment process.

Discussion: The Secretary agrees with commenters that proposed § 300.382(b) should be deleted from the final regulations because it implies that public agencies must provide such preparation only to certain categories of regular education personnel. Section 300.550 of the regulation requires that, to the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Through the implementation of this requirement, all regular education personnel, including administrators, teachers, counseling staff, and paraprofessionals, are potentially involved in the provision of education or services to children with disabilities.

With respect to the training of hearing officers, administrative law judges, and parents, § 300.370(b)(2) already permits a State to use funds under this part for that purpose.

The Secretary does not agree that the other requested changes should be made. The requirements proposed in the NPRM reflect the Secretary's intention to increase States' flexibility in this area. The Secretary believes that sufficient guidance is provided.

Changes: Section 300.382(b) has been deleted. A statement has been added to clarify that a purpose of the system of continuing education is to enable regular and special education and related services personnel to meet the needs of children with disabilities under Part B.

Data system on personnel and personnel development (§ 300.383).

Comment: Some commenters requested the inclusion of data on vision specialists, and several commenters requested the inclusion of data on personnel providing assistive technology. One commenter requested clarification of what types of special education personnel, in addition to the list of related service personnel provided in the NPRM, are covered by § 300.383(b)(2). Clarification on data collection regarding contract providers as opposed to personnel who are employees was requested.

One commenter suggested use of the phrase "profession and discipline" instead of "area of specialization" in § 300.383(c). Another commenter requested the deletion of the data requirements in § 300.383(b)(1)(ii) concerning personnel who do not hold appropriate State certification, licensure or other credentials comparable to certification or licensure for that profession or discipline. This commenter proposed the addition of data requirements in two categories: Personnel who meet and those who do not meet the highest requirements in the State. Other commenters stated that the data collection requirements constituted an unreasonable burden on the States and that the data were not relevant to providing special education and related services. Another commenter stated that the States do not have the necessary authority to collect the data regarding higher education.

Several commenters objected to the deletion of §§ 300.384–300.387. One commenter requested that the regulations require inclusion of the data specified in § 300.383 in the State plan.

Discussion: Section 300.383(b)(2) of the NPRM requires the collection of data regarding all personnel who provide or are needed to provide special education and related services, including vision specialists and personnel providing assistive technology. The Secretary believes that sufficient guidance is provided in this section and that no other clarification is needed. In response to requests for changes in the language in the section, as well as questions regarding the authority to require data, the language referred to and the authority to require data were added by Public Law 101–476, and the Secretary regards those provisions as sufficient. Finally, the CSPD provisions in the NPRM simplify and distill the fundamental requirements contained in §§ 300.384–300.387 of the current regulations and fully implement requirements added by Public Law 101–476. The new provisions give States greater flexibility in implementing the CSPD requirements than was possible under the current regulations. Therefore, the Secretary believes that the language in the NPRM should be retained in the final regulations.

Changes: None.

Prior notice; parent consent (§ 300.504(d)).

Comment: The proposed § 300.504(d) provides that States establishing additional State consent requirements must ensure that public agencies have informal and formal procedures for dealing with parental withholding of consent to those requirements. Some commenters suggested deleting all or part of § 300.504(d), stating that current procedures are adequate to ensure the provision of services to children; one of those commenters recommended that no requirements be added unless they are expressly found in the statute.

Some commenters indicated that in order to increase the States' flexibility when a parent withholds consent under additional State consent requirements, informal procedures for resolving disagreements between the parent and the public agency should be encouraged but not required. One commenter requested standards for informal procedures. Commenters also expressed concern about the potential for confusion if States are permitted to adopt additional consent requirements. A commenter indicated that proposed Note 3 should be revised to make it permissive to use formal procedures if informal procedures fail. One commenter requested modification of § 300.504(d) to provide for an expedited resolution in the form of an intermediate ruling so that a change in placement could occur before final resolution of an administrative proceeding.

Discussion: The Secretary believes that States should have the discretion to adopt additional parental consent requirements. Nothing in the Part B statute prohibits a State from implementing additional consent requirements that give parents additional procedural protections and do not otherwise conflict with the procedural protections guaranteed under Part B. The provisions that have been added to § 300.504 are for the purpose of ensuring that additional State consent requirements will be implemented in a manner that is consistent with the procedural protections guaranteed under Part B.

The Secretary agrees that proposed paragraph (d)(2), which requires informal and formal procedures for overriding parental withholding of consent, and proposed paragraph (d)(3), which permits States to designate the due process procedures in §§ 300.506–300.513 as the formal procedures for overriding parental withholding of consent, should be deleted to avoid imposing an additional and unnecessary burden on States, and to give States flexibility in implementing consent override procedures. However, with regard to additional State consent requirements, consent override procedures must be implemented, if necessary, to ensure that children with disabilities continue to receive FAPE. In

addition, the Secretary believes that it is important for the prohibition of the current § 300.504(b)(2) that "[e]xcept for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child" to apply to any other areas in which the State requires consent.

Changes: Sections 300.504(d)(2) and 300.504(d)(3) of the NPRM have been deleted. The consent requirements in the current regulations have been reorganized and revised (1) to provide that if a State requires additional consent requirements, the State must ensure that each public agency in the State establishes and implements effective procedures to ensure that individual children continue to receive FAPE, and (2) to ensure that a public agency does not require parental consent as a condition of any benefit except for services or activities covered by the Federal consent requirements and the additional State consent requirements. Note 3 has been revised to indicate that if parental consent is refused, and the public agency determines that the service or activity in dispute is necessary to provide FAPE to the child, the agency must implement its procedures to override the refusal.

Hearing rights (§ 300.508(a)(5)).

Comment: Commenters wondered whether the Secretary had the authority under the statute to require that hearing decisions be made public and expressed concern about the cost of implementing this requirement without the addition of new funds. One commenter requested the addition of "within a reasonable time" as a time frame for availability of the decisions. Commenters also requested clarification concerning which hearing decisions are covered and what format is required for dissemination of decisions. One commenter requested that administrative complaint decisions also be included within this requirement. One commenter suggested that summaries be permitted.

Discussion: The Secretary believes that no change is necessary for this section. The requirement that the public agency make hearing findings and decisions available to the State advisory panel and the general public after deleting any personally identifiable information is set forth at 20 U.S.C. 1415(d)(4). It is not necessary to add language requiring that the decisions be made available "within a reasonable period of time" because that concept is implicit.

The types of hearing decisions that must be made available to the public and transmitted to the State advisory council include due process hearing decisions under § 300.506(a) and review decisions under § 300.510 (see comment and discussion under § 300.510, following). The provisions of 20 U.S.C. 1415(d) do not apply to administrative complaint decisions under §§ 300.660–300.662. However, those decisions may be made available to the public at the discretion of the SEA. The format for disseminating decisions is also an individual SEA decision.

Changes: None.

Administrative appeal; impartial review (§ 300.510(c), (d), and Note 1).

Comments: The NPRM proposed to add a new paragraph (c) to § 300.510, and to revise Note 1 following the section, to clarify which officials may not conduct State-level reviews under this program. A number of commenters requested that the proposed paragraph and note be deleted from the final regulations. The comments included objections that the regulation goes beyond the scope of IDEA, and that it is contrary to some judicial opinion. One commenter stated that the regulation does not recognize that there is a distinction between the statutory requirements applicable to hearings and to State-level reviews. Another commenter stated that the proposed regulation conflicts with the SEA's obligation to conduct a review. One commenter felt that the need for the individual conducting the review to have special knowledge and training virtually required that the person be employed by the SEA. A commenter requested that the regulation be revised to permit the SEA to hire individuals whose primary role would be to conduct reviews, with some conditions established to ensure impartiality. Other commenters requested (1) further definition of "employee" of the SEA or any other public agency that may not conduct a review, (2) that language be added to indicate that the review may not be conducted by a person having a personal or professional interest that would conflict with the person's objectivity, and (3) that the regulation require knowledge of special education by the reviewing official.

A commenter requested that the requirement at proposed § 300.508(a)(5) concerning transmitting written findings of fact and decisions to the State advisory panel be applied to State-level review decisions.

Discussion: Based on the lack of consensus about the proposed change on State-level review officials and the wide variety of alternative suggestions offered, the Secretary has determined that the current regulation remains the best guidance at this time.

The Secretary interprets the requirement set forth at 20 U.S.C. 1415(d)(4) to require that both hearing and review decisions must be available to the public and transmitted to the State advisory panel.

Changes: Proposed § 300.510(c) and the change in Note 1 have been deleted. Paragraph (c) of the current regulations (regarding the finality of decisions) has been redesignated as paragraph (d), and a new paragraph (c) has been added to require that review findings and decisions be made available to the State advisory panel and to the public, after deleting any personally identifiable information.

Adoption of State complaint procedures (§ 300.660).

Comment: One commenter requested that the requirements on State complaint procedures in proposed §§ 300.660 through 300.662 be deleted because they exceed statutory authority. Two commenters requested that the requirement to review an appeal from a decision of a public agency with respect to a complaint be deleted or revised. Another commenter requested that the complaint procedures be retained in 34 CFR 76.780–76.783 until the proposed §§ 300.660–300.662 have been in effect for a period of time.

Commenters also requested clarification about whether the complainant can by-pass filing a complaint with an LEA and file the complaint directly with the SEA.

Discussion: The Secretary believes that proposed §§ 300.660–300.662, with certain modifications, should be retained and that they are generally consistent with the requirements previously in the EDGAR regulations at 34 CFR 76.780–76.782. The Secretary agrees that clarification is needed regarding the circumstances under which a complainant can file a complaint with an LEA and those when a complainant can file directly with the SEA. Proposed § 300.662 provides for complaints to be filed with the State. However, a revision is needed to allow an SEA, at its discretion, to have procedures that allow complainants to elect to file a complaint with an LEA or other public agency and to request the SEA to review that agency's decision on the complaint. The SEA must review the public agency's decision to ensure that the complaint was resolved.

Changes: Proposed § 300.660 (a) and (b) (redesignated as § 300.660 (a)(1) and (a)(2) in these final regulations) have been revised to specify that the SEA's procedures must provide for filing a complaint directly with the SEA, and may, at the SEA's discretion, permit the

filing of a complaint with the public agency, including the right to have the SEA review the public agency's decision on the complaint. The provision in proposed paragraph (c), regarding the SEA's procedures for conducting an independent on-site investigation of a complaint, has been deleted, because it is already required in the section on "Minimum State complaint procedures" (§ 300.661). Proposed § 300.660(d) has been redesignated as § 300.660(b).

Comment: One commenter requested the deletion of the proposed requirement that parents be informed about complaint procedures because it is too burdensome for public agencies. Another commenter suggested that the requirement to adopt procedures for informing parents about the State complaint procedures be changed to informing complainants.

One commenter requested that the proposed regulation be revised to clarify the scope of complaints that States must investigate and to provide that States are not required to investigate matters that are the subject of a due process hearing under § 300.506. Another commenter requested that mediation be required as a step prior to filing a complaint.

Several commenters requested guidelines and clarification for determining the responsibility of the State to conduct an independent review. Another commenter requested that the regulation be revised to provide that the SEA need not resolve a complaint if it has been resolved voluntarily.

One commenter requested that States be required to make complaint decisions available to the public. One commenter requested that the States be required to submit complaint management procedures as part of the State plan.

A commenter requested that a note be added to indicate that a State may use these procedures to resolve a complaint that an agency is violating the requirements of section 504 of the Rehabilitation Act of 1973.

Discussion: The Secretary believes that it is essential for parents and other interested individuals to be informed about their right to file a complaint and that this requirement is not unreasonably burdensome. Public agencies may choose to provide this information as part of the explanation of procedural safeguards in the notice requirements under § 300.504(a) and § 300.505(a)(1) or § 300.505(a)(2), or may use other means.

The Secretary believes that no further guidance is needed regarding the parent's right to file a complaint and request a due process hearing regarding the same issues. A parent has the right to file a complaint under proposed §§ 300.660–300.662 and to initiate a hearing under § 300.506 regarding the same issue. However, in order to avoid the possibility of inconsistent decisions on the same subject matter and waste of government resources, a State may delay resolution of identical issues raised in a complaint while those same issues are pending in a due process hearing. This does not relieve the SEA of its responsibility to resolve other issues in the complaint that are not identical to those raised under § 300.506.

It is not necessary to include a provision regarding mediation in the regulations. A State may include procedures that permit, but do not require, complainants to participate in mediation prior to filing a complaint. However, those procedures may not be used to deny or delay the right of an individual or organization to file a complaint or use the due process procedures in § 300.506.

The Secretary believes that no further guidance is needed related to conducting an independent review by the SEA, or regarding a State's responsibility to resolve a complaint that has been voluntarily resolved. It is implicit in proposed §§ 300.660 and 300.661 that a State need not resolve a complaint that has been otherwise resolved to the satisfaction of the complainant.

The Secretary believes that it would be unnecessarily burdensome to require SEAs to make complaint decisions available to the public or to include their complaint resolution procedures in their part B State plan.

Changes: None.

Minimum State complaint procedures (§ 300.661).

Comment: Several commenters requested that proposed § 300.661(a)(2), regarding the opportunity for the complainant to submit additional information, be deleted or revised. One commenter suggested that the regulations specify that the respondent should be given the opportunity to submit additional information in response to the allegations of the complainant.

Several commenters stated that the required complaint procedures are too specific. Another commenter requested that proposed § 300.661 be revised to permit a State to determine its own procedures. Other commenters stated that the requirement that written decisions include findings of fact and conclusions and the reasons for the SEA's final decision is burdensome, too formal, and makes the complaint less amenable to resolution.

Discussion: The Secretary believes that proposed § 300.661(a)(2) should be retained. As noted in the preamble to the NPRM, "many complainants have not been consulted in connection with complaint resolutions under this program in instances in which their input could have been helpful in facilitating the complaint resolution. Thus, proposed § 300.661(a)(2) requires each SEA to have procedures for soliciting input from the complainant as part of its minimum complaint procedures." The Secretary believes that as a matter of course the SEA would consider additional information submitted by the public agency that is the subject of a complaint.

The Secretary believes that the provisions in proposed § 300.661(a)(4)(i) and § 300.661(a)(4)(ii), regarding the content of the SEA's written decision to the complainant, should be retained. These provisions do not prescribe the format or level of formality in which this information must be provided. Moreover, the Secretary believes that the information required is the minimum necessary to enable the Secretary to review the final decision of the State where such review has been requested.

Changes: None.

Comment: One commenter requested that the regulations be revised to clarify that either party to a complaint may request review by the Secretary. Another commenter requested that language be added to encourage local resolution of complaints. Another commenter requested a revision to indicate that the 60-day time limit for issuing a written decision does not begin until after all documents have been received by the SEA.

Discussion: The Secretary agrees that proposed § 300.661(d) should be revised to clarify that the public agency that is the subject of the complaint also has the right to request secretarial review.

The proposed regulations neither preclude nor discourage the use of informal or local complaint procedures as an alternative to the formal complaint procedures set forth in these regulations. Some States have pointed to the success of informal conflict resolution procedures as an alternative to the formal procedures set forth in §§ 300.660–300.662. Public agencies may wish to suggest that parents and other complainants use these alternative procedures. However, these alternative procedures may not be used to deny or delay the right of an individual or organization to file a complaint with the State.

The Secretary believes that the 60 day time limit begins on the date that the

complaint is received by the SEA. This requirement is consistent with § 300.671(a) (previously, 34 CFR 76.781(a)) and long-standing Department policy.

Changes: The requirement in proposed § 300.661(a)(1) (regarding the SEA's procedures to carry out an on-site investigation) has been revised to add the statement "if the SEA determines that such an investigation is necessary." (This statement was included in proposed § 300.660(c).) Section 300.661(d) now indicates that a public agency has the right to request secretarial review.

Filing a complaint (§ 300.662).

Comment: Several commenters requested that the regulations be revised to require greater specificity in the content of complaints that are filed under this part. In particular, one commenter suggested that the name and address of the complainant and involved student and the specific requirements of part B that have been violated be required. Commenters further suggested that a note be added to indicate that this requirement may be met by a "factual statement." One commenter requested that submission of anonymous complaints be permitted, and another requested that oral complaints be permitted.

Discussion: The Secretary does not believe that proposed § 300.662 should be revised to set forth additional content requirements for filing complaints under this part. Sufficient guidance is provided in these regulations, and some of the requested changes would be unduly burdensome upon parents and other complainants. The Secretary also does not believe that proposed § 300.662 should be revised to require that States resolve anonymous and non-written complaints. The Secretary believes that it is reasonable for States to require that complaints be written and signed as a part of an orderly complaint resolution process, and that States, at their option, may include these requirements. These provisions are not intended to preclude a State from also accepting and resolving oral complaints if the State chooses to do so.

Changes: None.

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Part III

Department of Housing and Urban Development

Office of Community and Planning Development

Technical Assistance To Support a Coordinated Agenda for the Southwestern Area of the U.S. (CASA) for Colonias; Notice of Funding Availability for Fiscal Year 1993

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Community Planning and Development

[Docket No. N-92-3491; FR-3314-N-01]

NOFA for Technical Assistance To Support a Coordinated Agenda for the Southwestern Area of the U.S. (CASA) for Colonias

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of Funding Availability (NOFA) for Fiscal Year 1993.

SUMMARY: This NOFA announces the availability of $2.3 million in Community Development Technical Assistance Program funds to be used for the purpose of empowering residents of designated "colonias" in the States of California, New Mexico and Texas in their efforts to improve living standards and conditions within their communities. Technical assistance funds will be available for the development of programs for decent, affordable and energy-efficient housing; community water and sewer systems, including drainage systems and hook-up services to colonia residents; promotion of local economic development programs and projects including the establishment of state or federal (if applicable) Enterprise Zones within the colonias; and providing job training and self-employment programs for colonia youth and residents. These funds are to be awarded competitively as follows:

(1) A minimum of $1.5 million for the purpose of empowering colonia residents through the use of Community Development Block Grant (CDBG) funds to improve living conditions and standards within colonias. Eligible applicants include non-profit and for-profit organizations, states and units of general local government responsible for providing services in the colonias. Activities should be focused on technical assistance to finance business development which creates jobs and self-employment opportunities for colonia residents; and addressing problems affecting residents, such as the availability of energy-efficient affordable housing, adequate water and sewer services and drainage systems, platting and subdivision requirements, and other urgent community needs.

(2) A minimum of $800,000 for the purpose of coordinating federal, state and local program services available for colonia residents, including creation of local, "one-stop," service centers. Service centers would use local public or private facilities or mobile facilities to provide colonia residents with a variety of social and informational services funded in whole or in part with CDBG funds. Centers would also be used to coordinate services and programs available under the CDBG program and the Section 916 set-aside with other federal, state, local or private sector resources.

In the body of this NOFA is information concerning:

(1) The principal objectives of the two technical assistance competitions described above, the funding available, eligible applicants and activities, and factors for award;

(2) The application process, including how to apply and how selections will be made; and

(3) A checklist of application submission requirements.

DATES: The application due date will be specified in the application kit. Applicants will have at least 75 calendar days to prepare and submit their application. The 75-day response time will begin to run from the first date the application kit is available. The application kit will set out a specific date and hour deadline for submission of applications that will be enforced strictly. Applicants are encouraged to submit their materials early to avoid disqualification based upon failure to meet the stated application deadline.

EFFECTIVE DATE: Applications may be requested beginning September 29, 1992.

APPLICATION KIT: To obtain a copy of the application kit, contact: Processing and Control Branch, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., room 7255, Washington, DC 20410. Requests for application kits must be in writing, but requests may be faxed to: (202) 708-3363 (this is not a toll-free number). Requests for applications kits must include the applicant's name, mailing address (including zip code), telephone number (including area code), and must refer to "document FR-3314".

FOR FURTHER INFORMATION CONTACT: Barbara Dorf, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., room 7214, Washington, DC 20410. Telephone Number (202) 708-3176; TDD Number: (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this notice have been approved by the Office of Management and Budget (OMB) under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control number 2535-0084.

I. Purpose and Substantive Information

A. Authority

This competition is authorized under section 107(b)(5) of the Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320) (the ACT). Program requirements (including eligible activities) applicable to awards made under this competition are contained in HUD regulations at 24 CFR 570.400 and 570.402, governing the Community Development Technical Assistance Program.

Note: Section 570.402 of the regulation was revised on August 26, 1991, 56 FR 41936-41940. All references in this NOFA to § 570.402 are to that section, as revised.

Any proposed technical assistance activities must meet the eligibility requirements established in the regulations and as limited by this NOFA.

For purposes of this NOFA:

The term "colonia" means any identifiable community that—

(1) Is in the State of California, New Mexico, or Texas;

(2) Is located within 150 miles of the United States-Mexico Border and if in a standard metropolitan statistical area, the population of the standard metropolitan statistical area cannot exceed 1,000,000 residents.

(3) Is designated as a colonia by the State or county in which it is located;

(4) Is determined to be a colonia on the basis of objective criteria, including lack of a potable water supply, lack of adequate sewage systems, and lack of decent, safe and sanitary housing; and

(5) Was in existence and generally recognized as a colonia before the date of enactment of the National Affordable Housing Act of 1990. [November 28, 1990]

This definition is substantially the same as the definition set forth in section 916(d) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 5306 note).

The term "Enterprise Zone" means any area designated as such under state law or under the federal Enterprise Zones statute (if enacted).

B. Allocation Amount and Form of Award

This NOFA announces the availability of $2.3 million in Technical Assistance Program cooperative agreements to provide for coordinated and strategic

economic and community development and for affordable housing within "colonias" as defined in Section I.A. of this NOFA. HUD reserves the right to increase the amount of funds for the competitions held under this NOFA by up to $1 million per competition, should additional funds for the purpose of section 107(b)(5) of the Act become available before the time of award. These funds are to be awarded competitively in accordance with the following:

(1) For the $1.5 million competition, HUD will make available a minimum of $1.5 million for the purpose of empowering colonia residents through use of CDBG program and Section 916 funds to improve living conditions and standards within a designated colonia.

Subject to the receipt of qualifying applications, cooperative agreements in amounts up to $200,000 each, will be awarded to States, units of general local government and non-profit and for-profit organizations as specified in Section I.D. "Eligible Applicants".

This competition will be referred to in this document as the "$1.5 million competition".

(2) A minimum of $800,000 in Technical Assistance Program cooperative agreements will be made available for the purpose of coordinating CDBG and Section 916 funds with other Federal, State and local program resources and making services available for colonia residents in local "one-stop" service centers. The service centers would use local public or private facilities or mobile facilities to provide colonia residents with a variety of social and informational services convenient for their use.

Subject to the receipt of qualifying applications, one or more cooperative agreements will be awarded to states with a CDBG set-aside under section 916 of the National Affordable Housing Act of 1990 for colonias; and/or to non-profit and for-profit organizations qualified to provide technical assistance services to CDBG communities.

For this $800,000 competition, awards will be made in accordance with the following schedule:

Applicants may apply for funds to coordinate the delivery of CDBG funded programs and services made available to a colonia with other federal, state and local resources. Applicants who wish to coordinate services to colonias on a statewide basis may apply for a cooperative agreement in an amount up to $100,000 each for the state of California and up to $350,000 each for the states of New Mexico and Texas.

Applicants may apply for up to $800,000 in technical assistance program funds to provide coordinated delivery of services to colonias within all three states identified as eligible for assistance under this NOFA.

Section 107(b)(5) of the Act authorizes HUD to award funds for the purpose of providing technical assistance in planning and carrying out CDBG programs under Title I of the Act. Under each of these competitions, HUD will fund the applicants who best meet the criteria for the selection identified in this NOFA under the Factors For Award. HUD reserves the right to negotiate the final award amount and Statement of Work with all applicants. If HUD determines a smaller cooperative agreement amount than that requested would be appropriate to the proposed activities, HUD may reduce the amount of funding for an applicant. If HUD receives an insufficient number of applications in a given competition, or if funds remain after all acceptable applications have been funded, HUD may negotiate increased amounts of cooperative agreement awards with applicants selected for funding within any or each competition category in the NOFA.

C. Description of Technical Assistance Competition

The colonias along the U.S.-Mexico border are located in rural counties ranking among the poorest in the nation. These communities have existed since the 1960s, but conditions have become critical as the populations along the border area have continued to increase. It is estimated that as many as 200,000 people live in the four-county area of the Rio Grande Valley, and it is projected that by the year 2000, the population will increase to one-half million. In 1980, the thirty-county border region held an estimated 1.4 million people. By 1984, the growth of the population had reached 1.6 million, and estimates for the year 2000 call for a population in the region of 2.4 million. In many of the colonias throughout the border area, residents are predominantly hispanic, with incomes below the poverty level and there are no, or limited, economic development opportunities or job prospects for area residents. Four out of the five counties in the nation with the lowest per capita income are in this border region.

Aside from the high poverty rate, other factors continue to contribute to the problems facing colonia residents in the border region. These factors include: Unincorporated illegal subdivisions which inhibit or prevent the delivery of basic water and sewer services to many of these areas; a lack of natural resources and drought conditions; lack of adequate roads or drainage systems; lack of affordable housing; and a high birth rate and poor health care services. In many instances, these areas have "fallen through the cracks" because of a lack of common definition among federal, state and local programs, leaving these areas without a source of funds to provide decent affordable housing, potable water supplies and sewage systems, and economic development opportunities to improve income levels while providing stable long-term employment opportunities to residents of colonias throughout the region.

The Congress, by enacting section 916 of the National Affordable Housing Act of 1990, recognized the special needs of colonia residents and established a set-aside of Community Development Block Grant funds to address the community and economic development needs of residents of these areas.

Activities to be funded with CDBG funds included planning for water, sewer and housing activities, and payments for any charges levied against properties owned and occupied by low- and moderate-income persons to cover the cost of the public improvement—such as hook-up services. While Congress included the state of Arizona under the provisions of section 916, the State of Arizona has indicated to HUD that it has no colonias and has requested exemption for the provisions of section 916. HUD has honored the state's request and therefore has limited eligibility for this competition to the states of California, New Mexico and Texas.

The objectives of this technical assistance program are to:

(1) Produce improved living standards for the residents of colonias in the States of California, New Mexico and Texas through development of programs for decent, affordable, energy efficient housing; job training and self-employment for colonia residents and youth; local economic development programs and projects; community water, sewer and systems, including drainage systems and hook-up services; and energy systems for colonia residents. (The $1.5 million competition.)

(2) Assistance to create local service centers within colonias, either using existing or new local facilities, or to create mobile service centers for coordinated delivery of state, federal and local programs to residents of colonias. Activities may also include the implementation or design of mechanisms to facilitate or finance public works activities, including transportation, parks, hospital and

health care facilities or schools. (The $800,000 competition.)

D. Eligible Applicants

For the $1.5 million competition:

(1) Units of general local government eligible for CDBG funds under the Entitlement Program (24 CFR part 570, subpart D) which contain colonias as defined in this NOFA;

(2) Units of general local government receiving funds, or eligible to receive funds, under the State-administered Program for Non-entitlement Communities (24 CFR part 570, subpart I) in states with colonias as defined in this NOFA;

(3) The states of California, New Mexico and Texas, with a set-aside of funds under section 916 of the National Affordable Housing Act of 1990 for colonias; and

(4) Non-profit (including resident management councils and resident management corporations) and for-profit organizations qualified to provide services to the CDBG entities identified in paragraphs (1)–(3) above in the form of technical assistance in planning, developing or administering their CDBG/Title I-funded programs.

For the $800,000 competition:

(1) The states of California, New Mexico and Texas with a CDBG set-aside under section 916 of the National Affordable Housing Act of 1990 for colonias; and

(2) Non-profit and for-profit organizations qualified to provide technical assistance services to states, areas within states and CDBG communities in the Southwest Border region with areas designated as colonias as defined by this NOFA.

E. Program Requirements

This program is funded under the technical assistance program of section 107(b)(5) of title I of the Housing and Community Development Act of 1974. Technical assistance funds must be used for the provision of skills and knowledge to improve effectiveness in planning, developing and administering CDBG-assisted activities. Technical assistance activities funded under these competitions must be directed at implementation of programs for community and economic development or housing, or both, and coordination of services which are being, or are planned to be carried out (in whole or in part) with CDBG program funding provided by states or units of local government participating in the CDBG Entitlement Program or the State-administered Program for Non-Entitlement Communities. Applicants must establish a CDBG nexus between activities they propose to undertake in response to this NOFA and activities funded with CDBG funds that the technical assistance is proposed to assist.

(1) CDBG Nexus Eligibility Criterion for Entitlement Communities

A "CDBG nexus" exists if the technical assistance activities proposed by the applicant for funding through this NOFA are to be used by the awardee to develop, coordinate or implement specific community and economic development or housing programs, or both, or to coordinate services which are being, or are planned to be carried out, in whole or in part, with an entitlement city's or urban county's CDBG program funds, or with funds made available to an entitlement jurisdiction under the state's section 916 set-aside for colonias.

Proof of nexus shall consist of a statement signed by the Chief Executive Officer of the CDBG-funded community, or the Director of the agency administering the CDBG program funds, that identifies:

(a) The amount of CDBG program/Section 916 funds committed, or planned to be committed, to the activities for which the technical assistance is provided;

(b) The planned date the CDBG/Section 916-funded activities will commence and, where an amendment or other action is needed to carry out the funded activities, a statement of intent to effect the needed amendment or other action;

(c) The specific activities to be undertaken with the CDBG/Section 916 assistance;

(d) The location of the colonia or colonias to be assisted; and

(e) The relationship between the CDBG/Section 916 activities and the proposed strategic development and coordinated service technical assistance activities.

(2) CDBG Nexus for State Applicants

State applicants must establish a nexus between the technical assistance funded under this competition and the activities to be assisted in whole or in part with funds provided to units of general local government under the state's CDBG program or under the provisions of section 916 of the National Affordable Housing Act of 1990. A nexus exists where the technical assistance activities are directed to the development, planning, administration or implementation of specific CDBG/Section 916-assisted activities to improve the living standards for colonia residents.

Proof of nexus shall consist of a statement signed by the Director of the State-Administered CDBG Program for Non-Entitlement Communities, certifying that the technical assistance will be made available only in units of general local government which:

(a) Are undertaking, or have been approved to undertake, community, economic or housing development programs; or to coordinate service delivery activities within colonias with CDBG program/Section 916 funds;

(b) Are not currently using their CDBG funds to undertake programs or coordinate service delivery activities within colonias, but the state will grant a program amendment to permit such activities;

(c) Will be given a funding priority or a commitment of CDBG program/Section 916 funds for community, economic development, or housing programs, or for coordinating the delivery of services within colonias, in the state's next non-entitlement program or Section 916 set-aside funding round.

(d) Plan to submit an application for funding under Section 916 of the state's CDBG colonias set-aside.

The statement must also certify that where technical assistance is provided by the state with funds made available under this competition, the activities will be in addition to, or an enhancement of, the state's existing obligation to provide technical assistance to non-entitlement communities under the CDBG program, pursuant to the state's certification made in accordance with section 106(d)(2)(C)(ii) of the Housing and Community Development Act of 1974.

(3) CDBG Nexus for Non-Entitlement Community Applicants

A non-entitlement community must commit funds from a CDBG grant it currently is administering. If the community's current CDBG program grant does not authorize community, economic development or housing programs or coordinated service activities for colonias, the statement of CDBG funding commitment must be conditioned on receiving an amendment to the community's CDBG program to permit such activities. In this situation, the statement of the non-entitlement community must include a statement of intention to amend its CDBG program to permit such activities for the colonias in accordance with applicable state requirements.

If the non-entitlement community is proposing to effect a CDBG program amendment to permit community development, economic development,

housing or coordinated service activities for a colonia, the applicant must obtain a letter from the state indicating that the state will review and consider the amendment. The letter must be included with the application.

The CDBG nexus for non-entitlement community applicants may also be met if the unit of general local government applying for funds under this NOFA certifies that it will submit an application for CDBG funding under the State-Administered Program for Non-entitlement Communities or for Section 916 funding under the state's colonias set-aside.

(4) CDBG Nexus for Non-Profit and For-Profit Organizations

A CDBG nexus exists if the technical assistance activities proposed by the applicant for funding under this NOFA are to be used by states, entitlement communities or non-entitlement communities to plan, develop or administer programs funded under the Community Development Block Grant Program, or the CDBG set-aside for colonias established under Section 916 of the National Affordable Housing Act of 1990, or to prepare applications for assistance under the CDBG program or section 916. The submission requirements to indicate proof of CDBG nexus flow from the type of applicant to whom assistance is given, as follows:

(1) If a non-profit or for-profit organization is to provide technical assistance services to an entitlement community, the non-profit or for-profit organization must meet the proof of nexus requirements for entitlement communities (see item E.(1), above).

(2) If a state is to be provided with technical assistance services, the proof of nexus submission must meet the requirements for state applicants as described in item E.(2), above.

(3) If technical assistance services are to be provided to non-entitlement communities, the non-profit or for-profit organization must meet the proof of nexus requirements for non-entitlement communities as described in item E.(3), above.

Applicants that will be providing technical assistance services on a multi-state basis must receive proof of nexus from each state receiving assistance.

(5) Designation of Non-Profit and For-Profit Organizations as Technical Assistance Providers

A non-profit or for-profit applicant proposing to provide technical assistance to a community or to a state, or to an agency of the state, must obtain a letter from the state (or states, if proposing to provide assistance in all three states) or local governments, designating the non-profit or for-profit organization as a technical assistance provider. The letter must state specifically that the applicant is "designated" as a technical assistance provider to the state or local government (as appropriate) for the purposes of providing assistance to colonia residents to improve their economic and living environment. The letter of designation must be signed by the chief executive officer of the state or unit of general local government to receive the technical assistance services or by his or her authorized representative.

Designation letters should be clearly marked with the Request for Cooperative Agreement Application (RFCAA) number and the name of the applicant. (Failure to include the RFCAA number and the name of the applicant may result in the letter being misfiled or lost through no fault of the Department. This could prevent the applicant from receiving a cooperative agreement.)

(6) Language Proficiency and Experience in Providing Community and Economic Development Assistance in the Southwest Border Region

All applicants will be expected to demonstrate:

(a) Staff proficiency in the Spanish language, particularly dialects that may be prevalent in the colonias proposed to receive assistance under this competition;

(b) Familiarity with the customs and life styles of residents in communities designated as colonias and selected to receive technical assistance services;

(c) Familiarity and expert knowledge about the history and development of colonias in the states identified as eligible for the CDBG set-aside established in section 916 of the National Affordable Housing Act of 1990;

(d) Familiarity with subdivision development requirements, including platting requirements and issues, which have an impact upon the provision of water, sewer and other services to colonia residents, and expert knowledge concerning issue resolution; and

(e) Experience in providing technical assistance services to communities within the southwest border region, particularly communities designated as, or adjacent to, colonias.

(7) Requirements for CDBG Program Amendments

If a non-entitlement CDBG community in which the technical assistance is to be provided has a CDBG program for which assistance to colonias activities are not authorized, the required statement of CDBG funding commitment (described in the above section I.E., Program Requirements, of this NOFA) must be conditioned on an amendment of the CDBG program to permit these activities. The statement must include a statement of intent to effect the amendment in accordance with state CDBG program requirements and procedures.

In the case of a community funded under the State-administered CDBG program, HUD must also receive with the application a letter from the state indicating that the state will review and consider the amendment. Failure to receive this letter (if applicable) with the application will disqualify the applicant from further funding consideration.

F. Eligible Activities

Eligible technical assistance activities are specified in 24 CFR 570.402(d). The technical assistance must be for the provision of skills and knowledge to facilitate the planning, development and administration of CDBG-funded activities aimed at improving the living standards of colonias residents and coordinating resources with other federal, state or local program resources. Examples of activities applicants can undertake under each competition are identified below.

Activities Under the $1.5 Million Competition

Activities undertaken are to provide technical assistance services to implement a variety of community and economic development programs, projects or activities that would improve the living environment of colonias residents. Eligible technical assistance activities are specified in 24 CFR 570.402. Examples of the broad array of eligible activities are:

(1) For Economic Development Programs, Projects or Activities

- Identifying specific sites or locations in colonias to be targeted for economic development programs, projects or activities, including business development activities;
- Establishing public-service partnerships to finance economic and business development in colonias;
- Identifying sources of capital and securing startup and operating financing for new resident-owned micro and small businesses in colonias;
- Preparing cost estimates, feasibility studies, market analysis, or estimates of infrastructure requirements or other elements necessary to obtain economic and business development financing;

• Identifying and securing builders/developers to undertake the proposed economic or business development program, project or activity;

• Developing training programs to permit residents to colonias to obtain jobs resulting from the proposed economic or business development activities;

• Creating self-employment programs which include training and mentor programs for colonias residents participating in self-employment programs;

• Identifying financial intermediaries committed to economic development in colonias, and securing non-federal development capital for proposed economic development programs, projects or activities;

• Promoting private sector-funded incubators for micro and small business development within colonias;

• Identifying job opportunities for colonia residents with established companies and providing job training to meet the job skills required;

• Creating self-employment programs for colonia residents, including programs for youth entrepreneurs;

• Training residents to become economically self-sufficient by obtaining skills to become home construction workers, plumbers, electricians, carpenters, painters, etc.

(2) For Community Development Programs, Projects or Activities

• Addressing platting issues and requirements to remove impediments and barriers that prohibit implementing community and economic development activities, and creating affordable housing;

• Identifying colonias, or areas within colonias, where CDBG economic development activities would occur, and where creation of a state or federal (if applicable) Enterprise Zone would improve or assist the implementation of the CDBG-funded economic development activities;

• Creating Community Development Corporations to sponsor and undertake a variety of community development activities within a colonia;

• Developing plans and financing for public facilities such as community centers, meeting rooms, or recreation facilities within a colonia;

• Developing strategic plans to manage growth and development within a colonia;

• Providing for citizen participation to allow residents greater access and participation in developing and implementing community development programs, projects or activities;

• Devising financing systems to provide small water districts with the funds necessary to cover upfront costs for engineering, construction, operation and maintenance of community sewer, water, and energy systems;

• Developing mechanisms that permit colonia residents to pay for initiation of water and sewer services through installment payments, rather than a single up-front payment;

• Planning and designing residential and commercial streets and street lighting;

• Identifying models that can be used by colonia residents for the development of sewer and water systems, drainage systems, and street and road construction/maintenance;

• Streamlining government agency operations to create greater efficiency in the planning and use of funds for community and economic development in colonias;

• Providing technical assistance to community groups, organizations and residents in colonias to prepare applications for CDBG funds;

• Providing training to colonias residents to overcome language barriers that may inhibit residents from understanding and competing for funds made available under the CDBG program for colonias;

• Researching and clearing title to properties to permit construction of community and economic development or housing projects, or both, or related programs or activities.

• Providing technical assistance services to permit illegal subdivisions to be improved to meet state and local regulatory requirements, including meeting platting requirements so that building permits for CDBG/Section 916-funded community and economic development and/or housing projects, programs or activities can be legally issued.

(3) For Housing Programs, Projects or Activities

• Improving the administration of CDBG-funded HOME and HOPE 3 programs in colonias;

• Creating self-help housing programs in colonias as a means of providing more affordable, energy efficient housing for colonias residents;

• Establishing financing programs to enable colonia residents to own their own homes at an affordable price;

• Training colonia residents in new home construction techniques and rehabilitation methods for existing units, including energy efficient designs and renovations;

• Training colonia residents to become residential home builders, through on-the-job training and involvement in building and rehabilitation of housing within their colonias;

• Preparing documents necessary to obtain financing for construction and rehabilitation of low- and moderate-income housing in colonias;

• Identifying sites or areas suitable for prefab or mobile home manufacturers to locate within, and supply affordable housing to, colonia residents;

• Streamlining or eliminating government regulations to make housing more affordable to colonia residents;

• Creating homeownership opportunities for colonia residents through initiation of self-help housing construction programs and other residential ownership options;

• Training colonia residents in energy efficient construction and retrofit techniques and energy efficient use within the residences.

Activities Under the $800,000 Competition

• Activities undertaken by states and nonprofit and for-profit organizations qualified to provide technical assistance services are to provide technical assistance services to CDBG communities to coordinate federal, state and local resources for colonia residents and make services available to colonia residents in convenient "one-stop" centers. Eligible technical assistance activities are specified in 24 CFR 570.402. Examples of the broad array of eligible activities are:

• Identifying federal, state and local government regulations, whose elimination (even temporarily) would remove impediments to creating or expanding CDBG funded businesses, water and sewer systems, energy systems or housing; and preparing appropriate waiver requests to eliminate or ameliorate such restrictions;

• Identifying government-required fees, permits, or licensing charges whose elimination (even temporarily) would remove impediments to the creation or expansion of CDBG/Section 916-funded business opportunities, necessary infrastructure, or affordable housing in colonias in the southwest border region;

• Providing technical experts who would serve as "circuit riders" to colonias and who would provide technical assistance in the fields of engineering, finance, or other specialty areas for the planning and development of local water and sewer systems, housing projects, or business and commercial development in colonias;

• Addressing and resolving platting issues which would otherwise prevent the development or delivery of water or sewer services to colonia residents;

• Identifying sites in colonias that would serve as service centers where residents could conveniently seek available assistance from federal, state or local government and private sector agencies or organizations;

• Coordinating with local and state governments to target the selection of colonias to ensure a coordinated development agenda;

• Assisting communities in preparing applications for CDBG program funding, including funding under the Section 916 set-aside;

• Assisting communities in modifying their CHAS to include colonia developments.

II. Factors for Award

A. Rating Factors

HUD will use the following criteria to rate and rank applications received in response to this NOFA. The factors and maximum points for each competition are provided below. The total number of points for each competition is 100. Program policy criteria as identified in 24 CFR 570.402(f)(1)(ii) will not be used in reviewing and selecting applications for funding under the $1.5 million competition. Applications for the $800,000 competition will be rated and ranked in order by score by a HUD evaluation panel, after which the panel will apply the program policy criteria for geographic distribution, as identified in 24 CFR 570.402(f)(1)(ii)(A), in selecting applications for funding.

For the $1.5 Million Competition

(1) (30 points) The probable effectiveness of the application in meeting the needs of colonias and accomplishing program objectives. In rating this factor, HUD will consider:

(a) (12 of 30 points) The extent to which the applicant demonstrates an understanding of the problems facing colonia residents, as evidenced by the description of needs, rationale for, and feasibility of, the proposed statement of work; and the persuasiveness of the applicant's arguments.

(b) (10 of 30 points) The extent to which the applicant has an understanding of platting issues and problems which result from illegal subdivisions which impact CDBG/Section 916 activities, as evidenced by the rationale for, and the feasibility of, the proposed program of action to overcome the identified problems.

(c) (8 of 30 points) The extent to which the Statement of Work provided by the applicant demonstrates that activities are targeted to specific colonias and meet the CDBG nexus requirements as described in Section I, item E.

(2) (16 points) The soundness and cost-effectiveness of the proposed approach. In rating this factor, HUD will consider:

(a) (10 of 16 points) The demonstrated capability of the applicant to implement the proposed program of activities, as evidenced by the applicant's recent, relevant and successful experience in overcoming regulatory, statutory or administrative barriers that prohibit or inhibit the effective and coordinated delivery of services to low- and moderate-income residents.

(b) (6 of 16 points) The extent to which the proposed program of technical assistance services establishes realistic goals for the activities being undertaken, as described in the Statement of Work and supported by the applicant's discussion of how goals will be obtained.

(3) (48 points) The capability of the applicant to carry out the proposed activities in a timely and effective fashion. In rating this factor, HUD will consider:

(a) (5 of 48 points) The extent to which the applicant's organization and staff have recent, relevant and successful experience in providing community, economic development or housing development assistance in the southwest border area, and specifically have provided one or more of these forms of assistance to colonias in the region.

(b) (8 of 48 points) The applicant's knowledge of state and local laws relating to platting and subdivision issues and relevant, recent and successful experience in resolving issues which prevent or inhibit the delivery of programs and services to colonia residents.

(c) (27 of 48 points) The extent to which the applicant's staff has experience and expert knowledge in the following areas:

(i) (7 of 27 points) The extent to which the applicant organization and majority of the staff can demonstrate recent, relevant and successful experience in developing and implementing CDBG program activities in the areas of assistance proposed for funding in the applicant's Statement of Work.

(ii) (7 of 27 points) The extent to which the applicant's staff can demonstrate recent, relevant and successful experience in gaining the support and participation of low-income residents in the type of activities proposed in the Statement of Work.

(iii) (7 of 27 points) The extent to which the applicant's staff has conversational and written skills in the Spanish language, particularly Spanish as spoken in communities along the U.S.-Mexico border.

(iv) (6 of 27 points) The extent to which the applicant's organization and staff have recent, relevant and successful experience in securing private sector participation, and the participation of other federal, state and local entities in the development and implementation of community and economic development and housing activities.

(d) (8 of 48 points) The extent to which the proposed project management plan and budget-by-task presents a clear and feasible schedule for conducting program activities or tasks on time and within budget; provides for a reasonable allocation of program staff by skill and position for undertaking the work activities proposed; and provides appropriate procedures for coordinating activities among key parties during the term of the project.

(4) (6 points) The extent to which the results may be transferable or applicable to other CDBG program participants. In judging this factor, HUD will consider:

(a) (3 of 6 points) The extent to which proposed activities are likely to increase the capability of residents within colonias to apply for CDBG program funds made available under Section 916 of the National Affordable Housing Act of 1990 and successfully to implement CDBG-funded programs, projects or activities.

(b) (3 of 6 points) The extent to which the proposed activities are likely to increase the self-sufficiency of colonia residents, and the extent to which techniques applied could be transferred to other colonias in the region.

For the $800,000 Competition

(1) (28 points) The probable effectiveness of the application in meeting the needs of localities and accomplishing program objectives. In rating this factor, HUD will consider:

(a) (10 of 28 points) The extent to which the applicant demonstrates an understanding of the problems facing colonia residents, as evidenced by the rationale for, and feasibility of, the applicant's work program of activities for coordinating the delivery of available services and programs from federal, state and local sources—particularly CDBG funded activities.

(b) (11 of 28 points) The extent to which the proposed activities are likely to result in the creation and placement

of "one-stop" service centers within colonia, and are likely to provide coordinated delivery of CDBG program services with other services available from federal, state or local sources to colonia residents, as evidenced by the applicant's basis for establishing the goals and work activities in the Statement of Work.

(c) (7 of 28 points) The extent to which the applicant's Statement of Work demonstrates that proposed activities meet the CDBG nexus requirements as specified in Section I, item E.

(2) (36 points) The soundness and cost-effectiveness of the proposed approach. In rating this factor, HUD will consider:

(a) (12 of 36 points) The extent to which the applicant's staff has recent, relevant and successful experience in working with state and local governments (particularly state and local governments which are proposed to receive assistance in the Statement of Work) on CDBG-funded projects, programs or activities, and the justification provided by the applicant for the relevancy of the experience to activities proposed in the Statement of Work.

(b) (12 of 36 points) The extent to which the applicant's staff has relevant, recent and successful hands-on experience in resolving platting and subdivision issues which prevent or inhibit the delivery of services to colonia residents, particularly issues involving illegal subdivisions, platting and subdivision recording requirements, and state and local laws which have impact on the successful achievement of CDBG funded community and economic development and housing programs.

(c) (12 of 36 point) The extent to which the applicant can demonstrate that it has a commitment to form an effective partnership of federal agency, state and local officials to establish a coordinated resource-delivery system on a statewide or region-wide basis (as determined by the geographic coverage called for in the Statement of Work.)

(3) (31 points) The capability of the applicant to carry out the proposed activities in a timely and effective fashion. In rating this factor, HUD will consider:

(a) (8 of 31 points) The extent to which the applicant's staff has demonstrated conversational and written skills in the Spanish language, particularly Spanish as spoken in communities along the United States-Mexico border.

(b) (8 of 31 points) The demonstrated expert knowledge of the project manager and key staff in managing in-house staff, subcontractors and consultants to develop and implement economic and community development and housing programs, projects or activities, as evidenced by recent, relevant and successful experience.

(d) (15 of 31 points) The extent to which the project management plan delineates staff responsibilities by major task and sub-task; provides for a feasible schedule for completing tasks and meeting goals on time and within budget; and provides a reasonable allocation of staff by skill and position for the activities to be performed within the time proposed.

(4) (5 points) The extent to which the results may be transferable or applicable to other CDBG program participants, as determined by the extent to which the applicant's method for coordinating the delivery of federal, state and local resources is likely to be adopted successfully on a statewide or region-wide basis.

B. Selection Process

(1) The Statement of Work proposed by each applicant will be evaluated competitively within each competition, and rated using the factors for award specified in Section II A. After assigning points based upon the rating factors, a HUD evaluation panel will rank the applications in order by score. For the $1.5 million competition, HUD will fund all applications in rank order by score until all available funds have been expended. For the $800,000 competition, the HUD evaluation panel will rate and rank applications in order by score, after which the panel will apply the program policy criteria for geographic distribution as identified in 24 CFR 570.402(f)(1)(ii)(A) in selecting applications for funding.

(2) Applications will receive funding consideration provided they meet the CDBG nexus eligibility requirements and other program requirements specified in Section I.E., and receive rating scores that meet the following requirements:

For the $1.5 Million Competition

Application must receive a minimum score of 60 points for all rating factors. In addition, applicants must receive a minimum score of 5 rating points for factors 1(c), and 7 rating points for factor 1(b).

For the $800,000 Competition

Applicants must receive a minimum score of 60 points for all rating factors. In addition, applicants must receive a minimum score of 5 points for rating factor 1(c), minimum of 8 rating points under factor 2(b), and a minimum of 6 rating points under factor 3(a).

Applicants that do not meet these requirements will not be funded, even if adequate funds are available.

(3) HUD reserves the rights to fund all or a portion of the proposed activities identified in an application; to determine an appropriate amount of funds for the activities; or to reduce the amount of funding based upon the appropriateness of the proposed activities.

For the $800,000 competition, HUD reserves the right to reduce the amount of funding for geographic coverage should HUD elect to fund one or more applications that provide services on a region-wide basis; or to fund one or more applications that provide services on a statewide basis.

(4) If two or more applications have the same number of points and there are not sufficient funds to fund both, HUD will make a determination as follows:

For the $1.5 Million Competition

The application with the most points for factor (3) will be selected. If there is still a tie, the application with the most points for factor (1) will be selected.

For the $800,000 Competition

The application with the most points for factor (2) will be selected. If there is still a tie, the application with the most points for factor (3) will be selected.

(5) If the amount of funds remaining after funding as many of the highest ranking applications as possible is insufficient for the next highest ranking application, HUD will determine (based upon the proposed activities) the feasibility of funding part of the application and offering a smaller award amount to the applicant. If HUD determines that, given the proposed activities, a smaller award amount would make the activities infeasible, or if the applicant turns down the reduced award amount, HUD will make the same determination for the next highest ranking application until all applications within the funding range have been exhausted or available funds have been expended.

(6) If HUD receives an insufficient number of applications to expend all funds in a given category, or all funds set aside for this NOFA; or if funds remain after HUD approves all acceptable applications; or if more funds become available HUD may move funds from one category to another, or HUD may negotiate increased award amounts with applicants approved for funding.

(7) After all applications have been rated and ranked and awardees have been selected, funds available for this competition that are not used may be

made available for other technical assistance competitions.

C. Conditional Award Approvals

Before receiving an award, an applicant must:

(1) Provide proof of nexus that shall consist of a statement from the Director of the CDBG agency of each State or local government where technical assistance services will be provided. Each proof of nexus shall meet the nexus requirements specified in section I, item E to the satisfaction of HUD.

(2) Meet the requirements for designation as a technical assistance provider, to the satisfaction of HUD, as specified in section I., item E., if the applicant is a non-profit or for-profit organization.

(3) Meet the CDBG program amendment requirement if a local government is not currently authorized to undertake activities to benefit colonias. If such limitations exist, a conditional award may be made. The award will be subject to HUD's receiving, from the chief executive officer of the community, a certification that the program has been amended to permit the assistance to colonias as specified in this NOFA and for which the CDBG funding commitment was made. The program amendment must have received all required approvals by the state.

HUD must receive this certification no later than four months following notification of the conditional award, or the award will be withdrawn or the funding amount reduced.

If an applicant fails to meet these requirements in a manner satisfactory to HUD, HUD may offer a cooperative agreement to the next highest ranking applicant. If an alternative applicant fails to provide the required documents, HUD will make an offer to the next highest ranking applicant. An applicant offered a cooperative agreement will be expected to submit any required documents within 45 days of written notice of an offer of an award. Failure to comply within the 45-day period will disqualify the applicant from further funding consideration.

III. Application Submission Process

A. Obtaining Applications

For an application kit, contact the Processing and Control Branch, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., room 7253, Washington, DC 20410. Requests for application kits must be in writing, but the request may be faxed to (202) 708-3363. (This is not a toll-free number.) Please refer to "FR-3314", and provide the applicant's name, address (including zip code) and telephone number (including area code).

B. Submitting Applications and Deadline Date

Applications for funding under this NOFA must be complete and must be physically received in the place designated in the application kit for receipt, by the deadline date and time specified in the application kit. The application deadline in the application kit is firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

IV. Checklist of Application Submission Requirements

A. Application Content

Applicants must complete and submit applications in accordance with instructions contained in the application kit.

The following is a checklist of the application contents that will be specified in the RFCAA:

(1) Transmittal letter;

(2) OMB Standard Forms 424 (Request for Federal Assistance) and 424B (Non-Construction Assurances);

(3) Statement of Work, including Budget-By-Task (Form HUD 40079) and Project Management System Baseline Plan (HUD 441.1 and accompanying narrative);

(4) Narrative statement addressing the factors for award;

(5) Organization plan;

(6) Letter of CDBG Commitment of Funds signed by the chief executive officer of the CDBG recipient community or the Director of the CDBG program (May be submitted later after selection.);

(7) Letter from chief executive officer of the community designating the technical assistance provider, where appropriate (May be submitted later after selection);

(8) Letter from the state indicating its willingness to review and consider an amendment to the community's CDBG program that would permit activities to assist colonias as set forth in the application, where appropriate. (May be submitted later after selection.)

B. Certifications and Exhibits

Applications must also include the following:

(1) Drug-Free Workplace Certification;

(2) Certification prohibiting excessive force against nonviolent civil rights demonstrators, pursuant to 42 U.S.C. 5304 (applies only to applicants that are units of general local government);

(3) Certification on HUD Form 2880 disclosing receipt of at least $200,000 in covered assistance during the fiscal year, pursuant to 24 CFR part 12, subpart C.

V. Corrections to Deficient Applications

After the submission deadline date, HUD will screen each application to determine whether it is complete. If an application lacks certain technical items or contains a technical error, such as an incorrect signatory, HUD will notify the applicant in writing that it has 14 calendar days from the date of HUD's written notification to cure the technical deficiency. If the applicant fails to submit the missing material within the 14-day cure period, HUD will disqualify the application.

This 14-day cure period applies only to non-substantive deficiencies or errors. Deficiencies capable of cure will involve only items not necessary for HUD to assess the merits of an application against the factors specified in this NOFA.

VI. Other Matters

A. Environmental Review

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(b) of the HUD regulations, the policies and procedures in this document relate only to the provision of technical assistance and therefore are categorically excluded from the requirements of the National Environmental Policy Act.

B. Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies and procedures contained in this notice will not have substantial direct effects on states or their political subdivisions, or the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the notice is not subject to review under the Order. Specifically, the notice solicits participation in an effort to provide technical assistance that would promote

community and economic development, provide job training and self-employment opportunities, increase the supply of decent and affordable housing, and provide community water, sewer and energy systems for colonias in states designated in Section 916 of the National Affordable Housing Act of 1990 to receive CDBG funding set-asides, and provide for coordinated delivery of resources available to colonias from federal, state, local and private section sources. The notice does not impinge upon the relationships between the federal government and state or local governments.

C. Impact on the Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this notice will likely have a beneficial impact on family formation, maintenance, and general well-being. The technical assistance to be provided by the funding under this NOFA is expected to help colonia residents to become self-sufficient by improving living conditions and standards. Since the impact on the family is beneficial, no further review is considered necessary.

D. Documentation and Public Access Requirements

Applicant/Recipient Disclosures; HUD Reform Act Responsibilities—Documentation and Public Access.

Pursuant to section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3537a) (Reform Act), HUD will ensure that documentation and other information pertaining to each application submitted under this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance under this NOFA in a quarterly **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis. (See 24 CFR 12.14(a) and 12.16(b), and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942), for further information on these requirements.)

HUD responsibilities—disclosures. HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available, along with the applicant disclosure reports, but in no case for a period generally less than five years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR part 12, subpart C, and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942), for further information on these disclosure requirements.)

State and unit of general local government responsibilities—disclosures. States and units of general local government receiving assistance under this NOFA must make all applicant disclosure reports available to the public for three years. Required update reports must be made available along with the applicant disclosure reports, but in no case for a period less than three years. Each state and unit of general local government may use HUD Form 2880 to collect the disclosures, or may develop its own form. (See 24 CFR part 12, subpart C, and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942) for further information on these disclosure requirements.)

E. Prohibition Against Advance Information on Funding Decisions

HUD's regulation implementing section 103 of the HUD Reform Act was published on May 13, 1991 (56 FR 22088) and became effective on June 12, 1991. That regulation, codified as 24 CFR part 4, applies to the funding competition announced today. The requirements of the rule continue to apply until the announcement of the selection of successful applicants.

HUD employees involved in the review of applications and in the making of funding decisions are restrained by part 4 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants who have questions should contact the HUD Office of Ethics (202) 708–3815 (TDD/Voice). (This is not a toll-free number.) The Office of Ethics can provide information of a general nature to HUD employees, as well. However, a HUD employee who has specific program questions, such as whether particular subject matter can be discussed with persons outside the Department, should contact his or her Regional or Field Office Counsel, or Headquarters counsel for the program to which the question pertains.

F. Prohibition Against Lobbying of HUD Personnel

Section 112 of the HUD Reform Act added a new section 13 to the Department of Housing and Urban Development Act (42 U.S.C. 3531 *et seq.*). Section 13 contains two provisions dealing with efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department and those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the **Federal Register** on May 17, 1991 (56 FR 22912). If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in Appendix A of the rule.

Any questions about the rule should be directed to the Office of Ethics, Room 2158, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–3000. Telephone: (202) 708–3815 (TDD/Voice) (This is not a toll-free number.) Forms necessary for compliance with the rule may be obtained from the local HUD office.

G. Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure requirements and prohibitions of section 319 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of federal contracts, grants, or loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable

certification regarding lobbying. Under 24 CFR part 87, applicants, recipients, and subrecipients of assistance exceeding $100,000 must certify that no federal funds have been or will be spent on lobbying activities in connection with the assistance.

H. The Catalog of Federal Domestic Assistance Program number is 14.227.

Authority: 42 U.S.C. 5301–5320; 42 U.S.C. 3535(d); 24 CFR 570.402.

Dated: September 15, 1992.

Randall H. Erben,

Acting Assistant Secretary for Community Planning and Development.

[FR Doc. 92–23522 Filed 9–28–92; 8:45 am]

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Tuesday
September 29, 1992

Part IV

Department of the Treasury

Office of the Comptroller of the Currency
12 CFR Parts 6 and 19
Office of Thrift Supervision
12 CFR Part 565
Prompt Corrective Action; Rules of Practice for Hearings; Final Rules

Federal Reserve System

12 CFR Parts 208 and 263

Federal Deposit Insurance Corporation

12 CFR Parts 308 and 325

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 6 and 19

[Docket No. 92-19]

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 263

[Docket No. R-0763; Regulation H]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 325

RIN 3064-AB16

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 565

[Resolution No. 92-403]

RIN 1550-AA57

Prompt Corrective Action; Rules of Practice for Hearings

AGENCIES: Board of Governors of the Federal Reserve System; Office of the Comptroller of the Currency, Treasury; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Treasury.

ACTION: Final rules.

SUMMARY: The Board of Governors of the Federal Reserve System (Board of Governors), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively "the agencies") have adopted final rules revising their regulations to implement for the institutions that they supervise the system of prompt corrective action established by section 38 of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). Section 38 requires each Federal banking agency to implement prompt corrective action for the institutions that it regulates. The agencies have also revised their rules of practice for hearings to establish procedures for the issuance of directives and other actions required under prompt corrective action.

Section 38 requires or permits the agencies to take certain supervisory actions when an insured depository institution falls within one of five specifically enumerated capital categories. It also restricts or prohibits certain activities and requires the submission of a capital restoration plan when an insured institution becomes undercapitalized. The revisions adopted by the agencies are necessary to establish the capital levels at which institutions will be deemed to come within the five capital categories. The revisions also establish procedures for issuing and contesting prompt corrective action directives including directives requiring the dismissal of directors and senior executive officers.

The agencies sought public comment on this proposal in July 1992. The final rule reflects a number of changes to the original proposal to address concerns raised by the commenters.

EFFECTIVE DATE: December 19, 1992.

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board: Frederick M. Struble, Associate Director (202/452-3794), Norah Barger, Supervisory Financial Analyst (202/452-2402), Division of Banking Supervision and Regulation; Scott G. Alvarez, Associate General Counsel (202/452-3583), Gregory A. Baer, Senior Attorney (202/452-3236), Legal Division; Myron L. Kwast, Assistant Director, Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452-3544), Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

OTS: John Connolly, Program Manager, (202) 906-6465, Policy; Lorraine E. Waller, Counsel (Banking and Finance), (202) 906-6457, Deborah Dakin, Assistant Chief Counsel, (202) 906-6445, Regulations and Legislation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

FDIC: Daniel M. Gautsch, Examination Specialist (202-898-6912), Stephen G. Pfeifer, Examination Specialist (202-898-8904), Division of Supervision; Valerie Jean Best, Counsel (202-898-3812), Claude A. Rollin, Counsel (202-898-3985), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OCC: Kevin J. Bailey, Executive Assistant, Senior Deputy Comptroller for Bank Supervision Operations, (202) 874-5030; Daniel Berkland, National Bank Examiner, Special Supervision, (202) 874-4450; or Beth Kirby, Senior Attorney, Corporate Organization and Resolutions Division, (202) 874-5300, Office of Comptroller of the Currency.

SUPPLEMENTARY INFORMATION:

I. Background

In early July, the Board of Governors of the Federal Reserve System (Federal Reserve Board) (57 FR 29226, July 1, 1992), the Federal Deposit Insurance Corporation (FDIC) (57 FR 29662, July 6, 1992), the Office of the Comptroller of the Currency (OCC) (57 FR 29808, July 7, 1992), and the Office of Thrift Supervision (OTS) (57 FR 29826, July 7, 1992) proposed regulations to implement the provisions of section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102-242), which is entitled "Prompt Corrective Action". Section 131 of FDICIA created a new statutory framework that applies to every insured depository institution a system of supervisory actions indexed to the capital level of the individual institution. The stated purpose of this statutory provision is to resolve the problems of insured depository institutions at the least possible long-term loss to the deposit insurance fund. The new framework is contained in section 38 of the FDI Act (12 U.S.C. 1831o) ("section 38"). This framework and the authority it confers on the Federal banking agencies are meant to supplement the existing supervisory authority vested in the agencies, and do not limit in any way the agencies' existing authority under other statutes or regulations to initiate supervisory actions to address capital deficiencies, unsafe or unsound conduct, practices, or conditions, or violations of law.

Section 38 requires the Federal banking agencies, within 9 months of the enactment of FDICIA, to promulgate final regulations necessary to carry out the purposes of that section. Under the statute, these regulations must become effective within one year after the date of enactment of FDICIA, or no later than December 19, 1992.

II. Summary of Final Rules

The agencies have received 92 comments from interested persons, and have reviewed the original proposal in light of those comments. As an initial matter, the commenters strongly supported the agencies' efforts to adopt uniform rules implementing the provisions of section 38. The agencies believe that a uniform approach to capital definitions and capital categories, as well as a uniform framework of procedures, will simplify the tasks facing bank and thrift management of monitoring and maintaining the capital levels of insured depository institutions, and will remove any competitive distortions that might

arise if different standards were applied to competing institutions. Accordingly, the agencies have adopted substantially the same rules.

The final rules that have been adopted by the agencies are substantially as originally proposed by the agencies, with modifications to address concerns and issues raised by the commenters. In particular, the final rules define the relevant capital measures for the categories of well-capitalized, adequately capitalized, undercapitalized, and significantly undercapitalized, to be the ratio of total capital to risk-weighted assets, the ratio of Tier 1 capital to risk-weighted assets, and the ratio of Tier 1 capital to total average assets (the leverage ratio).[1] The ratio of tangible equity to total assets has been adopted as the sole relevant capital measure for defining the critically undercapitalized category.

The capital thresholds that have been adopted for each of the five capital categories are the thresholds that were originally proposed by the agencies. Under the final rules, an institution will be deemed to be:

- *Well-capitalized* if the institution has a total risk-based capital ratio of 10.0 percent or greater, a Tier 1 risk-based capital ratio of 6.0 percent or greater, and a leverage ratio of 5.0 percent or greater, and the institution is not subject to an order, written agreement, capital directive, or prompt corrective action directive to meet and maintain a specific capital level for any capital measure;
- *Adequately capitalized* if the institution has a total risk-based capital ratio of 8.0 percent or greater, a Tier 1 risk-based capital ratio of 4.0 percent or greater, and a leverage ratio of 4.0 percent or greater (or a leverage ratio of 3.0 percent or greater if the institution is rated composite 1 in its most recent report of examination, subject to appropriate Federal banking agency guidelines), and the institution does not meet the definition of a well-capitalized institution;
- Undercapitalized if the institution has a total risk-based capital ratio that is less than 8.0 percent, a Tier 1 risk-based capital ratio that is less than 4.0 percent, or a leverage ratio that is less than 4.0 percent (or a leverage ratio that is less than 3.0 percent if the institution is rated composite 1 in its most recent report of examination, subject to appropriate Federal banking agency guidelines);
- Significantly undercapitalized if the institution has a total risk-based capital ratio that is less than 6.0 percent, a Tier 1 risk-based capital ratio that is less than 3.0 percent, or a leverage ratio that is less than 3.0 percent.
- Critically undercapitalized if the institution has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

To the extent possible, the final rules define capital terms in the same way as they are defined under existing capital adequacy standards. The final rules also generally rely on the most recent Consolidated Report of Condition and Income (Call Report)[2] and examination report for determining the capital category of an institution, and provide that the appropriate banking agency will provide written notice to an institution in the event that the agency determines the capital category of the institution on the basis of other information. The final rules also establish a procedure for an institution to notify the appropriate agency in the event that a material event occurs that would result in the reclassification of the institution to a lower capital category. This procedure has been modified in several respects to address concerns raised by commenters. The final rules do not adopt a requirement that an institution calculate its capital position on a daily basis.

The final rules establish a uniform schedule for filing and reviewing capital restoration plans. In addition, the rules adopt several provisions clarifying certain aspects of the capital guarantee required to be made as part of an acceptable capital plan by companies that control an undercapitalized institution, including the limit on the liability of such companies.

The agencies have adopted uniform procedures for the issuance of directives by the appropriate agency under section 38. Under these procedures, an institution will generally be provided advance notice when the appropriate agency proposes that the institution take one or more of the actions committed to agency discretion under section 38. These procedures provide an opportunity for the institution to respond to the proposed agency action, or, where circumstances warrant immediate agency action, an opportunity for administrative review of the agency's action.

A separate procedure has been adopted in the case of proposals by the appropriate Federal banking agency to subject an institution to more stringent treatment based on supervisory factors other than capital. The proposed procedures were modified at the request of commenters to provide an informal hearing whether the treatment is based on a determination that the institution is in unsafe or unsound condition or based on an institution's failure to correct deficient ratings received in an examination. The final rules also implement the statutory requirement that officers and directors dismissed as a result of an agency order issued under section 38 be afforded agency review of the dismissal, including an opportunity for an informal hearing.

The final rules and the public comments are discussed in more detail below.

III. Summary of Statutory Framework

In the request for comment, the agencies provided a brief summary of the statutory framework established by section 38. That summary is reprinted here in order to give context to the agencies' final rules. The summary is not intended to be a complete description of the requirements of section 38, and insured institutions and other persons affected by section 38 should consult the provisions of section 38.

Section 38 provides a framework of supervisory actions based on the capital level of an insured depository institution. Section 38 establishes five capital categories: well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. The statute deems an insured depository institution to be:

> "Well capitalized" if the institution significantly exceeds the required minimum level for each relevant capital measure;
>
> "Adequately capitalized" if the institution meets the required minimum level for each relevant capital measure;
>
> "Undercapitalized" if the institution fails to meet the required minimum level for any relevant capital measure;
>
> "Significantly undercapitalized" if the institution is significantly below the required minimum level for any relevant capital measure; or,
>
> "Critically undercapitalized" if the institution has a ratio of tangible equity to total assets of 2 percent or less, or otherwise fails to meet the critical capital level established pursuant to section 38 (c)(3)(A).

Section 38 requires the Federal banking agencies to specify, by regulation, the levels at which an institution would be within each of these five categories. The applicability

[1] For savings associations, all references to Tier 1 capital should be read as core capital, as defined in part 567 of the OTS's regulations, which is the thrift capital measure comparable to Tier 1 capital. 12 CFR part 567. In addition, all references to total average assets should be read as adjusted total assets, as defined in part 567 of the OTS's regulations.

[2] Savings associations report their capital levels on Thrift Financial Reports.

of supervisory actions provided in section 38 to an individual institution depends on the institution's classification within one of these five categories.[3]

A. Provisions Applicable to All Institutions

Section 38 prohibits an insured depository institution from declaring any dividends, making any other capital distribution, or paying a management fee to a controlling person if, following the distribution or payment, the institution would be within any of the three undercapitalized categories.[4] The statute provides a limited exception to this prohibition for stock redemptions that do not result in any decrease in an institution's capital and would improve the institution's financial condition, provided that the redemption has been approved by the institution's appropriate Federal banking agency after consultation with the FDIC.

B. Provisions Applicable to Undercapitalized Institutions

Institutions that are classified as undercapitalized are subject to additional mandatory supervisory actions. These include:

- Increased monitoring by the appropriate Federal banking agency for the institution and periodic review of the institution's efforts to restore its capital;
- A requirement that the institution submit, generally within 45 days, a capital restoration plan acceptable to the appropriate Federal banking agency for the institution and implement that plan;
- A restriction on growth of the institution's total assets; and
- A limitation on the institution's ability to make any acquisition, open any new branch offices, or engage in any new line of business without the prior approval of the appropriate Federal banking agency for the institution or the FDIC.

Section 38 also provides that the appropriate Federal banking agency for an undercapitalized institution may take any of a number of discretionary supervisory actions if the agency determines that any of these actions is necessary to resolve the problems of the institution at the least possible long-term cost to the deposit insurance fund. These discretionary supervisory actions include requiring the institution to raise additional capital, restricting transactions with affiliates, restricting interest rates paid by the institution on deposits, requiring replacement of senior executive officers and directors, restricting the activities of the institution and its affiliates, requiring divestiture of the institution or the sale of the institution to a willing purchaser, and any other supervisory action that the agency believes would better carry out the purpose of section 38. Because these discretionary actions are also applicable to significantly undercapitalized institutions (as well as to critically undercapitalized institutions), these actions are described more fully in the next section.

C. Provisions Applicable to Significantly Undercapitalized Institutions

Section 38 provides that significantly undercapitalized institutions are subject to the four mandatory provisions listed above that are applicable to undercapitalized institutions. Section 38 also restricts the ability of a significantly undercapitalized institution to pay bonuses or raises to senior executive officers of the institution. A significantly undercapitalized institution may pay bonuses and raises to senior executive officers of the institution with the prior written approval of the appropriate Federal banking agency, unless the institution has failed to submit an acceptable capital restoration plan. For so long as an institution has failed to submit an acceptable capital restoration plan, the institution is prohibited from paying any bonus or raise to any senior executive officer.

In addition to these mandatory requirements, section 38 specifies that the appropriate Federal banking agency shall impose one or more restrictions on an institution that is significantly undercapitalized. These discretionary actions include:

- Requiring the institution to sell enough additional capital, including voting shares, so that the institution would be adequately capitalized after the sale;
- Restricting transactions between the institution and its affiliates, including transactions with its insured depository institution affiliates;
- Restricting the interest rates paid on deposits collected by the institution to the prevailing rates in the region where the institution is located;
- Restricting the institution's asset growth or requiring the institution to reduce its total assets;
- Requiring the institution or any subsidiary of the institution to terminate, reduce or alter any activity that the agency determines poses excessive risk to the institution;
- Requiring the institution to hold a new election of its board of directors;
- Requiring the institution to dismiss any director or senior executive officer who had held office at the institution for more than 180 days immediately before the institution became undercapitalized if the agency deems such dismissal to be appropriate, and to employ new officers who may be subject to agency approval;
- Prohibiting the institution from accepting deposits from correspondent depository institutions;
- Prohibiting any bank holding company that controls the institution from making any dividend payment without prior approval of the Federal Reserve Board;
- Requiring the institution to accept an offer to be acquired by another institution or company, or requiring any company that controls the institution to divest the institution;
- Requiring the institution to divest or liquidate any subsidiary that is in danger of becoming insolvent and poses a significant risk to the institution, or that is likely to cause significant dissipation of the institution's assets or earnings;
- Requiring any company that controls the institution to divest or liquidate any affiliate of the institution (other than another insured depository institution) if the appropriate Federal banking agency for the holding company determines that the affiliate is in danger of becoming insolvent and poses a significant risk to the institution, or is likely to cause significant dissipation of the institution's assets or earnings; and
- Requiring the institution to take any other action that the agency determines would better carry out the purposes of section 38.

While the statute generally provides the agency with discretion to determine whether these actions are appropriate in connection with a particular institution, the statute establishes certain presumptions and requirements with respect to the agency's consideration of these actions. Section 38 requires that the appropriate agency take at least one of the above discretionary supervisory actions in connection with an institution that is significantly undercapitalized or critically undercapitalized. The statute also establishes a presumption that the agency require each significantly undercapitalized or critically undercapitalized institution to (1) be acquired by another institution or company or sell sufficient shares to restore the institution's capital to at least the minimum acceptable capital

[3] A savings association operating in accordance with a capital plan approved by the OTS before December 19, 1991, is subject to certain exceptions from provisions of section 38 (12 U.S.C. 1831o(o)(2)). However, neither section 38 nor this regulation in any way limits the authority of the OTS under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law or regulation, unsafe or unsound conditions or other practices.

[4] The OTS intends that the permissibility of capital distributions will be determined by the prompt corrective action regulations. A savings association permitted to make a capital distribution under the prompt corrective action regulations may do so if the amount and type of distribution would be permitted under section 563.134 of the OTS's regulations. The OTS will review its capital distributions regulations and consider making amendments that may be necessary based on section 38 of the FDI Act.

level, (2) restrict transactions with affiliates of the institution, including transactions with depository institution affiliates, and (3) restrict the interest rates the institution pays on deposits. The agency must impose each of these three actions unless the agency determines that the action would not further the purpose of section 38.

As discussed above, each of the discretionary actions listed above may also be taken, by issuance of a prompt corrective action directive, in connection with undercapitalized institutions if a finding is made by the agency that the action is necessary to carry out the purposes of section 38. In addition, these discretionary actions may be taken in connection with any undercapitalized institution that fails to submit or implement in any material respect a capital restoration plan, as if the institution were a significantly undercapitalized institution. As noted above, the provision restricting the payment of bonuses and raises to senior executive officers applies to any undercapitalized institution that has failed to submit a capital restoration plan that is acceptable to the appropriate agency.

In addition to the discretionary actions discussed above, section 38 also provides that, where the appropriate agency finds it necessary to carry out the purposes of section 38, the agency may require, by issuance of a prompt corrective action directive, a significantly undercapitalized institution to comply with one or more of the restrictions established by the FDIC on the activities of critically undercapitalized institutions. The same actions may be taken in the case of an undercapitalized institution that has failed to submit or implement, in any material respect, an acceptable capital restoration plan.

D. Provisions Applicable to Critically Undercapitalized Institutions

Section 38 requires that an insured depository institution that is critically undercapitalized be placed in conservatorship (with the concurrence of the FDIC) or receivership within 90 days, unless the appropriate Federal banking agency for the institution and the FDIC concur that other action would better achieve the purposes of section 38. A determination by the agency to defer placing a critically undercapitalized institution in receivership or conservatorship must be reviewed every 90 days and must document the reasons the agency believes other action would better achieve the purposes of section 38.

The statute requires that the institution be placed in receivership if the institution continues to be critically undercapitalized on average during the fourth quarter after the institution initially became critically undercapitalized, unless certain specific statutory requirements are met. To be eligible for the exception, the institution must: (1) Have positive net worth, (2) be in substantial compliance with an approved capital restoration plan, (3) be profitable or have an upward trend in earnings, and (4) have reduced its ratio of nonperforming loans to total loans. In addition, the head of the appropriate Federal banking agency for the institution and the Chairperson of the FDIC must both certify that the institution is viable and not expected to fail.

Critically undercapitalized institutions are also prohibited, beginning 60 days after becoming critically undercapitalized, from making any payment of principal or interest on subordinated debt issued by the institution without the prior approval of the FDIC. Section 38 does not prevent unpaid interest from accruing on subordinated debt under the terms of the debt instrument.

Section 38(i) of the FDI Act also provides that the FDIC, by regulation or order, must restrict the activities of critically undercapitalized institutions. At a minimum, the FDIC must prohibit a critically undercapitalized institution from doing any of the following without the prior written approval of the FDIC:

- Entering into any material transaction other than in the usual course of business. Such activities include any investment, expansion, acquisition, sale of assets or other similar action where the institution would have to notify its appropriate Federal banking agency;
- Extending credit for any highly leveraged transaction (HLT);
- Amending the institution's charter or bylaws unless required to do so in order to carry out any other requirement of any law, regulation or order;
- Making any material change in its accounting methods;
- Engaging in any "covered transactions" within the meaning of section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c), which concerns affiliate transactions;
- Paying excessive compensation or bonuses; and
- Paying interest on new or renewed liabilities at a rate which would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates in the institution's normal market areas.

Pursuant to section 38(j) of the FDI Act, none of these restrictions apply (1) to institutions in conservatorship for which the FDIC or RTC has been appointed the conservator or (2) to any bridge bank that is wholly owned by the FDIC or the RTC. Pursuant to section 38(o)(2) of the FDI Act, none of these restrictions shall apply, before July 1, 1994, to any insured savings association if:

(a) The savings association had submitted a plan meeting the requirements of section 5(t)(A)(ii) of the Home Owners' Loan Act (12 U.S.C. 1464(t)(A)(ii));

(b) The Director of OTS had accepted the plan; and

(c) The savings association remains in compliance with the plan or is operating under a written agreement with the appropriate Federal banking agency.

IV. Discussion of Final Rules and Public Comments

The agencies received a total of 92 comment letters from interested persons regarding the proposed rules implementing section 38. Sixty of the commenters were from banks, thrifts and bank and thrift holding companies, while nineteen were from industry trade associations and organizations. Eight were from Federal Reserve Banks. In addition, there were five from law firms and other organizations and individuals.

The comments provided a number of suggestions for clarifying or modifying the proposed rule. These are discussed below.

Many of the commenters supported the underlying purpose of prompt corrective action. However, several expressed concern that section 38 unduly restricts regulatory flexibility and discretion. Several commenters urged, as a general matter, that the agencies retain as much flexibility as possible in implementing the rules governing prompt corrective action and in administering the requirements of section 38. These commenters argued that capital alone is an inexact measure of the financial strength of an institution, and is only one of a number of measures that must be considered in determining the financial strength of an insured institution. Commenters argued that a narrow focus on capital levels to the exclusion of other indications of financial strength could result in unnecessary and counterproductive actions being taken against financially sound institutions. To avoid this result, many commenters argued that the agencies should adopt flexible rules that permit the agencies as much discretion as possible in determining when to take action under section 38 and what actions are appropriate.

The agencies have attempted to address this concern to the extent possible under the statute. Section 38 establishes a framework that is triggered by the capital levels of insured institutions, and subjects an insured institution that has capital below the regulatory minimum levels to several mandatory provisions that apply without any agency action. Section 38 also authorizes the agencies, in their discretion, to impose a number of additional requirements and proscriptions on an institution that is undercapitalized, significantly undercapitalized, or critically undercapitalized. The statute permits the agencies to tailor these discretionary supervisory actions to the specific problems faced by individual institutions, and the final rules retain this flexibility.

In addition, commenters generally were concerned that the agencies provide adequate procedural protections to insured institutions and individuals prior to taking any discretionary actions under section 38. The agencies have established procedures in the rule to give affected institutions and persons notice of, and a right to participate in the process for determining, discretionary actions taken by the agency under section 38. These procedures include the general right to advance notice of any action contemplated by the agency, and the right to provide the agency with any information that an affected institution or person believes should be considered by the agency in exercising its discretion under the statute. These procedures provide a mechanism for an institution to identify facts and circumstances that the agency should consider in determining appropriate action for that institution, and are intended to supplement informal discussions that ordinarily occur between an institution that has less than adequate capital and the institution's appropriate Federal banking agency.

A. Capital Measures

For purposes of defining each of the capital categories (except for the critically undercapitalized category), section 38(c) requires the agencies to prescribe capital standards that include a leverage limit and a risk-based capital requirement. The agencies may establish additional capital measures for these categories if additional capital measures would serve the purposes of section 38. In addition, section 38 permits the agencies to rescind the leverage limit or the risk-based capital measure if the Federal banking agencies concur that either measure is no longer an appropriate means for carrying out the purposes of section 38.

The agencies proposed to adopt the leverage limit and the total risk-based capital measure in defining the capital categories other than the critically undercapitalized category. In addition, the agencies proposed to adopt the Tier 1 risk-based capital ratio as a capital measure in defining these capital categories.

Most commenters supported or did not object to the proposal to adopt these three capital measures. Commenters expressed a strong preference for using capital measures and definitions that are currently in place in order to reduce the burden and costs associated with calculating the capital category of an institution.

Several commenters suggested that the agencies eliminate one or more of the proposed capital measures. In particular, a small number of commenters argued that the agencies should not adopt a leverage ratio as a capital measure. Several other commenters argued that the agencies should not establish a separate threshold for Tier 1 capital to risk-weighted assets. A few commenters argued that the agencies should rely solely on the ratio of Tier 1 capital to risk-weighted assets and should eliminate use of the ratio of total capital to risk-weighted assets and the leverage ratio. Finally, one commenter suggested that the agencies rely only on the leverage ratio for smaller institutions that are not internationally active, dropping the risk-based capital tests for these institutions.

The agencies have determined to adopt the three capital measures originally proposed for defining whether an institution is well-capitalized, adequately capitalized, undercapitalized, or significantly undercapitalized. Section 38 requires the agencies to employ a risk-based capital requirement and the leverage ratio as capital measures for each capital category unless the agencies all agree that these capital measures are no longer an appropriate means for carrying out the purposes of section 38. The agencies continue to believe that the ratio of total capital to risk-weighted assets represents an appropriate capital measure. In addition, the ratio of Tier 1 capital to total assets, which is a component of the total risk-weighted capital ratio, represents an important measure of the highest quality capital available to the institution to absorb losses. Both the total risk-weighted capital ratio and the Tier 1 risk-weighted capital ratios are recognized in the Basle Accord and are elements of the minimum capital adequacy standards currently employed by the Federal banking agencies.

The agencies have considered the suggestion of commenters that the leverage ratio be eliminated as an appropriate capital measure. The agencies do not believe that elimination of the leverage ratio is appropriate at this time. One of the rationales for retaining a leverage ratio after the risk-based capital measure was introduced was that the risk-based capital measure is focused on credit-related risk, and does not explicitly factor in other risks, particularly interest rate risk.

However, the agencies noted in the request for comment that revisions to the risk-based capital standards mandated by FDICIA may warrant review of the capital measures and thresholds specified under section 38 at a later date. Section 305 of FDICIA, which amends section 18 of the FDI Act, requires the agencies to revise their risk-based capital standards by no later than June 1993 to take into account interest rate risk, concentration of credit risk, and the risks of nontraditional activities and multi-family mortgages. The agencies intend to lower or eliminate the leverage capital component from the definitions of "well capitalized," "adequately capitalized," and "undercapitalized" after the risk-based capital standards have been revised by each Federal banking agency to take into account interest rate risk as required by section 305 of FDICIA and after experience has been gained with such standards. The agencies acknowledge the requirements of section 38(c) of the FDI Act and would comply with those requirements, to the extent they apply, before taking any such action.[5] Several commenters supported reconsideration of the need for the leverage ratio after completion of the review required by section 305.

B. Definition of Capital Terms

The agencies had proposed to adopt the same definitions of capital terms for purposes of the prompt corrective action

[5] Section 38(c) of the FDI Act requires that the capital standards prescribed under that section by each appropriate Federal banking agency shall include a leverage limit and a risk-based capital requirement, as well as any other additional relevant capital measures needed to carry out the purpose of section 38 and implemented by regulation. However, an appropriate Federal banking agency may, by regulation, rescind any relevant capital measure required by section 38, upon determining (with the concurrence of the other Federal banking agencies) that the measure is no longer an appropriate means for carrying out the purpose of section 38.

provisions of section 38 as are currently used under the capital adequacy guidelines or regulations adopted by the agencies. The commenters strongly favored this approach because it would reduce the burden and complexity that could result from the use of new or modified capital definitions, and would minimize the possibility that an institution may be uncertain regarding its capital levels for purposes of section 38. Accordingly, the final rules adopt the definitions of the various capital elements and terms currently used in the agencies' existing capital adequacy guidelines and regulations.

The agencies requested comment regarding the appropriate period for calculation of capital levels. Under current reporting requirements, as specified in the instructions to the Call Report, the level of capital of an institution is generally calculated as the ratio of the institution's quarter-end capital to the quarterly average of its total assets (in the case of the leverage ratio) or its quarter-end risk-weighted assets (in the case of the risk-based capital ratios).[6] The agencies sought comment on whether capital calculations should be based on the same period calculations for purposes of section 38. The agencies also requested comment on the feasibility of requiring institutions to make a daily calculation of various capital measures.

Commenters generally supported applying the same periods for capital calculations under section 38 as are currently used under the agencies' capital adequacy standards. The commenters also strongly objected to any requirement that capital calculations be required on a daily basis for purposes of implementing section 38. The commenters argued that daily calculations would substantially increase the reporting burden and costs for many institutions. In addition, commenters contended that daily calculations present a distorted picture of the capital position of an institution by focusing on individual daily events (such as a temporary increase in deposits in connection with a lock-box operation) and do not take account of related actions that occur within a reasonably short period or remedial actions that are readily available to the institution (such as a scheduled withdrawal of deposits from a lock-box account). The commenters argued that the calculation periods currently adopted by the agencies in their capital adequacy standards provide a more accurate and reliable estimation of the capital levels of institutions.

Based on these comments, the final rules use the same calculation periods for purposes of section 38 as are currently employed under the agencies' capital adequacy standards. The agencies have determined not to require the daily calculation of capital for purposes of section 38 at this time.

C. Specific Capital Levels for Five Capital Categories

The agencies proposed specific capital levels defining each capital category. Under the standards set forth in section 38, an institution is deemed to be adequately capitalized if it meets the required minimum level for each relevant capital measure. Thus, the agencies proposed to set the capital levels for the adequately capitalized category generally at the same levels as the minimum ratios established under the existing minimum capital adequacy rules and guidelines adopted by the agencies. These minimums are 8 percent for the total risk-based capital ratio, 4 percent for the Tier 1 risk-based capital ratio, and 4 percent for the Tier 1 leverage ratio (3 percent for composite 1-rated banks and savings associations, subject to appropriate Federal banking agency guidelines). An institution would have to meet all these minimums in order to be deemed adequately capitalized.

The statute provides specific guidance as to the capital level for defining a critically undercapitalized institution. Section 38 requires that a critically undercapitalized institution be defined by reference to the institution's ratio of tangible equity to total assets. The statute requires the agencies to establish the threshold ratio for defining a critically undercapitalized institution at no lower than 2 percent.

Taking the capital levels for the adequately capitalized and critically undercapitalized categories as benchmarks, the agencies proposed that the capital levels for the undercapitalized category be defined as any level under 8 percent for the total risk-based capital ratio, under 4 percent for the Tier 1 risk-based capital ratio, or under 4 percent for the Tier 1 leverage ratio (under 3 percent for composite 1-rated banks and savings associations, subject to appropriate Federal banking agency guidelines). An institution would be considered undercapitalized if it were below the specified capital level for any of the three capital measures.

Further, the capital levels for significantly undercapitalized institutions were defined as any level under 6 percent for the total risk-based capital ratio, under 3 percent for the Tier 1 risk-based capital ratio, or under 3 percent for the Tier 1 leverage ratio. An institution would be considered significantly undercapitalized if it were below the specified capital level for any of the three capital measures. Under the proposed definitions, an institution that is significantly undercapitalized also would be deemed to be undercapitalized. Similarly, an institution that is critically undercapitalized also would be deemed to be significantly undercapitalized and undercapitalized. The overlap between these categories is contemplated by the statute and has the effect of applying to significantly undercapitalized institutions and to critically undercapitalized institutions any provisions of section 38 that are applicable to undercapitalized institutions.

The agencies proposed establishing the minimum total risk-based capital level for the well capitalized category at 10 percent and setting the minimum leverage capital level for this category at 5 percent. To emphasize the importance the agencies place on Tier 1 capital, the agencies proposed that the minimum level for the Tier 1 risk-based capital ratio be set at 6 percent for the well capitalized category.

Many commenters indicated agreement with the capital thresholds proposed by the agencies. Several commenters were concerned that the levels be applied equally to institutions of all sizes. Other commenters argued that the capital levels set for the well-capitalized category were established at too high a level. These commenters noted that the standard for well capitalized institutions would require an institution to hold 25 percent more total risk-based capital, 50 percent more Tier 1 capital, and 66 percent more leverage capital than an adequately capitalized institution.

Commenters stated that they were particularly concerned about the well-capitalized levels because several of the newly proposed rules required by FDICIA impose new constraints on institutions that are not within the well-capitalized category. Commenters believe that these provisions will have the practical effect of establishing the well-capitalized category as the minimum acceptable capital category for most institutions. Several commenters argued that high capital thresholds for the well-capitalized category would have significant implications in the near term for the availability of credit in the

[6] Savings associations report their capital amounts on their Thrift Financial Reports based on end of the quarter total assets and total risk-weighted assets.

United States, as depository institutions attempt to meet the higher capital levels of the well-capitalized category through slower asset growth or shrinkage of assets. These commenters also argued that establishing high capital thresholds for this category would significantly impair the ability of domestic depository institutions to compete against foreign institutions that are not subject to this capital-based regulatory and supervisory framework. In order to address these potential effects, these commenters argued that the capital thresholds should be lowered, or phased-in over a period of time.

On the other hand, a few commenters argued that the capital levels proposed by the agencies were too low. In particular, these commenters contended that a higher threshold for the definition of the critically undercapitalized category was necessary in order to minimize potential losses to the federal deposit insurance funds. One commenter argued that, at the thresholds in the proposal, the number of institutions that would qualify for the well-capitalized category was too high and included a large number of institutions that had received unsatisfactory examination ratings. These commenters argued that higher thresholds for each of the capital categories would permit the agencies to initiate supervisory actions under section 38 against a greater number of institutions, thereby permitting action while an institution is still sufficiently healthy to reverse its deterioration.

After considering the comments, the agencies have determined at this time to adopt the capital thresholds as proposed. In the agencies' view the proposed thresholds strike a reasonable balance between the statutory requirements on the one hand, and the need to promote safe and sound banking conditions in a manner that gives due consideration to the international capital standards to which the United States and the other G–10 countries have agreed on the other hand. The agencies believe that such consideration is appropriate in view of the competitive pressures faced by U.S. banks operating in international markets with foreign banks adhering to these standards. In this regard, as with the capital adequacy standards currently adopted by the agencies, the thresholds adopted in the final rules under section 38 will apply to each insured depository institution, regardless of the size of the institution. Comparable thresholds are applied to insured branches of foreign banks.

In establishing these thresholds, the agencies recognize that capital ratios alone are not fully indicative of the capital strength of an institution. The agencies are aware, for example, that some poorly-rated depository institutions have capital ratios above the specified minimums for the well-capitalized and adequately capitalized categories. One reason that some poorly-rated institutions qualify as well capitalized for prompt corrective action purposes is that capital is a lagging indicator of problems of insured depository institutions. In part for this reason, examiners traditionally have reached judgments on an institution's capital needs by also taking into account a range of factors such as interest rate risk and concentration risk. As noted above, the agencies have under way initiatives mandated by FDICIA to review their risk-based capital standards to ensure that they take adequate account of such risks, and also have been engaged in a project under the Federal Financial Institutions Examination Council (FFIEC) to refine and improve procedures for assessing the reserving policies and practices of individual institutions. After those projects have been completed and improvements implemented and assessed, the agencies intend to revisit the question of how the specifications for the well-capitalized category may need to be modified or adjusted.

Several commenters argued that an institution that nominally has capital above the threshold for well-capitalized institutions should not be excluded from that category because the institution is subject to an agency order or directive to raise additional capital. These commenters argued that use of capital directives or agency orders to raise additional capital as a means of defining the well-capitalized category is not contemplated by section 38, and is not consistent with the statute's instruction that capital categories be defined by reference to the actual capital level of an institution.

To qualify as a well-capitalized institution under section 38, the capital levels of an institution must significantly exceed the required minimum level for each relevant capital category. The agencies believe that an institution that is subject to an agency order or directive to raise capital or to maintain capital at a higher capital level does not meet the statutory definition of a well-capitalized institution. Instead, institutions that have been ordered to raise capital or maintain a higher level of capital are subject to an agency determination that, given the particular circumstances and financial condition of the institution, the capital level of the institution is inadequate or minimally adequate. Accordingly, the agencies have adopted the definition of the well-capitalized category as proposed, and have retained the provision disqualifying from the well-capitalized category any institution that is subject to an agency order or directive to meet and maintain a specific capital category. The agencies have modified the language of this section to clarify that the provision applies only to written agreements, orders, capital directives, and prompt corrective action directives that are issued under certain provisions of the FDI Act, the International Lending Supervision Act, the Home Owners' Loan Act, or regulations implementing these laws.

D. Critically Undercapitalized Institutions

The statute requires that the critically undercapitalized category be based on the ratio of tangible equity to total assets of the institution. Section 38 requires that the minimum ratio for this category be established at a level of tangible equity that is no less than 2 percent of the institution's total assets, and that is no higher than the ratio equal to 65 percent of the required minimum level of capital under the leverage limit. The agencies may, by regulation, specify additional capital measures (such as a risk-based capital ratio) in defining the critically undercapitalized category. Any such measures may not, without the concurrence of the FDIC, be set at a level lower than the level specified by the FDIC for insured state-chartered banks that are not members of the Federal Reserve System.

The agencies proposed to define the level for the critically undercapitalized category as a ratio of tangible equity to total assets of 2 percent or less. The agencies did not propose to establish any additional capital measures for the critically undercapitalized category. The commenters that addressed these matters favored the capital level proposed by the agencies for this capital category and generally agreed that no additional capital measure was necessary to define this category. Accordingly, the final rules adopt the original proposal to define an institution as critically undercapitalized if the institution has a ratio of tangible equity to total assets of 2.0 percent or less.

Section 38 provides that the critically undercapitalized category must be defined by reference to the ratio of tangible equity to total assets of an institution. However, section 38 does not define the term "tangible equity." Moreover, the term is not currently defined by the Federal banking agencies

in connection with their capital adequacy standards or by the accounting profession. To implement this provision, the agencies had proposed to define the ratio of tangible equity to total assets in the same manner as the leverage ratio currently established by the agencies by regulation or guideline, which is the ratio of Tier 1 capital to total average assets.

A significant number of commenters argued that the agencies should modify the proposed definition of tangible equity to permit the inclusion of all forms of equity capital, in particular cumulative perpetual preferred stock. These commenters noted that the OCC recognizes the level of cumulative perpetual preferred stock in determining whether a national bank is insolvent for purposes of the National Bank Act.

In adopting the final rules, the agencies have determined to define tangible equity to include the core capital elements recognized in the calculation of Tier 1 capital. In addition, the final rule includes cumulative perpetual preferred stock issued by the institution and related surplus. The agencies recognize that cumulative perpetual preferred stock provides a cushion against losses suffered by the institution and provides protection to the deposit insurance funds. The agencies have determined not to include other instruments, however. The agencies are concerned that the inclusion of other types of instruments, in particular instruments that are hybrids of equity and debt, will distort the capital raising efforts of depository institutions and result in the development and issuance of instruments that, while providing some protection against loss, place a significant burden on the earnings of the institution over the life of the instrument and on the ability of the institution to raise additional capital.

Several commenters also argued that the agencies should not require the deduction of all intangible assets in determining whether an institution is critically undercapitalized. These commenters argued that many assets that are considered intangible in fact have significant value and serve as a ready and marketable source of liquidity to troubled institutions.

In determining whether equity is "tangible" for purposes of the final rule under section 38, the agencies have determined to require the deduction of all intangible assets with one exception.[7] The agencies have sought public comment on a proposal to amend their capital adequacy standards regarding inclusion of certain purchased mortgage servicing rights in the calculation of Tier 1 capital. This proposal is in response to section 475 of FDICIA, which requires the Federal banking agencies to determine whether a portion of certain purchased mortgage servicing rights should be included in the definition of "tangible capital."

To comply with this statutory provision, the agencies must determine whether certain purchased mortgage servicing rights have sufficient value to warrant a determination that these assets should not be treated as intangible assets for purposes of the calculation of tangible capital. The agencies believe that, to the extent that purchased mortgage servicing rights are determined under this statutory provision to be properly included in "tangible capital," these assets should be given identical treatment in the calculation of tangible equity under section 38.[8]

E. Notice of Capital Category

Under section 38, an institution becomes subject to certain mandatory provisions on the basis of the capital category of the institution. These mandatory provisions apply immediately without agency action. As noted above, an undercapitalized institution is immediately subject to a restriction on the payment of dividends and management fees, a limitation on asset growth and expansion, and an obligation to file an acceptable capital restoration plan. In addition to these requirements, an institution that is significantly undercapitalized or critically undercapitalized is subject to a limitation on the payment of bonuses or raises to senior executive officers. A number of other mandatory restrictions are imposed on critically undercapitalized institutions. Moreover, once an institution is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, section 38 grants the appropriate Federal banking agency for the institution discretion to take a number of supervisory actions to address the problems of the institution.

The final rules include provisions for an institution and its appropriate Federal banking agency to determine the capital category of the institution, and, thereby to determine when the provisions of section 38 are applicable. Commenters supported the agencies' proposal to base capital calculations principally on the Call Report filed by each institution and on an institution's examination.

Accordingly, the final rules retain provisions that deem an institution to be aware of its capital category as of the date that the Call Report is required to be filed. Similarly, the institution is deemed to be notified of its capital category as of the date that the examination report is provided to the institution.

The final rules also retain the provision permitting the agencies to determine the capital category of an institution based on other information available to the agency, including information obtained in the applications process, through other reports filed by the institution under the banking laws or the securities laws, or in public announcements by the institution. The final rules provide that, in the event that the agency determines the capital category of the institution on the basis of other information, the agency must notify the institution in writing of its determination.

The agencies also requested comment on whether to require capital calculations to be made daily or monthly for purposes of applying the provisions of section 38. A significant number of commenters opposed any requirement that institutions make daily calculations of capital. A number of commenters also argued that daily calculations of capital would present a distorted view of the capital position of an institution because daily calculations emphasize the timing of events and do not permit consideration of offsetting events that are reasonably expected to occur at a later date. These commenters also argued that requiring institutions to calculate capital levels on a daily basis would be impractical, particularly for institutions with extensive branch networks or with foreign offices, and would impose significant added costs and burdens on insured institutions. As explained above, the agencies have not adopted provisions requiring institutions to make daily calculations or file daily reports of capital levels for purposes of section 38.

[7] For savings associations, pursuant to section 5(t) of the Home Owners' Loan Act (12 U.S.C. 1464(t)), enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, certain qualifying supervisory goodwill will also be included in "tangible equity."

[8] Several commenters argued that the definition of tangible equity should include investments in certain types of subsidiaries, which savings associations are required to deduct for purposes of their general capital calculations. The OTS has determined that investments in these subsidiaries will be included in the definition of tangible equity only to the extent permitted in the definition of Tier 1 capital under the Home Owners' Loan Act's transitional rule, which expires July 1, 1994. 12 U.S.C. 1464(t)(5)(D).

Several commenters argued that similar burden would result from the agencies' proposal to establish a procedure that requires an institution to notify the appropriate agency within 5 days of any change in the institution's capital position that would cause the institution to be within a different capital category. The agencies had proposed this notification procedure as a means of supplementing the use of Call Reports and periodic examinations for determining the capital category of insured institutions.

The agencies have made several revisions to the proposed notification procedures to address commenters' concerns. The final rules have been modified to require an institution to notify the appropriate agency only of material events that affect the capital position of the institution. The notice period has also been extended to 15 days from the 5 days originally proposed. The determination of whether the capital category of the institution has changed may be made by reference to the most recent Call Report or examination report.

The rule retains the original proposal that the capital category of the institution will not change until the appropriate agency has reviewed the data provided by the institution along with any explanation offered by the institution. Following review of this information, the agency will determine whether an adjustment to the capital category of the institution is appropriate.

Finally, in response to several comments, the rule has been modified to eliminate the requirement that the institution notify the agency of events that improve the capital level of the institution. Because an institution's capital category is based on the information filed in the most recent Call Report or report of examination, however, an institution that has improved its capital position prior to the time that a new Call Report has been filed or examination report completed would continue to be considered within the capital category reflected in the most recent Call Report or examination report unless the institution voluntarily sought a determination by the agency that the institution is in a different capital category.

The agencies believe that the revised notification procedures address the concerns raised by these commenters while at the same time still providing adequate notice to the appropriate Federal banking agency when an institution's capital category has changed between filing of Call Reports or examinations. The agencies believe that failure to recognize material events that occur during this period could result in delay in application of the supervisory requirements of section 38, including the mandatory provisions of the statute.

F. Procedures Governing Agency Action

1. In General

The final rules establish procedures governing four types of agency action that may be taken under section 38.[9] In three cases, the final rules generally require the appropriate agency to provide notice to an insured institution or company of proposed agency action and an opportunity for the institution or company to submit to the agency information that is relevant to the agency's decision before the agency takes final action. In particular, the final rules establish these procedures for: (1) Issuing a directive under section 38 that imposes requirements or restrictions committed to agency discretion on an undercapitalized institution or a company that controls an undercapitalized institution; (2) determining that an institution should be subject to more stringent treatment because the institution is in unsafe or unsound condition; and (3) determining that an institution should be subject to more stringent treatment because the agency deems the institution to be engaged in an unsafe or unsound practice based on the institution's failure to correct certain deficient ratings received in an examination. The final rules also establish a special procedure, as required by section 38, permitting senior executive officers and directors who have been dismissed from an institution as a result of an agency directive an opportunity to petition for reinstatement.

In establishing these procedures, the agencies have attempted to comply with the statutory mandate that the agencies take prompt action to resolve the problems of troubled institutions while also providing affected institutions, companies, and persons the opportunity to be heard at a meaningful time and in a meaningful manner.

2. Procedures for Issuing Prompt Corrective Action Directives

Section 38 imposes certain mandatory restrictions on institutions that are undercapitalized, significantly undercapitalized, or critically undercapitalized. The statute also provides the agencies with discretion to impose a number of supervisory requirements or restrictions on an insured institution that is undercapitalized, significantly undercapitalized or critically undercapitalized, as well as on any company that controls such an institution. These discretionary supervisory actions are described above. The system enacted in section 38 is based on Congress's belief that prompt action must be taken to resolve problems at insured depository institutions at an early enough stage to minimize costs to the federal deposit insurance funds, and ultimately the taxpayer.

The agencies do not believe that the purpose and mandate of section 38 are compromised by, as a general matter, providing institutions notice of proposed agency action under section 38 and an opportunity to submit relevant information to the agency for its consideration. Under the final rules, the appropriate agency will provide written notice to an institution or company prior to issuing a directive as a general matter. The notice must describe the action contemplated by the agency. The institution or company is then provided at least 14 calendar days to submit written arguments and evidence in response to the proposed agency action. Failure to file a timely response constitutes consent to the issuance of the directive and a waiver of the opportunity to appeal. The agency will consider the submission in determining whether to issue the directive.

The agencies reserve the right to issue directives that are effective immediately when the circumstances of a particular case indicate that immediate action is necessary to serve the purpose of prompt corrective action. In these cases, the final rules provide the institution an opportunity to seek modification or rescission of the directive on an expedited basis. An institution or company that appeals an immediately effective directive is required to file a written appeal within 14 days of receiving the notice, and the agency must consider the appeal within 60 days of receiving it.

The agencies believe that these procedures afford an adequate and fair opportunity for affected persons to present the agency with argument and information relevant to the agency's action. The procedures adhere to the mandate of section 38 that the agencies take prompt corrective action to resolve the problems of insured depository

[9] The agencies will not be required to grant administrative review if an institution, company, or person consents to the action to be taken by the agency either as initially proposed by the agencies or as modified by mutual agreement. Actions taken with such consent have the same legal affect and are enforceable to the same extent and by the same means as actions taken upon exhaustion of these procedures.

institutions at the least possible long-term loss to the deposit insurance fund while providing institutions with an opportunity for agency review.

Commenters raised various objections to the procedures proposed by the agencies for issuing directives under section 38. Some commenters stated that an oral hearing is required by principles of due process and fundamental fairness before an agency can issue a prompt corrective action directive. Certain other commenters expressed concern about the agencies' proposal to allow issuance of a directive without prior notice to the institution in limited cases; other commenters recommended that such an immediately effective directive be issued only after a determination by the agency head that exigent circumstances require immediate action.

The final rules do not adopt the suggestion of several commenters that the agencies provide for an oral hearing in connection with the issuance of a prompt corrective action directive. The agencies believe that the procedures for prior notice and an opportunity for submission of written argument and information are sufficient in light of the purpose and mandate of section 38. As explained above, the language and legislative history of section 38 indicate that Congress intended agency action under section 38 to be taken as promptly as possible. 12 U.S.C. 1831o(a)(2); see also S. Rep. No. 102-167, 102d Cong., 1st Sess. (1991) ("The prompt corrective action system will require regulators to act at the first sign of trouble.").

In addition, Congress clearly indicated those occasions when it believed that an oral hearing is appropriate in connection with actions taken under section 38. Congress gave no indication in either the statutory language or legislative history that it intended to require an oral hearing in connection with supervisory actions committed to agency discretion under section 38.

Finally, the agencies believe that the provision for written submissions prior to issuance of a directive affords adversely affected parties an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *see FDIC* v. *Mallen*, 486 U.S. 230 (1988) (upholding post-deprivation hearing in case of suspension or removal of a bank officer charged with a felony); *Federal Deposit Ins. Corp.* v. *Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 170 (1992) (affirming hearing procedures for FDIC capital directive).

In special cases where immediate action is necessary and prior notice has not been given, the institution is given prompt post-directive administrative review. The courts have found similar post-deprivation procedures to be adequate when necessary to protect the public interest. See *Mallen*, 486 U.S. at 243; *Soranno's Gasco, Inc.* v. *Morgan*, 874 F.2d 1310, 1317-18 (9th Cir. 1989) (power to suspend permit immediately is necessitated by state's interest in enforcing pollution control laws).

Several commenters argued that the 14-day deadline for submission of a response to a proposed directive was too short, favoring deadlines from 30 to 90 days. The final rule provides at least 14 days for submission of a response, but permits the agency to extend that period in individual cases as appropriate.

3. Dismissal of Directors or Senior Executive Officers

Section 38 provides that a director or senior executive officer who is dismissed by an institution in compliance with an agency directive may obtain review of the dismissal by filing, within ten days, a petition for reinstatement with the agency that ordered the dismissal. The statute also provides that the petitioner shall have the opportunity to submit written materials in support of the petition and to appear at a hearing before member(s) or designated employee(s) of the agency. Under the statute, the hearing shall occur within 30 days of the filing of the petition unless the petitioner requests a later date. Under the final rules, within 20 days of the closing of the hearing record, the presiding officer must make a recommendation to the agency regarding the petition for reinstatement, and the agency shall issue a decision within 60 days of the date of the closing of the hearing record.

The statute envisions a post-dismissal hearing procedure, as it refers to the appeal as a "petition for reinstatement" and sets a short time for agency decision following the hearing. Accordingly, the proposed regulation required that an institution ordered to dismiss a senior executive officer or director take that action immediately upon receiving a final directive requiring that action.

The agencies also proposed that any officer or director who is dismissed in compliance with an agency directive under section 38 be provided an opportunity to petition the agency for reinstatement within the statutorily prescribed period, and be afforded an opportunity for an informal agency hearing. The petitioner was provided the right to appear at the hearing, with counsel, and to submit written materials and present oral argument.

The proposed regulation also incorporated the statutory burden of proof imposed upon an officer or director seeking reinstatement. When the dismissal order is based upon an institution's capital category or its failure to submit or implement a capital restoration plan, the petitioner must prove that his or her continued employment would materially strengthen the institution's ability to become adequately capitalized. When the dismissal order is based upon a reclassification of an institution on grounds of unsafe or unsound condition or practice, the petitioner must prove that his or her continued employment would materially strengthen the institution's ability to correct the condition or practice. The agencies proposed to restrict the ability of an officer or director seeking reinstatement to challenge the capital category to which the institution has been assigned.

Commenters generally recognized that most of the procedures for review of a dismissal are set out in the statute and that the agency proposal adopted these statutory standards. Several commenters urged the agencies to amend the proposal to allow dismissed officers and directors to present, as a matter of right, oral testimony or witnesses at the agency hearing. The proposal permitted the presentation of oral testimony or witnesses only with the permission of the presiding officer. The commenters argued that the petitioner must meet a heavy burden of proof in order to be reinstated, and should be permitted to meet that burden through the presentation of oral testimony.

The agencies have decided to retain the provision providing that petitioners may present oral testimony and witnesses with the permission of the presiding officer without providing an absolute right to presentation of oral testimony. Under the proposed procedures, petitioners have the right to submit affidavits or other written statements from any person in making their case. In addition, petitioners may request permission of the presiding officer to present oral testimony or witnesses. Any decision by a presiding officer not to permit oral testimony is subject to review when the agency determines the action that is appropriate on the basis of the record compiled at the hearing.

Commenters also expressed concern that neither the statute nor the proposed rule requires an agency to identify any connection between the conduct of the officer or director and the financial deficiencies experienced by the insured

institution before dismissing or upholding the dismissal of the officer or director. Commenters urged that the agencies consider whether the conduct of an officer or director contributed to the troubled condition of the institution in deciding whether to dismiss the officer or director and in considering a petition for reinstatement.

The agencies note that the burden of proof necessary for reinstatement is established by statute for all petitions for reinstatement. The agencies do not have discretion to establish an alternative burden of proof for cases in which an officer or director believes that he or she has not contributed to the financial weakness of the institution. However, the agencies note that the statute does not limit the types of arguments or evidence that may be presented by a petitioner in meeting the statutory burden of proof. In this regard, the agencies believe that evidence concerning the past performance of the director or officer at the institution may be relevant to determining whether a director or officer would materially strengthen an institution's ability to address its problems. Accordingly, the final rules adopt the procedures for review of petitions for reinstatement as proposed by the agencies.

Finally, one commenter argued that a dismissed officer or director should be allowed to challenge the bank's capital category, since the bank's capital category is the basis for the dismissal. The agencies have decided not to adopt this restriction in the final rule.

4. More Stringent Treatment Based on Non-Capital Supervisory Criteria

In establishing a system of prompt corrective action based primarily on the capital level of each institution, Congress recognized that factors other than capital should in certain circumstances be used to assess the financial condition of an institution. In providing for more stringent treatment based on non-capital indications of financial condition, Congress appears to have had the same concern that underlies prompt corrective action generally: preventing loss to the deposit insurance funds. See S. Rep No. 102–167, 32–38 (giving regulators "flexibility to discipline institutions based on criteria other than capital * * * will help reduce deposit insurance losses * * *."). If actions taken based on criteria other than capital are to be effective, they must be taken promptly.

Section 38 provides that the appropriate Federal banking agency may, under certain circumstances, reclassify a well capitalized insured depository institution as adequately capitalized. Section 38 also permits the appropriate agency to require an adequately capitalized or undercapitalized institution to comply with the supervisory provisions as if the institution were in the next lower category (but not treat a significantly undercapitalized institution as critically undercapitalized) based on supervisory information other than the capital levels of the institution. (While the agencies recognize that these provisions are not strictly a reclassification of the institution in all cases, reclassification to the adequately capitalized category and treatment of an institution as if it were in the next lower capital category are referred to collectively in this document and in the final rules as a "reclassification.")

The statute provides that an institution may be reclassified if the appropriate Federal banking agency determines (after notice and opportunity for hearing) that [the institution] is in an unsafe or unsound condition or, pursuant to section 8(b) (8), deems the institution to be engaging in an unsafe or unsound practice. 12 U.S.C. 1831o(g). Section 8(b)(8) of the FDI Act was amended by FDICIA to provide that an institution may be deemed to be engaged in an unsafe or unsound practice if (1) the institution has received a less-than-satisfactory rating in its most recent examination report for assets, management, earnings or liquidity [10], and (2) the institution has not corrected the deficiency. 12 U.S.C. 1818(b)(8).

Relying on the statutory language, the proposed rule provided different procedures for review of reclassifications based on unsafe or unsound condition and those based on unsafe or unsound practice. In the case of unsafe or unsound condition, the proposed regulation provided for notice to the institution and an opportunity for an informal hearing prior to the reclassification; in the case of unsafe or unsound practice, the proposed regulation provided for notice to the institution, a 14-day period in which the institution could make a written submission objecting to the reclassification, and agency review of that submission prior to any reclassification.

Several commenters argued that the agencies should provide a formal administrative hearing in connection with reclassifications that are based on a finding that the institution is in unsafe or unsound condition. Commenters argued that the provision in section 38 requiring that this type of reclassification occur only "after notice and opportunity for hearing" indicates a Congressional intent that a full administrative hearing be given in these cases. Commenters also contended that principles of fundamental fairness require a full hearing in these cases.

The agencies do not believe that the statute or the principles of fairness require that a formal administrative hearing be afforded in the case of reclassifications based on a finding of unsafe and unsound condition. The courts have determined that the statutory language—"after notice and opportunity for hearing"—does not require a formal hearing. See, *e.g.*, *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 240 (1973) (use of the word "hearing" in statute "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker"). Where, as here, the statute does not contain the phrase "hearing on the record" and the legislative history does not indicate a Congressional intent to provide for a formal hearing, the agency may meet the statutory requirements by providing an informal hearing. See, *e.g.*, *Independent U.S. Tanker Owner Comm.* v. *Lewis*, 690 F.2d 908, 922 n.63 (D.C. Cir. 1982).

The final rules adopt the agencies' proposal to provide institutions with an opportunity for an informal hearing in connection with a reclassification based on the institution's condition. Under the procedures adopted by the agencies, an institution will be provided prior written notice of any intention by the agencies to reclassify the institution, along with an explanation of the reasons for the proposed reclassification. The institution is provided an opportunity to present written testimony and argument and an opportunity for an informal hearing prior to the reclassification. The informal hearing is available as a matter of right. At the informal hearing, the institution may present written and oral argument, written evidence and testimony, and, where appropriate, oral testimony.

The agencies believe that these procedures, which include an opportunity for an informal hearing, provide institutions with an adequate opportunity to be heard prior to agency action. These procedures also ensure that agency action in connection with an institution whose nominal capital levels do not provide an accurate indication of the condition of the institution, will be prompt, as mandated by section 38.

[10] For savings associations, the equivalent categories are the management, assets, risk, and operations components of the MACRO rating.

Several commenters objected to the agency proposal to establish a different procedure—without an opportunity for a hearing—for the reclassification of an institution that has received an unsatisfactory examination rating and failed to correct the deficiency. These commenters favored providing at least an informal hearing in the case of both types of reclassification. Commenters argued that the consequences of reclassification were identical, whether based on an examination rating or on a finding that the institution is in unsafe or unsound condition, and, therefore, a hearing should be provided in both cases.

Commenters also argued that the apparent difference in the wording of the statute in authorizing the two methods for reclassification of insured institutions did not indicate a Congressional intent to deprive institutions of a hearing in connection with a reclassification based on an examination rating. Rather, commenters argued that insured institutions should be afforded an opportunity for a hearing prior to reclassification based on an unsatisfactory examination rating because examinations are inherently subjective and the consequences to the institution of reclassification, particularly for an institution that is nominally adequately capitalized, could be significant. Accordingly, commenters contended that principles of fundamental fairness required that an opportunity for a hearing be provided prior to a reclassification based on an examination rating.

Following consideration of the comments, the agencies have modified the final rules to provide an opportunity for an informal hearing in the case of both types of reclassifications. The agencies believe that providing an opportunity for an informal hearing prior to reclassification based on an unsatisfactory examination rating will provide the institution with an adequate and meaningful opportunity to provide the agency with information and argument relevant to the agency's decision without substantially delaying the ability of the agencies to take prompt action as required by section 38.

The agencies do not believe that a formal hearing is required in connection with reclassifications based on an unsatisfactory examination rating. The statute does not require a formal hearing on the record in the case of these types of reclassifications. Instead, the statute grants the agencies significant discretion in reclassifying an institution that has received an unsatisfactory examination rating and failed to correct the deficiency.

In addition, the agencies believe that the availability of an informal hearing meets any requirement of fundamental fairness or due process when viewed in context. The examination rating that serves as the trigger for a reclassification is the result of a process that involves substantial participation by the affected institution. This participation includes an opportunity to provide all relevant information to the examiner, and to meet with the examiner with regard to issues that arise during the examination. Moreover, following the examination, each of the agencies provides an informal appeals process whereby an institution can seek review of an examiner's decision at a higher level of the agency. Thus, an institution that has been reclassified based on its examination ratings will have already been afforded substantial opportunity to present evidence and argument prior to any reclassification procedure.

The agencies also note that reclassification of an institution based on an examination rating is not an automatic result of receiving an unsatisfactory rating. Instead, each agency retains discretion to initiate the procedures for reclassification and will do so based on the facts of each case.

Finally, no restrictions or requirements become effective automatically as a result of reclassification. As commenters noted, section 38 does not make institutions that have been reclassified immediately subject to the mandatory provisions of section 38. Instead, section 38 authorizes the appropriate agency, in its discretion, to impose requirements or proscriptions contained in section 38.

Several commenters expressed concern that any use of the reclassification procedures would result in public disclosure of an institution's examination rating. Consequently, these commenters contended that the agencies should never reclassify an institution on the basis of ratings received in an examination report. Several other commenters argued that examination ratings are subjective in nature and should not serve as the basis of reclassification of an institution under section 38.

The agencies expect to use the reclassification provisions of section 38 when appropriate. The agencies believe that steps can be taken to prevent public disclosure of examination ratings, and that use of the reclassification provisions of section 38 is important to ensuring prompt corrective action. The agencies also believe that examination ratings are a proper basis for reclassification under section 38. As noted above, depository institutions participate in the examination process and are afforded an informal appeal of an examiner's judgment. Furthermore, reclassification based on a less-than-satisfactory rating is not automatic, and is left to the agency's discretion, with corresponding procedural protections.

A small number of commenters favored other changes to the reclassification procedures. In particular, one commenter urged that the period for filing a response to a proposed reclassification be lengthened from 14-days to 45 or 60 days. In light of the agencies' decision to provide an opportunity for an informal hearing in connection with reclassifications based on an examination rating, the agencies have determined not to lengthen the time within which an institution may provide its initial written response to a proposed reclassification.

Another commenter suggested delaying the effective date of any reclassification to allow the institution to adjust to new restrictions on its activities. The agencies believe that, because reclassification does not result in the automatic application of any mandatory provision under section 38, it is not necessary to delay the effective date of any reclassification.

Finally, one commenter requested that the agencies provide by regulation that the presiding officer at a hearing not be an individual that has served as an examiner of the institution. The agencies expect to select presiding officers that may render a qualified recommendation to the agency regarding whether reclassification is appropriate, and do not believe that it is necessary or appropriate to specify in the regulation the qualifications of the presiding officer.

5. Enforcement of Directives

Section 8 of the FDI Act, as amended by FDICIA, includes prompt corrective action directives issued pursuant to section 38 among the orders that may be enforced in the courts pursuant to section 8(i)(1), and also makes any depository institution, company, or institution-affiliated party that violates such a directive subject to civil money penalties pursuant to section 8(i)(2)(A). 12 U.S.C. 1818(i). The final rules adopt the proposed clarification that the failure of a depository institution to implement, in any material respect, a capital restoration plan, or the failure of a company having control of a depository institution to fulfill a

guarantee that the company has given in connection with a capital plan accepted by the appropriate Federal banking agency, will subject responsible parties to civil money penalties. Commenters did not object to this proposal.

G. Capital Restoration Plans

1. Information Required

Section 38 requires an institution that is undercapitalized, significantly undercapitalized, or critically undercapitalized to submit a plan to the appropriate Federal banking agency to restore the institution's capital at least to the minimum capital levels required for adequately capitalized institutions. The statute requires that this capital restoration plan be submitted in writing and specify:

(1) The steps the institution will take to become adequately capitalized;

(2) The levels of capital the institution expects to attain in each year that the plan is in effect;

(3) How the institution will comply with the restrictions and requirements imposed on the institution under section 38;

(4) The types and levels of activities in which the institution will engage; and

(5) Any other information required by the appropriate Federal banking agency.

Section 38 provides that the appropriate Federal banking agency may not accept a capital restoration plan unless the plan:

(1) Contains the information required by statute;

(2) Is based on realistic assumptions and is likely to succeed in restoring the institution's capital; and

(3) Would not appreciably increase the risk (including credit risk, interest-rate risk, and other types of risk) to which the institution is exposed.

The agencies did not propose to require by regulation any additional information in a capital restoration plan submitted under section 38, and the commenters generally agreed that the agencies should not impose additional reporting requirements by regulation. The commenters argued that the agencies could require additional information in cases in which circumstances warranted.

2. Schedule for Submission and Review of Capital Plans

The agencies proposed adopting the schedule for submission and review of capital restoration plans that is generally established in the statute. This schedule provided an institution with 45 days to submit a capital restoration plan after the institution has received notice or been deemed to have notice that the institution is undercapitalized, significantly undercapitalized or critically undercapitalized.[11] The proposal permitted the appropriate Federal banking agency to change this period in individual cases, provided that the agency notified the institution that a different schedule had been adopted.

The proposed schedule also required the appropriate Federal banking agency to review each capital restoration plan within 60 days of submission of the plan unless the agency extends the time for review. The agencies would be required to provide written notice to the institution regarding whether the agency had approved or rejected the capital plan. The agency would also provide a copy of each acceptable capital restoration plan, or amendments thereto, to the FDIC within 45 days of accepting the plan.

The commenters addressing this proposal generally supported adopting the schedule provided in section 38, without revision. Two commenters argued that the agencies should be required to review capital restoration plans in less than 60 days.

The final rules adopt the schedule for filing and review of capital restoration plans as proposed. The agencies have determined not to shorten the review period for capital plans as a general matter because the longer period will permit the agencies to discuss revisions to the plan with the institution before the agency is required to take final action on the plan. The agencies expect, however, not to delay action on capital plans, and to act on these plans well within the regulatory schedule.

3. Failure to Submit or Implement an Acceptable Capital Plan

Section 38 provides that an undercapitalized institution that fails to submit or implement, in any material respect, an acceptable capital plan shall be subject to the same restrictions applicable to an institution that is significantly undercapitalized. In the event that the appropriate Federal banking agency has disapproved an institution's capital restoration plan, the proposal would require the institution to submit a new capital restoration plan within a time specified by the appropriate Federal banking agency. During the period following notice of such disapproval and prior to approval by the agency of a new or revised capital plan, the statute treats the institution in the same manner as a significantly undercapitalized institution. Institutions that fail to submit any capital restoration plan within the required period also are subject to the provisions applicable to significantly undercapitalized institutions. Included in these provisions is the statutory prohibition on payment by the institution of any bonus or raise to any senior executive officer.

Several commenters argued that the rule should be revised to permit an undercapitalized institution that had submitted its original capital restoration plan in good faith an opportunity to formulate and submit a revised capital plan before becoming subject to the provisions applicable to significantly undercapitalized institutions. Commenters expressed concern that rejection of the capital plan by the institution's appropriate agency, and corresponding treatment of the institution as significantly undercapitalized, pre-supposes an unwillingness on the part of the institution to devise and implement an acceptable capital plan. Commenters argued that a capital restoration plan may be found by an agency to be unacceptable for reasons that are unrelated to the willingness or ability of the institution to devise an acceptable capital plan. For example, commenters were concerned that a capital plan may be rejected because an institution was unaware that the appropriate agency expected the institution to take certain steps in addition to the steps proposed by the institution, or because developments may have occurred during the period that the plan is under review by the agency that were not reasonably foreseeable by the institution at the time the plan was submitted.

As an initial matter, the agencies believe that it is important that an undercapitalized institution discuss the development of its capital restoration plan with the appropriate banking agency during the period that the plan is being developed. The agencies have adopted the maximum time periods permitted by section 38 for the formal submission and review of a capital restoration plan in order to permit an opportunity for informal discussions between institutions and the appropriate agency. The adoption of a schedule for formal action does not, and is not intended to, preclude informal discussions between the institution and the appropriate agency regarding the elements of the plan prior to the time that the plan is formally submitted.

[11] As discussed above, an institution is deemed to have been notified of its capital category on the date that it is required to file its Call Report, the date that the institution receives its final report of examination or inspection, or the date that the appropriate federal banking agency notifies the institution of the institution's capital category (based on an adjustment to capital reported by the institution or on other information obtained by the agency).

Further, as noted above, the agencies expect discussions to continue during the period that the agency reviews the plan. These discussions should eliminate the chances that a capital restoration plan will be rejected by the agency for a reason that is not anticipated by the institution.

In cases in which an undercapitalized institution nonetheless has failed to submit a capital restoration plan or a plan submitted by an institution is rejected by the appropriate agency, the statute provides that the institution is subject to the provisions applicable to significantly undercapitalized institutions. This treatment has two consequences under section 38.[12] First, the institution is subject to restrictions on its ability to pay bonuses or salary increases to the institution's senior executive officers. In this regard, section 38 specifically prohibits any institution that has failed to submit a capital restoration plan that is acceptable to its appropriate agency from paying any bonus or raise to its senior executive officers. The purpose of this restriction appears to be to prevent senior officers of an undercapitalized institution from receiving any increase in pay if the officers have not devised and submitted a capital restoration plan that the agency agrees will address the problems faced by the institution.

Second, the appropriate Federal banking agency for the institution is permitted to take, and must consider taking, a number of additional discretionary actions in connection with the institution. In determining whether to exercise its discretion to take additional supervisory actions, the agencies believe that they may consider the types of factors noted by the commenters, including events that have occurred after submission of the original plan, the efforts of management to devise a realistic and acceptable plan, and other factors.

In light of the statutory language and the ability of the agencies to consider the factors identified by commenters on a case-by-case basis in determining appropriate action that the agency should take, the agencies believe that it is appropriate to retain in the final rules the provision indicating that an undercapitalized institution is subject to the provisions applicable to significantly undercapitalized institutions in the event the institution has submitted a capital restoration plan that is rejected by the appropriate agency. Similarly, an undercapitalized institution that fails to implement, in any material respect, its capital restoration plan would immediately be subject to these same provisions upon the institution's failure to implement the plan.

4. Guarantee of Performance of Capital Restoration Plan

Section 38 provides that the appropriate agency may not accept a capital restoration plan submitted by an undercapitalized institution unless each company that controls the institution has guaranteed that the institution will comply with the plan until the institution has been adequately capitalized on average during each of four consecutive calendar quarters, and each such company has provided appropriate assurances of performance. This guarantee by any controlling company is independent of any liability of affiliates of the depository institution pursuant to the cross-guarantee provision of the FDI Act (12 U.S.C. 1815(e)).

The agencies proposed to implement the performance guarantee provision by providing that the agencies will not approve a capital restoration plan required to be submitted by an undercapitalized, significantly undercapitalized, or critically undercapitalized institution under section 38, unless each company that controls the institution submits a written guarantee of the plan.[13] The performance guarantee would include a commitment to take actions required by the capital plan, including, for example, assuring that competent management will be selected, restricting transactions between the institution and the controlling company, and discontinuing certain risky activities within the institution or an affiliate. This guarantee would also include assurances that the institution would fulfill any commitments to raise capital made in the plan. Each company that provides the financial guarantee would be jointly and severally liable for fulfillment of the guarantee, up to the statutory limit of liability. Failure of any company that controls an undercapitalized institution to provide the required guarantee causes the institution to become subject to the provisions of section 38 applicable to significantly undercapitalized institutions.

Section 38 also requires each company that controls an undercapitalized institution to provide adequate assurances that the institution will perform under its capital plan. Providing adequate assurances will include committing to take whatever steps are necessary to ensure that the capital restoration plan is fully implemented.

The agencies requested comment regarding whether it was appropriate to specify by regulation the types of performance assurances that would be required. In addition, the agencies proposed a number of clarifications to the capital guarantee in the original proposal.

Most of the commenters that addressed the guarantee provisions suggested that the agencies determine on a case-by-case basis, and not specify by regulation, the form of guarantee that would be acceptable and whether adequate assurances of performance had been given by companies that control an undercapitalized institution. At this time, the agencies agree with the commenters that the adequacy of a capital guarantee and of the assurances of performance should be determined on a case-by-case basis in connection with an agency's review of capital restoration plans, and not by regulation. This will provide the agencies and companies that control undercapitalized institutions with flexibility to devise guarantees that are appropriate for individual cases, and permit the agencies and the industry to gain experience with the types of assurances that are adequate. As the agencies and the industry gain experience in this area, the agencies will reconsider whether it is appropriate to establish regulatory requirements in this area.

The commenters generally did not object to the agencies' interpretation that each company that provides a performance guarantee under section 38 would be jointly and severally liable for fulfillment of the guarantee. However, several commenters requested clarification regarding whether companies that are intermediate shell holding companies would be permitted to fulfill their guarantee requirement by providing a certification that the parent of the intermediate companies would guarantee performance. Similarly, these commenters sought agency guidance regarding whether intermediate shell holding companies would be permitted to rely on the financial resources of the parent company or of a third party as adequate assurance of performance on the guarantee.

The agencies believe that a guarantee that is backed by the contractual pledge of resources of a parent company may, particularly in situations involving the ownership of an insured institution by a company through a wholly owned domestic shell holding company, satisfy

[12] As explained above, a significantly undercapitalized institution is subject to the same mandatory and discretionary provisions that apply to undercapitalized institutions.

[13] A capital restoration plan does not supersede an existing net worth maintenance agreement.

the requirements of section 38. In other situations, a third party guarantee made by a party with adequate financial resources may be satisfactory for purposes of section 38. The agencies will consider the type of guarantee that would be appropriate in multi-tier holding companies on a case-by-case basis. The agencies will also consider on a case-by-case basis the type of guarantee that is necessary in the case of a parent holding company that is a shell company or has limited resources.

Section 38 limits the aggregate liability under the capital performance guarantee of all companies that control a given insured depository institution to the lesser of:

(1) An amount equal to 5 percent of the institution's total assets at the time the institution became undercapitalized; or

(2) The amount necessary (or that would be necessary) to bring the institution into compliance with all capital standards applicable with respect to such institution as of the time the institution fails to comply with its capital restoration plan.

In incorporating this provision into the regulation, the agencies proposed to adopt the same definition of total assets for purposes of computing the first component of the limit on liability as would be used in determining the capital category of the institution. As discussed above, the commenters unanimously favored using the same definition of capital terms to the extent possible in implementing section 38, and argued against the use of definitions that would require daily calculation of risk-weighted assets or capital. The final rules rely on existing definitions and capital calculation procedures in implementing the capital guarantee provisions.

The agencies also proposed to clarify that the second component of the limit on liability refers to the amount necessary to restore the capital of the institution to the applicable minimum capital levels as those levels were defined at the time that the institution initially failed to comply with its capital plan. The amount of a capital guarantee would not change if the minimum capital adequacy standards changed after the time the institution initially failed to comply with its capital restoration plan. [14] The commenters that addressed this issue favored this approach, and the agencies have adopted the proposal in the final rules.

[14] Any modification of the minimum capital requirement for savings associations, required by FIRREA's transition schedules, is not a change of the minimum capital adequacy requirements for purposes of section 38 and this part.

The final rules also include the agencies' proposal for implementing the statutory provision that limits the duration of a guarantee of a capital plan. Under the proposal, the appropriate Federal banking agency would provide notice to the company that the guarantee has expired once the depository institution has remained adequately capitalized for four consecutive calendar quarters. This approach permits the agency and the institution to verify that the limit of liability under the guarantee has expired.

The final rules adopt provisions that make clear that expiration of a guarantee or fulfillment of a guarantee given by a company in connection with one capital restoration plan does not relieve the company from the obligation to guarantee another capital restoration plan that may be required at a future date for the same institution if it again becomes undercapitalized. Similarly, the fact that a company has, at one time, fulfilled a guarantee by providing resources to an institution up to the statutory limit would not reduce the amount of any guarantee of a future capital plan for the same institution. Moreover, the provision or fulfillment by a company of a guarantee for one institution does not affect the obligation of that company to guarantee a capital plan in connection with any other insured depository institution. Commenters generally did not disagree with these provisions.

One commenter asked that a company that has performed on a guarantee of a capital plan be granted a two-year grace period before being required to guarantee another plan by the same institution. The agencies do not believe that the statute contemplates such an exception.

5. Priority in Bankruptcy

In the original proposal for comment, the agencies noted that the FDIC will have a priority claim in any bankruptcy proceedings of a holding company that has guaranteed an institution's compliance with a capital restoration plan. The FDIC's claim against a holding company's estate would have priority over the claims of unsecured creditors and is provided for in section 507(a)(8) of Title 11 of the United States Code, as amended by the Crime Control Act of 1990, Public Law 101–647, 104 Stat. 4789. Sections 365(o) and 523(a)(12) of Title 11 of the United States Code, as amended by the Crime Control Act of 1990, also provide special protections for the FDIC. The agencies did not receive any comment on this matter.

6. Submission of Plans by Reclassified Institutions

Section 38(g) provides that an institution that has been reclassified to a different capital category as a result of an agency determination that the institution is in an unsafe or unsound condition or is engaged in an unsafe or unsound practice must describe the steps the institution will take to address these deficiencies. The final rules reflect this statutory requirement.

Section 38(g) also provides that an institution is not required to submit a capital restoration plan if the institution nominally has adequate capital but has, because of its condition or practices, been made subject to provisions applicable to an undercapitalized institution. The agencies requested comment on whether it was appropriate to require by regulation that all adequately capitalized institutions that are subject to provisions as if the institution were undercapitalized file a plan describing the steps that would be required to address its deficiencies. The commenters strongly urged that this provision not be adopted in the regulation and that the agencies reserve authority to require plans on a case-by-case basis. The agencies agree that these plans may not always be appropriate and have determined to consider the need for these plans on a case-by-case basis as provided in section 38.

7. Revised Capital Restoration Plans

The agencies requested comment regarding whether the final rules should require in all cases that an insured depository institution that is operating under a capital restoration plan that has been approved by the appropriate Federal banking agency must submit an additional or a revised capital restoration plan if the institution's capital classification changes. Commenters generally believed that an inflexible rule would result in requiring an institution to file capital plans more frequently than necessary to address the institution's problems. On the other hand, commenters agreed that the agencies had discretion under section 38 to require a capital plan in individual cases as appropriate.

The final rules do not adopt a regulatory requirement that an institution file a new or revised capital restoration plan in the event that the institution's capital category changes. Instead, the agencies have adopted a provision in the final rules retaining discretion to determine on a case-by-case basis that an institution must

submit a new or revised capital plan. Under the final rules, in the event that the agency determines that a new or revised plan must be submitted, the agency will provide notice to the institution.

H. Monitoring Undercapitalized Institutions.

Section 38 requires the agencies to monitor closely institutions that are undercapitalized, significantly undercapitalized, or critically undercapitalized. The agencies must also monitor compliance by these institutions with their capital restoration plans and with restrictions and requirements imposed under section 38. This monitoring will be carried out through review of the reports filed by the institution, examinations of the institution on an appropriate time schedule, and informal discussions with the institution regarding the steps that it is taking to improve its condition, develop and implement an acceptable capital restoration plan, and comply with applicable requirements.

As part of this monitoring program, the appropriate Federal agency will discuss with the institution any revisions that may need to be made by an institution to its capital plan. The appropriate agency also will discuss elimination of restrictions that are no longer needed as an institution successfully implements its capital plan and improves its financial condition. Once an institution has fulfilled its capital restoration plan and returned to at least the adequately capitalized category, directives issued pursuant to section 38 will be removed.

I. Other Matters

1. Definition of "Management Fee"

Section 38 of the FDI Act prohibits any institution from paying management fees to a controlling person if, following the payment of those fees, the institution would be undercapitalized. The agencies had proposed to define a management fee to be any payment for management services or advice, other than payments to individuals in their capacity as employees of the institution.

Commenters expressed concern that this definition could be interpreted to preclude payments for non-management services obtained from an affiliate, such as data processing services. In order to address this concern, one commenter, representing a group of insured institutions, suggested defining a management fee to be any payment made for the provision of management services or advice in connection with "supervisory, executive, managerial, or policymaking functions." The agencies believe that this formulation covers the types of fees identified by the statute without affecting fees paid for non-management services, which are not prohibited by the mandatory provisions of section 38.

The final rules generally adopt the language suggested by the commenter and define management fees to include any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the bank, or related overhead expenses, including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the bank. The definition does not include payments to a controlling person for such things as electronic data processing, trust activities, mortgage servicing, audit and accounting services, property management, or other similar service fees.

The agencies point out that while fees paid for nonmanagement services provided by an affiliate are not prohibited by the mandatory provisions of section 38, the agencies have discretion under several provisions of section 38 to restrict any fees paid to an affiliate by an undercapitalized institution or any transaction between the undercapitalized institution and an affiliate. The agencies also stress that all management fees and servicing fees paid by an insured institution to an affiliate are subject to the restrictions and requirements of sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c, 371c–1), regardless of the institution's capital category under section 38. Sections 23A and 23B require that services that are provided to an insured institution be provided on terms that are at least as favorable to the insured institution as would be available from a third party.

2. Definition of "Control" and "Controlling Person"

The agencies requested comment regarding the definition of "control," particularly whether an exception should be provided for persons that have acquired control of an institution in a fiduciary capacity or in satisfaction of a debt previously contracted (DPC). The word "control" is used in two provisions of the regulation: first, in the definition of controlling person, noted below, and second, in the requirement that for any capital restoration plan to be acceptable, the plan must be guaranteed by each company having control of the institution.

Section 38 does not define the term "control." Section 3 of the FDI Act, however, adopts the definition of "control" contained in section 2 of the Bank Holding Company Act (BHC Act) (12 U.S.C. 1841(a)(2)). Under the BHC Act, a company controls an institution if the company owns or controls 25 percent or more of the voting securities of that institution, controls the board of directors of the institution; or exercises a controlling influence over the management or policies of the institution.

The BHC Act also provides exclusions for certain types of share ownership from the applicability of the control provisions. Section 2(a)(5)(A) of the BHC Act (12 U.S.C. 1841(a)(5)(A)) states that a bank or company is not deemed to be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, provided that the bank or company does not retain sole right to vote the shares. Additionally, section 2(a)(5)(D) of the BHC Act (12 U.S.C. 1841(a)(5)(D)) permits a company to hold shares of a depository institution acquired DPC without being deemed to be a bank holding company, provided that the company disposes of the shares within two years (with the possibility of three one-year extensions).

The proposed rules noted that the FDI Act also contains a DPC exception. Section 5 of the Act (12 U.S.C. 1815), addresses the liability of commonly controlled depository institutions for "cross-guarantee" claims. Section 5(e)(7) of the FDI Act (12 U.S.C. 1815(e) (7)) contains an exception for the acquisition by an insured depository institution of shares of another depository institution in satisfaction of a debt previously contracted. That exception is conditioned on the requirement that all transactions between the controlling institution or any affiliate of the controlling institution and the subsidiary institution comply with the restrictions contained in sections 23A and 23B of the Federal Reserve Act.

The agencies requested comment on whether it would be appropriate under section 38 to provide, by regulation, an exception from the definition of "control" for shares held in a fiduciary capacity or for shares acquired DPC. The agencies also requested comment on whether, assuming there were an exception for shares acquired DPC, the exception should be subject to the conditions established in the FDI Act regarding compliance with sections 23A and 23B.

The agencies received 18 comment letters on this matter. All 18 comment letters supported the adoption of a definition of "control" similar to that found presently in the BHC Act. Seventeen comment letters also supported the adoption of fiduciary ownership and DPC exceptions from the definition of "control". Commenters strongly supported adopting these exceptions and argued that without these exceptions companies would be unlikely to hold stock from an insured institution in a fiduciary capacity or accept such stock as collateral for a loan because of the potential liability under section 38. Seven comment letters supported the inclusion of conditions similar to those contained in section 5(e)(7) of the FDI Act in the DPC exception, with one comment letter opposed.

The agencies have included in the final rules implementing section 38 a definition of the term "control" identical to that provided in section 2 of the BHC Act and an exception from that definition for shares held in a fiduciary capacity and for shares acquired DPC. Similar to section 2(a)(5)(A) of the BHC Act, the fiduciary exception is premised on the condition that the bank or company holding the shares not retain the sole right to vote the shares. The DPC exception in the final rule parallels section 2(a)(5)(D) of the BHC Act in that the shares held DPC must be disposed of within two years, with the possibility of three one-year extensions. The agencies did not consider it necessary to include conditions similar to those contained in the DPC exception to section 5 of the FDI Act (12 U.S.C. 1815(e)(7)) in the final rule.

Qualification for an exemption from the definition of control, however, does not exempt the depository institution whose shares are held by another company or depository institution from the provisions of section 38. Whether or not it is "controlled" by another entity, a depository institution whose stock is held DPC or in a fiduciary capacity will still be subject to all relevant provisions of section 38 in accordance with its capital category. For example, an undercapitalized institution whose stock is held DPC may not pay dividends.

The final rules add a definition of the term "controlling person." The term "controlling person" is defined as any person having control of an insured depository institution and any company controlled by that person. Thus, the prohibition on payment of management fees covers payment to any company, including a consulting firm, owned by the principal shareholder of an institution, and any servicing company owned by a bank holding company.

3. Restrictions on Advertising

The proposed rule limited an insured depository institution's use of its capital category for any purpose, except when permitted by the appropriate Federal banking agency or otherwise required by law. This provision was intended to restrict the ability of insured depository institutions to advertise their capital category.

The agencies received eleven comments in support of this limitation on use of the capital category. Twelve commenters objected and urged that financial institutions be allowed to advertise their capital category.

Some commenters expressed concern about the practicality of such a prohibition given that disclosure of the category may be required for purposes of risk-based deposit insurance premiums, brokered deposits, and interbank liabilities. Disclosure may also be necessary in securities filings.

The agencies recognize that disclosure may be appropriate under some circumstances. The prompt corrective action framework in section 38 was designed, however, to be a supervisory tool, not a marketing vehicle. The agencies have long held that capital levels are a lagging indicator of problems in financial institutions. An advertisement that cites a financial institution's capital category under section 38 could be misleading to the general public. Depositors, investors and other affected persons could improperly view the capital category designation as the regulator's definitive assessment of the insured depository institution's true financial condition.

Taking account of the concerns expressed by the commenters, the final rule has narrowed the disclosure restriction to prohibit the advertising of the capital category assigned to an institution pursuant to section 38. The final rule does not restrict advertising of the institution's capital levels or financial condition. The institution may not, however, describe itself in an advertisement or in promotional material as falling within the well capitalized category, as that category is defined by the Federal banking agencies pursuant to section 38. Nor may the institution advertise that its appropriate Federal banking agency has determined it to be well capitalized.

4. Applicability of Capital Categories to Bank Holding Companies and Savings and Loan Holding Companies

Section 38 applies capital-based prompt corrective action to insured depository institutions but not to holding companies that control such institutions. The commenters strongly urged the Federal Reserve Board and the OTS not to impose the framework of section 38 to bank holding companies and to savings and loan holding companies. Several commenters argued that the enactment of section 38 provided the agencies with an opportunity to eliminate the capital adequacy standards that are currently applicable to bank holding companies and savings and loan holding companies.

The Board and the OTS have determined not to apply section 38 to bank holding companies and savings and loan holding companies. The statute, by its terms, applies only to insured depository institutions, and Congress has provided no indication that it intended the framework to be extended. The agencies also have authority under a number of other statutory provisions to supervise the activities and financial condition of holding companies.

The agencies note, however, that, while the complete supervisory framework of section 38 does not govern holding companies, various provisions of section 38 apply to companies that control insured depository institutions. These provisions, including the provisions regarding guarantee of a capital restoration plan, appear to apply to holding companies regardless of the capital level of those holding companies. The Federal Reserve Board intends to consult with the Federal banking agency for each insured depository institution subsidiary of a bank holding company to monitor supervisory actions required under section 38, and, in the supervision of the holding company, to take appropriate action at the holding company level based on an assessment of these developments. In supervising savings and loan holding companies, the OTS will concentrate on ensuring that subsidiary savings associations are well managed and well capitalized and that transactions and relationships between savings associations and their holding companies satisfy fiduciary requirements and do not negatively affect the safety and soundness of the subsidiary associations. OTS will supervise holding companies in a manner consistent with the effectiveness of supervisory actions required under section 38 imposed upon subsidiary associations.

5. Restrictions on Activities of Critically Undercapitalized Institutions

Section 38(i) of the FDI Act provides that the FDIC must, by regulation or

order, restrict the activities of critically undercapitalized institutions. The activities that must be restricted are described above. FDICIA does not provide specific guidance on how to interpret and implement each of the restrictive provisions of section 38(i). Consequently, the FDIC considered a number of options.

The prohibition on entering into "any material transaction other than in the usual course of business" can be interpreted in a general fashion relying on outstanding case law in the area of securities disclosures. The concept of materiality also could be defined from an accounting perspective by establishing specific limits for determining materiality. For example, the FDIC could, by regulation, require that any prospective transaction other than one that is in the usual course of business that results or could result in a 5 percent change in an institution's tangible equity capital account or net income account would automatically be considered a material transaction requiring the FDIC's prior approval. Other transactions could be defined as material on a case by case basis. The FDIC solicited comment on how to define the terms "material" and "usual course of business" as well as what specific guidance, if any, should be provided by the FDIC to the banking industry.

The FDIC received two comments on the materiality issue. One respondent suggested the definition be based on market capitalization as opposed to a percentage based on equity capital. The range suggested was between 5 and 10 percent. The other respondent suggested that the denominator for defining a material transaction be based on 10 percent of total assets.

After consideration of the above comments, the FDIC has decided to define a material transaction on a case-by-case basis. The FDIC believes that defining a material transaction using a fixed percentage of capital or assets could be arbitrary and exclude those transactions that initially may be de minimus in amount or not easily subjected to a quantifiable measure but "material" in substance such as a proposal to engage in a new service-oriented activity. A fixed measurement also could be inconsistent with the statutory requirement that a material transaction includes those activities where the institution would have to notify its appropriate Federal banking agency.

The FDIC did not receive any comments on how to apply the phrase "usual course of business" or what specific guidance, if any, to provide to the banking industry. The FDIC intends to interpret this phrase to mean any activity currently engaged in by the specific institution. Therefore, any new activity not currently exercised by the specific institution, though permissible and approved by the appropriate regulator(s), would require the FDIC's prior written approval. For example, a critically undercapitalized institution that wishes to engage for the first time in commercial real estate lending and to establish a new commercial real estate loan department would be required to obtain the FDIC's prior written approval under this section.

The FDIC recognizes that the types of activities considered "usual" for a particular institution are contingent on its size, location, management expertise, business strategy, etc. Consequently, what may be "usual" for a large urban institution may not be "usual" for a smaller rural institution and vice versa. The FDIC believes that this definition of new activity is consistent with the statutory intent that troubled institutions should focus their attention on their existing problems and existing lines of business.

The FDIC proposed to define the term "highly leveraged transaction" by utilizing the interagency definition published in the **Federal Register** (57 FR 5040, February 11, 1992). Due to the uncertainty over whether the HLT definition will remain in effect, the FDIC has decided to adopt in the final rule an abbreviated definition for HLTs that will apply to critically undercapitalized institutions. The FDIC also intends to rely on existing generally accepted accounting principles when interpreting the restriction on making any "material change in accounting methods."

Section 39(c) of the FDI Act requires the Federal banking agencies to prescribe standards for determining when compensation paid to employees, directors and principal shareholders of insured depository institutions is excessive. An advance notice of proposed rulemaking was recently published in the **Federal Register** (52 FR 31336, July 15, 1992). The FDIC intends to interpret the restrictive provision in section 38(i)(2)(F) involving the payment of excessive compensation or bonuses in a manner that is consistent with the FDIC's actions in fulfilling the requirements of section 39(c) of the FDI Act. In the interim, the FDIC intends to enforce section 38(i) by requiring prior written approval of any change in the institution's compensation of any of its executive officers (as defined in Federal Regulation O (12 CFR part 215), directors and principal shareholders and will consider existing compensation levels on a case-by-case basis.

The provision that restricts "paying interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market areas" contains terms that are similar to those mandated by section 301 of FDICIA and the revisions of § 337.6 of the FDIC's regulations (12 CFR 337.6) as recently implemented by the FDIC. Specifically, the FDIC intends to interpret the phrase "significantly exceeding the prevailing rates" the same as defined in § 337.6. The prevailing effective yields of interest are the effective yields on insured deposits of comparable maturities offered by other insured depository institutions in the market area in which deposits are being solicited. A market area is any readily defined geographic area in which the rates offered by any one insured depository institution soliciting deposits in the area may affect the rates offered by other institutions soliciting deposits in the same area.

6. Application of Prompt Corrective Action to Insured Branches

Section 38(a)(2) of the FDI Act, as added by section 131 of FDICIA, provides that each appropriate Federal banking agency and the FDIC (acting in the FDIC's capacity as the insurer of depository institutions) shall take prompt corrective action to resolve the problems of insured depository institutions.

Section 3(c)(2) of the FDI Act defines the term "insured depository institution" as any bank or savings association the deposits of which are insured by the FDIC pursuant to the FDI Act. 12 U.S.C. 1813(c)(2). The term "bank" is defined, in section 3(a)(1) of the FDI Act, to include, *inter alia*, any "insured branch." 12 U.S.C. 1813(a)(1). Section 3(s)(3) defines the term "insured branch" to mean any branch (as defined in section 1(b)(3) of the International Banking Act of 1978) of a foreign bank any deposits in which are insured pursuant to the FDI Act. 12 U.S.C. 1813(s)(3).

The plain language of these statutory provisions requires the application of the prompt corrective action provisions to insured branches of foreign banks, including insured federal branches. Insured branches, however, are not required to maintain minimum capital levels under the FDIC's capital maintenance regulations, 12 CFR part 325. In fact, they are expressly excluded

from the definition of "insured depository institution" which is used in the FDIC's capital maintenance regulations. 12 CFR 325.2(f). Insured branches, however, are required to maintain a pledge of assets, pursuant to 12 CFR 346.19, and a certain volume of eligible assets, pursuant to 12 CFR 346.20.

Insured federal branches, likewise, are not required to maintain minimum capital levels under the OCC's capital maintenance regulations, 12 CFR part 3. See 50 FR 10215, March 14, 1985. In addition to the asset pledge and asset maintenance requirements to which all insured branches are subject, all federal branches are required by section 4 of the International Banking Act of 1978 (12 U.S.C. 3102(g)(2)) to establish capital equivalency deposits which generally must equal at least 5 percent of the branch's third party liabilities. Federal branches also may be required by the OCC to maintain a certain quantity of specified assets in the states in which they operate.

In an effort to promote competitive equality between insured federal and state branches of foreign banks, the OCC and the FDIC proposed a uniform definition of capital categories for all insured branches of foreign banks based upon the FDIC's asset pledge and asset maintenance requirements which apply to all insured branches.

The OCC and the FDIC recognize that the eligible assets and, more particularly, the pledge of assets are not perfect substitutes for capital. Nonetheless, the FDIC has long taken the position that the asset maintenance requirement is analogous to a domestic bank's required capital. Therefore, the OCC and the FDIC have decided to utilize FDIC's regulations governing the pledge of assets and the level of eligible assets to determine an insured branch's capital category.

For prompt corrective action purposes, an insured federal branch will be deemed:

"Well capitalized" if it:

1. Maintains the pledge of assets required under 12 CFR 346.19; and

2. Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

3. Has not received written notification from (1) the OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.6(a), or to comply with the asset maintenance requirements pursuant to 12 CFR 28.9 or (2) the FDIC to pledge additional assets pursuant to 12 CFR 346.19 or to maintain a higher ratio of eligible assets pursuant to 12 CFR 346.20.

"Adequately capitalized" if it:

1. Maintains the pledge of assets required under 12 CFR 346.19;

2. Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

3. Does not meet the definition of a "well capitalized" insured branch.

"Undercapitalized" if it:

1. Fails to maintain the pledge of assets required under 12 CFR 346.19; or

2. Fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

"Significantly undercapitalized" if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 104 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

"Critically undercapitalized" if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 102 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

Section 38 of the FDI Act enumerates the corrective measures that the appropriate Federal banking agency may or must take against, and what restrictions apply to, institutions in each of the five capital categories. Some of the prescribed measures and applicable restrictions may not be practical or appropriate in dealing with insured branches of foreign banks.

Therefore, it is the intent of the OCC and the FDIC to apply to insured branches as many of the prompt corrective measures and restrictions as practical and appropriate, given the unique characteristics of insured branches.

Several respondents expressed the view that the prompt corrective action provisions in section 38 of the FDI Act should apply to insured branches of foreign banks and that the capital levels should be comparable with those for domestic banks. The FDIC and OCC, as the primary federal regulators of insured branches, concur with this approach. As a result, the prompt corrective action rules of the FDIC and OCC intend to accomplish this objective by using the asset pledge and asset maintenance tests noted above for purposes of determining an insured branch's capital category.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, it is hereby certified that these final rules will not have a significant impact on a substantial number of small entities.

The final rules impose the minimum burdens necessary to implement the prompt corrective action provisions of section 131 of FDICIA for all insured depository institutions, regardless of size. The regulation requires each insured depository institution to monitor its capital levels and to report to the appropriate Federal banking agency any material event that would cause the institution to be classified within a lower capital category. In addition, the final rules require an institution that becomes undercapitalized, significantly undercapitalized, or critically undercapitalized to submit a capital restoration plan.

The filing of the capital plan is a requirement imposed by statute and occurs only when an institution initially becomes undercapitalized, significantly undercapitalized, or critically undercapitalized. In establishing a mechanism for gathering sufficient information to determine the appropriate capital category for each insured depository institution, the Federal banking agencies have attempted to reduce the burden imposed on such institutions by relying primarily on the Call Report that must already be filed and on reports of examination that would otherwise take place. No additional regular reporting requirement has been imposed.

Executive Order 12291

The OCC and OTS have determined that these final rules are not major regulations as defined in Executive Order 12291. These final rules implements section 131 of FDICIA, which established a new statutory framework for resolving the problems of insured depository institutions at the least long-term cost to the FDIC.

List of Subjects

12 CFR Part 6

Banks, Banking, Capital adequacy, National banks.

12 CFR Part 19

Administrative practice and procedure, Crime, Dismissals, Investigations, National banks, Penalties, Reclassification, Securities.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business

information, Currency, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

12 CFR Part 263

Administrative practice and procedure, Federal Reserve System.

12 CFR Part 308

Administrative practice and procedure, claims, equal access to justice, lawyers, penalties.

12 CFR Part 325

Bank deposit insurance, Banks, Banking, Capital adequacy, Reporting and recordkeeping requirements, State nonmember banks, Savings associations.

12 CFR Part 565

Administrative practice and procedure, Capital, Savings associations.

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 263

For the reasons outlined above, the Board of Governors amends 12 CFR parts 208 and 263 as set forth below:

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

1. The authority citation for 12 CFR part 208 is revised to read as follows:

Authority: Secs. 9, 11(a), 11(c), 19, 21, 25 and 25(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); secs. 4, 13(j) and 38 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1814, 1823(j), and 1831o, respectively); sec. 7(a) of the International Banking Act of 1978 (12 U.S.C. 3105); secs. 907–910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3906–3909); secs. 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, 781(b), 1781(g), 781(i), 78o–4(c) (5), 78q, 78q–1, and 78w, respectively); sec. 5155 of the Revised Statutes (12 U.S.C. 36) as amended by the McFadden Act of 1927; and secs. 1101–1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3310 and 3331–3351).

Subpart A—General Provisions

2. The undesignated centerheading preceding § 208.1 is removed, §§ 208.1 through 208.19 are designated as subpart A to part 208, and the subpart A heading is added to read as set forth above.

3. Subpart B, comprising §§ 208.30 through 208.35, is added to part 208 to read as follows:

Subpart B—Prompt Corrective Action

Sec.
208.30 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.
208.31 Definitions.
208.32 Notice of capital category.
208.33 Capital measures and capital category definitions.
208.34 Capital restoration plans.
208.35 Mandatory and discretionary supervisory actions under section 38.

Subpart B—Prompt Corrective Action

§ 208.30 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.

(a) *Authority.* This subpart is issued by the Board of Governors of the Federal Reserve System (Board) pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o.).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for state member banks, the capital measures and capital levels that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to state member banks. Certain of these provisions also apply to officers, directors and employees of state member banks. Other provisions apply to any company that controls a state member bank and to the affiliates of a state member bank.

(d) *Other supervisory authority.* Neither section 38 nor this subpart in any way limits the authority of the Board under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the Board, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a bank under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the Board or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the Board or any other Federal banking agency has assigned the bank to a particular capital category.

§ 208.31 Definitions.

For purposes of this subpart, except as modified in this section or unless the context otherwise requires, the terms used have the same meanings as set forth in section 38 and section 3 of the FDI Act.

(a) (1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term "controlled" shall be construed consistently with the term "control."

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate Federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to average total consolidated assets, as calculated in accordance with the Board's Capital Adequacy Guidelines for State Member Banks: Tier 1 Leverage Measure (appendix B to part 208).

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the bank or related overhead expenses,

including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the bank.

(e) *Risk-weighted assets* means total weighted risk assets, as calculated in accordance with the Board's Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure (appendix A to part 208).

(f) *Tangible equity* means the amount of core capital elements in the Board's Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure (appendix A to part 208), plus the amount of outstanding cumulative perpetual preferred stock (including related surplus), minus all intangible assets except purchased mortgage servicing rights to the extent that the Board determines pursuant to section 475 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 1828 note) that purchased mortgage servicing rights may be included in calculating the bank's Tier 1 capital.

(g) *Tier 1 capital* means the amount of Tier 1 capital as defined in the Board's Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure (appendix A to part 208).

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to weighted risk assets, as calculated in accordance with the Board's Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure (appendix A to part 208).

(i) *Total assets* means quarterly average total assets as reported in a bank's Report of Condition and Income (Call Report), minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of qualifying total capital to weighted risk assets, as calculated in accordance with the Board's Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure (appendix A to part 208).

§ 208.32 Notice of capital category.

(a) *Effective date of determination of capital category.* A state member bank shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart as of the date the bank is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A state member bank shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Report of Condition and Income (Call Report) is required to be filed with the Board;

(2) A final report of examination is delivered to the bank; or

(3) Written notice is provided by the Board to the bank of its capital category for purposes of section 38 of the FDI Act and this subpart or that the bank's capital category has changed as provided in paragraph (c) of this section or § 208.33(c).

(c) *Adjustments to reported capital levels and capital category.—(1) Notice of adjustment by bank.* A state member bank shall provide the Board with written notice that an adjustment to the bank's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the bank to be placed in a lower capital category from the category assigned to the bank for purposes of section 38 and this subpart on the basis of the bank's most recent Call Report or report of examination.

(2) *Determination by the Board to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the Board shall determine whether to change the capital category of the bank and shall notify the bank of the Board's determination.

§ 208.33 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this subpart, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this subpart, a state member bank shall be deemed to be:

(1) "Well capitalized" if the bank:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the Board pursuant to section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) "Adequately capitalized" if the bank:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has—

(A) A leverage ratio of 4.0 percent or greater, or

(B) A leverage ratio of 3.0 percent or greater if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth; and

(iv) Does not meet the definition of a "well capitalized" bank.

(3) "Undercapitalized" if the bank:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) (A) Except as provided in clause (B), has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent, if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth.

(4) "Significantly undercapitalized" if the bank has—

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) "Critically undercapitalized" if the bank has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Reclassification based on supervisory criteria other than capital.* The Board may reclassify a well capitalized state member bank as adequately capitalized and may require an adequately capitalized or an undercapitalized state member bank to comply with certain mandatory or discretionary supervisory actions as if the bank were in the next lower capital category (except that the Board may not reclassify a significantly undercapitalized bank as critically undercapitalized) (each of these actions are hereinafter referred to generally as "reclassifications") in the following circumstances:

(1) *Unsafe or unsound condition.* The Board has determined, after notice and opportunity for hearing pursuant to § 263.203 of this chapter, that the bank is in unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The Board has determined, after notice and opportunity for hearing pursuant to § 263.203 of this chapter, that, in the most recent examination of the bank,

the bank received and has not corrected, a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

§ 208.34 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A state member bank shall file a written capital restoration plan with the appropriate Reserve Bank within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the Board notifies the bank in writing that the plan is to be filed within a different period. An adequately capitalized bank that has been required pursuant to § 208.33(c) to comply with supervisory actions as if the bank were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a bank that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 208.33(c) unless the Board notifies the bank that it must submit a new or revised capital plan. A bank that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate Reserve Bank within 45 days of receiving such notice, unless the Board notifies the bank in writing that the plan is to be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report, unless the Board instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A bank that is required to submit a capital restoration plan as the result of a reclassification of the bank pursuant to § 208.33(c) shall include a description of the steps the bank will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of that Act by each company that controls the bank.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the Board shall provide written notice to the bank of whether the plan has been approved. The Board may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the Board, the bank shall submit a revised capital restoration plan within the time specified by the Board. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized state member bank (as defined in § 208.33(b)(3)) shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the bank has been approved by the Board.

(e) *Failure to submit capital restoration plan.* A state member bank that is undercapitalized (as defined in § 208.33(b)(3)) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) *Failure to implement capital restoration plan.* Any undercapitalized state member bank that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(g) *Amendment of capital plan.* A bank that has filed an approved capital restoration plan may, after prior written notice to and approval by the Board, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Notice to FDIC.* Within 45 days of the effective date of Board approval of a capital restoration plan, or any amendment to a capital restoration plan, the Board shall provide a copy of the plan or amendment to the Federal Deposit Insurance Corporation.

(i) *Performance guarantee by companies that control a bank—(1) Limitation on Liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific state member bank that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the bank's total assets at the time the bank was notified or deemed to have notice that the bank was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the bank to the levels required for the bank to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the bank initially fails to comply with a capital restoration plan under this subpart.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this subpart shall expire after the Board notifies the bank that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same bank after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given bank shall be jointly and severally liable for the guarantee for such bank as required under section 38 and this subpart, and the Board may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a bank that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e) (2) of the FDI Act, the bank shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart that are applicable to banks that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a bank to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the bank shall be subject to the provisions of section 38 and this subpart that are applicable to banks that have failed in a material respect to implement a capital restoration plan.

§ 208.35 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all banks.* All state member banks are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks.* Immediately upon receiving notice or being deemed to have notice, as provided in section § 208.32 or section § 208.34 of this subpart, that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the Board monitor the condition of the bank (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the bank's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 3(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 208.32 or § 208.34 of this subpart, that the bank is significantly undercapitalized, or critically undercapitalized, or that the bank is subject to the provisions applicable to institutions that are significantly undercapitalized because the bank failed to submit or implement in any material respect an acceptable capital restoration plan, the bank shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a) (2) and (3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 208.32 of this subpart, that the bank is critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting the activities of the bank (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the bank (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the Board's discretion to take in connection with: A state member bank that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such bank; or a company that controls such bank, the Board shall follow the procedures for issuing directives under §§ 263.202 and 263.204 of this chapter, unless otherwise provided in section 38 or this subpart.

Subparts C and D—[Reserved]

Subpart E—Interpretations

4. Subparts C and D are added to part 208 and reserved, the undesignated centerhead preceding section 208.116 is removed, §§ 208.116, 208.117, 208.122, and 208.124 through 208.128 are designated as subpart E of part 208, and the subpart E heading is added to read as set forth above.

PART 263—RULES OF PRACTICE FOR HEARINGS

1. The authority citation for 12 CFR Part 263 is revised to read as follows:

Authority: 5 U.S.C. 504; 12 U.S.C. 248, 324, 504, 505, 1817(j), 1818, 1828(c), 1831o, 1847(b), 1847(d), 1884(b), 1972(2) (F), 3105, 3107, 3108, 3907, 3909; 15 U.S.C. 21, 78o-4, 78o-5, and 78u-2.

2. Section 263.50(b) is amended by removing the word "and" at the end of paragraph (b)(9), removing the period at the end of paragraph (b)(10) and adding in its place a semicolon, and by adding paragraphs (b)(11) through (b)(14) to read as follows:

§ 263.50 Purpose and scope.

* * * * *

(b) * * *

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1)); and

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii)).

3. A new subpart H is added to part 263 to read as follows:

Subpart H—Issuance and Review of Orders Pursuant to Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

Sec.
§ 263.201 Scope.
§ 263.202 Directives to take prompt corrective action.
§ 263.203 Procedures for reclassifying a state member bank based on criteria other than capital.
§ 263.204 Order to dismiss a director or senior executive officer.
§ 263.205 Enforcement of directives.

Subpart H—Issuance and Review of Orders Pursuant to Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

§ 263.201 Scope.

(a) The rules and procedures set forth in this subpart apply to state member banks, companies that control state member banks or are affiliated with such banks, and senior executive officers and directors of state member banks that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) and subpart B of part 208 of this chapter.

§ 263.202 Directives to take prompt regulatory action.

(a) *Notice of intent to issue directive.*—(1) *In general.* The Board shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized state member bank or, where appropriate, any company that controls the bank, prior written notice of the Board's intention to issue a directive requiring such bank or company to take actions or to follow proscriptions described in section 38 that are within the Board's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The bank shall have such time to respond to a proposed directive as provided by the Board under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the Board finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the Board may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a state member bank or any company that controls a state member bank immediately to take actions or to follow proscriptions described in section 38 that are within the Board's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A bank or company that is subject to such an immediately effective directive may submit a written

appeal of the directive to the Board. Such an appeal must be received by the Board within 14 calendar days of the issuance of the directive, unless the Board permits a longer period. The Board shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the Board, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the bank's capital measures and capital levels;

(2) A description of the restrictions, prohibitions, or affirmative actions that the Board proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the bank or company subject to the directive may file with the Board a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A bank or company may file a written response to a notice of intent to issue a directive within the time period set by the Board. The date shall be at least 14 calendar days from the date of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the Board is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the proposed directive.

(d) *Board consideration of response.* After considering the response, the Board may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the bank or company; or

(3) Seek additional information or clarification of the response from the bank or company, or any other relevant source.

(e) *Failure to file response.* Failure by a bank or company to file with the Board, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any bank or company that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the Board reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the Board, the directive shall continue in place while such request is pending before the Board.

§ 263.203 Procedures for reclassifying a state member bank based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.* (A) Pursuant to § 208.33(c) of Regulation H (12 CFR 208.33(c)), the Board may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The Board determines that the bank is in unsafe or unsound condition; or

(*2*) The Board deems the bank to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as "reclassification."

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 208.33(c) of this chapter, the Board shall issue and serve on the bank a written notice of the Board's intention to reclassify the bank.

(2) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition shall include:

(i) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(ii) The reasons for reclassification of the bank;

(iii) The date by which the bank subject to the notice of reclassification may file with the Board a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the Board. The response should include:

(i) An explanation of why the bank is not in unsafe or unsound condition or otherwise should not be reclassified;

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the reclassification.

(4) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the Board to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the Board or its designee under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the Board shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the bank requests a later date. The hearing shall be held in Washington, DC or at such other place as may be designated by the Board, before a presiding officer(s) designated by the Board to conduct the hearing.

(7) *Hearing procedures.* (i) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the Board or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing

under this section unless the Board orders that such procedures shall apply.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the bank upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the Board on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the Board will decide whether to reclassify the bank and notify the bank of the Board's decision.

(b) *Request for rescission of reclassification.* Any bank that has been reclassified under this section, may, upon a change in circumstances, request in writing that the Board reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the Board, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the Board.

§ 263.204 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the Board issues and serves a directive on a state member bank pursuant to § 263.202 requiring the bank to dismiss from office any director or senior executive officer under section 38(f) (2) (F) (ii) of the FDI Act, the Board shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the Board at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the Board or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the Board, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the Board shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, D.C., or at such other place as may be designated by the Board, before a presiding officer(s) designated by the Board to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the Board or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the Board orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the Board concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the Board shall grant or deny the request for reinstatement and notify the Respondent of the Board's decision. If the Board denies the request for reinstatement, the Board shall set forth in the notification the reasons for the Board's action.

§ 263.205 Enforcement of directives.

(a) *Judicial remedies.* Whenever a state member bank or company that controls a state member bank fails to comply with a directive issued under section 38, the Board may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i) (1) of the FDI Act.

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i) (2) (A) of the FDI Act, the Board may assess a civil money penalty against any state member bank or company that controls a state member bank that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who

participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of a bank to implement a capital restoration plan required under section 38, subpart B of Regulation H (12 CFR part 208, subpart B), or this subpart, or the failure of a company having control of a bank to fulfill a guarantee of a capital restoration plan made pursuant to section 38 (e) (2) of the FDI Act shall subject the bank or company to the assessment of civil money penalties pursuant to section 8(i) (2) (A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the Board may seek enforcement of the provisions of section 38 or subpart B of Regulation H (12 CFR part 208, subpart B) through any other judicial or administrative proceeding authorized by law.

By order of the Board of Governors of the Federal Reserve System.

Dated: September 18, 1992.

William W. Wiles,

Secretary of the Board.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 6 and 19

For the reasons set forth in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as set forth below:

1. Part 6 is added to read as follows:

PART 6—PROMPT CORRECTIVE ACTION

Subpart A—Capital Categories

Sec.
6.1 Authority, purpose, scope, and other supervisory authority.
6.2 Definitions.
6.3 Notice of capital category.
6.4 Capital measures and capital category definitions.
6.5 Capital restoration plans.
6.6 Mandatory and discretionary supervisory actions and section 38.

Subpart B—Directives To Take Prompt Corrective Action

6.20 Scope.
6.21 Notice of intent to issue a directive.
6.22 Response to notice.
6.23 Decision and issuance of a prompt corrective action directive.
6.24 Request for modification or rescission of directive.
6.25 Enforcement of directive.

Authority: 12 U.S.C. 93a, 1831o.

Subpart A—Capital Categories

§ 6.1 Authority, purpose, scope, and other supervisory authority.

(a) *Authority.* This part is issued by the Office of the Comptroller of the Currency (OCC) pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for insured national banks, the capital measures and capital levels, and for insured federal branches, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This part 6 also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to insured national banks and insured federal branches. Certain of these provisions also apply to officers, directors and employees of these insured institutions. Other provisions apply to any company that controls an insured national bank or insured federal branch and to the affiliates of an insured national bank or insured federal branch.

(d) *Other supervisory authority.* Neither section 38 nor this part in any way limits the authority of the OCC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OCC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of an insured national bank or insured federal branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the OCC or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the OCC or any other federal banking agency has assigned the bank to a particular capital category.

§ 6.2 Definitions.

For purposes of section 38 and this part, the definitions related to capital in part 3 of this chapter shall apply. In addition, except as modified in this section or unless the context otherwise requires, the terms used in this subpart have the same meanings as set forth in section 38 and section 3 of the FDI Act.

(a) *Bank* means all insured national banks and all insured federal branches, except where otherwise provided in this subpart.

(b) (1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term controlled shall be construed consistently with the term control.

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(c) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(d) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(e) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the bank or related overhead expenses, including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the

individual's capacity as an officer or employee of the bank.

(f) *Risk-weighted assets* means total risk weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(g) *Tangible equity* means the amount of Tier 1 capital elements in the OCC's Risk-Based Capital Guidelines (appendix A to part 3 of this chapter) plus the amount of outstanding cumulative perpetual preferred stock (including related surplus) minus all intangible assets except purchased mortgage servicing rights to the extent that the OCC determines pursuant to section 475 of the Federal Deposit Insurance Corporation Improvement Act of 1991 that purchased mortgage servicing rights may be included in calculating the bank's Tier 1 capital.

(h) *Tier 1 capital* means the amount of Tier 1 capital as defined in the OCC's Minimum Capital Ratios in part 3 of this chapter.

(i) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

(j) *Total assets* means quarterly average total assets as reported in a bank's Consolidated Reports of Condition and Income (Call Report), minus intangible assets as provided in the definition of tangible equity. The OCC reserves the right to require a bank to compute and maintain its capital ratios on the basis of actual, rather than average, total assets when computing tangible equity.

(k) *Total risk-based capital ratio* means the ratio of qualifying total capital to risk-weighted assets, as calculated in accordance with the OCC's Minimum Capital Ratios in part 3 of this chapter.

§ 6.3 Notice of capital category.

(a) *Effective date of determination of capital category.* A bank shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the bank is notified of, or is deemed to have notice of, its capital category pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A bank shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition and Income (Call Report) is required to be filed with the OCC;

(2) A final report of examination is delivered to the bank; or

(3) Written notice is provided by the OCC to the bank of its capital category for purposes of section 38 of the FDI Act and this part or that the bank's capital category has changed as provided in paragraph (c) of this section or § 6.1 of this subpart and subpart M of part 19 of this chapter.

(c) *Adjustments to reported capital levels and capital category*—(1) *Notice of adjustment by bank.* A bank shall provide the OCC with written notice that an adjustment to the bank's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the bank to be placed in a lower capital category from the category assigned to the bank for purposes of section 38 and this part on the basis of the bank's most recent Call Report or report of examination.

(2) *Determination to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OCC shall determine whether to change the capital category of the bank and shall notify the bank of the OCC's determination.

§ 6.4 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio;

(3) The leverage ratio.

(b) *Capital categories.* For purposes of the provisions of section 38 and this part, a bank shall be deemed to be:

(1) *Well capitalized* if the bank:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order or capital directive, or prompt corrective action directive issued by the OCC pursuant to section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the bank:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the bank is rated 1 in the most recent examination of the bank; and

(iv) Does not meet the definition of a well capitalized bank.

(3) *Undercapitalized* if the bank:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) (A) Except as provided in paragraph (b)(3)(iii) (B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) If the bank is rated 1 in the most recent examination of the bank, has a leverage ratio that is less than 3.0 percent.

(4) *Significantly undercapitalized* if the bank has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the bank has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Capital categories for insured federal branches.* For purposes of the provisions of section 38 of the FDI Act and this part, an insured federal branch shall be deemed to be:

(1) *Well capitalized* if the insured federal branch:

(i) Maintains the pledge of assets required under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to § 28.6(a) of this chapter, or to comply with asset maintenance requirements pursuant to § 28.9 of this chapter; or

(B) The FDIC to pledge additional assets pursuant to 12 CFR 346.19 or to maintain a higher ratio of eligible assets pursuant to 12 CFR 346.20.

(2) *Adequately Capitalized* if the insured federal branch:

(i) Maintains the pledge of assets prescribed under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Does not meet the definition of a well capitalized insured federal branch.

(3) *Undercapitalized* if the insured federal branch:

(i) Fails to maintain the pledge of assets required under 12 CFR 346.19; or

(ii) Fails to maintain the eligible assets prescribed under 12 CFR 346.20 at

106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(4) *Significantly undercapitalized* if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 104 percent or more of the preceding quarter's average book value of the insured federal branch's third-party liabilities.

(5) *Critically undercapitalized* if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 102 percent or more of the preceding quarter's average book value of the insured federal branch's third-party liabilities.

(d) *Reclassification based on supervisory criteria other than capital.* The OCC may reclassify a well capitalized bank as adequately capitalized and may require an adequately capitalized or an undercapitalized bank to comply with certain mandatory or discretionary supervisory actions as if the bank were in the next lower capital category (except that the OCC may not reclassify a significantly undercapitalized bank as critically undercapitalized) (each of these actions are hereinafter referred to generally as reclassifications) in the following circumstances:

(1) *Unsafe or unsound condition.* The OCC has determined, after notice and opportunity for hearing pursuant to subpart M of part 19 of this chapter, that the bank is in unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The OCC has determined, after notice and opportunity for hearing pursuant to subpart M of part 19 of this chapter, that in the most recent examination of the bank, the bank received, and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

§ 6.5 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A bank shall file a written capital restoration plan with the OCC within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the OCC notifies the bank in writing that the plan is to be filed within a different period. An adequately capitalized bank that has been required pursuant to § 6.4 and subpart M of part 19 of this chapter to comply with supervisory actions as if the bank were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a bank that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 6.4 and subpart M of part 19 of this chapter unless the OCC notifies the bank that it must submit a new or revised capital plan. A bank that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the OCC within 45 days of receiving such notice, unless the OCC notifies the bank in writing that the plan must be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report, unless the OCC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A bank that is required to submit a capital restoration plan as the result of a reclassification of the bank, pursuant to § 6.4 and subpart M of part 19 of this chapter, shall include a description of the steps the bank will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of that Act by each company that controls the bank.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the OCC shall provide written notice to the bank of whether the plan has been approved. The OCC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital restoration plan.* If a capital restoration plan is not approved by the OCC, the bank shall submit a revised capital restoration plan within the time specified by the OCC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized bank (as defined in § 6.4) shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the bank has been approved by the OCC.

(e) *Failure to submit a capital restoration plan.* A bank that is undercapitalized (as defined in § 6.4) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized banks.

(f) *Failure to implement a capital restoration plan.* Any undercapitalized bank that fails, in any material respect, to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized banks.

(g) *Amendment of capital restoration plan.* A bank that has submitted an approved capital restoration plan may, after prior written notice to and approval by the OCC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Notice to FDIC.* Within 45 days of the effective date of OCC approval of a capital restoration plan, or any amendment to a capital restoration plan, the OCC shall provide a copy of the plan or amendment to the Federal Deposit Insurance Corporation.

(i) *Performance guarantee by companies that control a bank*—(1) *Limitation on liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific bank that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the bank's total assets at the time the bank was notified or deemed to have notice that the bank was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the bank to the levels required for the bank to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the bank initially fails to comply with a capital restoration plan under this subpart.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this subpart shall expire after the OCC notifies the bank that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in

connection with any capital restoration plan filed by the same bank after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given bank shall be jointly and severally liable for the guarantee for such bank as required under section 38 and this subpart, and the OCC may require payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a bank that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the bank shall, upon submission of the plan, be subject to the provisions of section 38 and this part that are applicable to banks that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a bank to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the bank shall be subject to the provisions of section 38 and this part that are applicable to banks that have failed in a material respect to implement a capital restoration plan.

(j) *Enforcement of capital restoration plan.* The failure of a bank to implement, in any material respect, a capital restoration plan required under section 38 and this section shall subject the bank to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

§ 6.6 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all banks.* All banks are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks.* Immediately upon receiving notice or being deemed to have notice, as provided in § 6.3, that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act—

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the OCC monitor the condition of the bank (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the bank's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in this subpart, that the bank is significantly undercapitalized, or critically undercapitalized or that the bank is subject to the provisions applicable to institutions that are significantly undercapitalized because it has failed to submit or implement, in any material respect, an acceptable capital restoration plan, the bank shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a) (2) and (3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 6.3, that the bank is critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act—

(i) Restricting the activities of the bank (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the bank (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the OCC's discretion to take in connection with a bank that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized or significantly undercapitalized; an officer or director of such bank; or a company that controls such bank, the OCC shall follow the procedures for issuing directives under subpart B of this part and subpart N of part 19 of this chapter, unless otherwise provided in section 38 or this part.

Subpart B—Directives To Take Prompt Corrective Action

§ 6.20 Scope.

The rules and procedures set forth in this subpart apply to insured national banks, insured federal branches and senior executive officers and directors of banks that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) and subpart A of this part.

§ 6.21 Notice of intent to issue a directive.

(a) *Notice of intent to issue a directive*—(1) *In general.* The OCC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized bank prior written notice of the OCC's intention to issue a directive requiring such bank or company to take actions or to follow proscriptions described in section 38 that are within the OCC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). The bank shall have such time to respond to a proposed directive as provided under § 6.22.

(2) *Immediate issuance of final directive.* If the OCC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the OCC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a bank immediately to take actions or to follow proscriptions described in section 38 that are within the OCC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). A bank that is subject to such an immediately effective directive may submit a written appeal of the directive to the OCC. Such an appeal must be received by the OCC within 14 calendar days of the issuance of the directive, unless the OCC permits a longer period. The OCC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the OCC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the bank's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the OCC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the bank subject to the directive may file with the OCC a written response to the notice.

§ 6.22 Response to notice.

(a) *Time for response.* A bank may file a written response to a notice of intent

to issue a directive within the time period set by the OCC. The date shall be at least 14 calendar days from the date of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(b) *Content of response.* The response should include:

(1) An explanation why the action proposed by the OCC is not an appropriate exercise of discretion under section 38;

(2) Any recommended modification of the proposed directive; and

(3) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank regarding the proposed directive.

(c) *Failure to file response.* Failure by a bank to file with the OCC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

§ 6.23 Decision and issuance of a prompt corrective action directive.

(a) *OCC consideration of response.* After considering the response, the OCC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the bank; or

(3) Seek additional information or clarification of the response from the bank, or any other relevant source.

§ 6.24 Request for modification or rescission of directive.

Any bank that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the OCC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the OCC, the directive shall continue in place while such request is pending before the OCC.

§ 6.25 Enforcement of directive.

(a) *Judicial remedies.* Whenever a bank fails to comply with a directive issued under section 38, the OCC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies.* Pursuant to section 8(i)(2)(A) of the FDI Act, the OCC may assess a civil money penalty against any bank that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the OCC may seek enforcement of the provisions of section 38 or this part through any other judicial or administrative proceeding authorized by law.

PART 19—[AMENDED]

2. The authority citation for part 19 of this chapter is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1817, 1818, 1820, 1831o, 1972, 3102, 3108(a), and 3909; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78u, 78u–2, 78u–3, and 78w; and 31 U.S.C. 330.

3. Part 19 is amended by adding subparts M and N to read as follows:

Subpart M—Procedures for Reclassifying a Bank Based on Criteria Other Than Capital

Sec.
19.220 Scope.
19.221 Reclassification of a bank based on unsafe or unsound condition or practice.
19.222 Request for rescission of reclassification.

Subpart N—Order To Dismiss a Director or Senior Executive Officer

19.230 Scope.
19.231 Order to dismiss a director or senior executive officer.

Subpart M—Procedures for Reclassifying a Bank Based on Criteria Other Than Capital

§ 19.220 Scope.

This subpart applies to the procedures afforded to any bank that has been reclassified to a lower capital category by a notice or order issued by the OCC pursuant to section 38 of the Federal Deposit Insurance Act and this part.

§ 19.221 Reclassification of a bank based on unsafe or unsound condition or practice.

(a) *Issuance of notice of proposed reclassification*—(1) *Grounds for reclassification.* (i) Pursuant to § 6.4 of this chapter, the OCC may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized bank or undercapitalized bank to the supervisory actions applicable to the next lower capital category if:

(A) The OCC determines that the bank is in an unsafe or unsound condition; or

(B) The OCC deems the bank to be engaging in an unsafe or unsound practice and not to have corrected the deficiency.

(ii) Any action pursuant to this paragraph (a)(1) shall hereinafter be referred to as "reclassification."

(2) *Prior notice to institution.* Prior to taking action pursuant to § 6.4 of this chapter, the OCC shall issue and serve on the bank a written notice of the OCC's intention to reclassify the bank.

(b) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition will include:

(1) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(2) The reasons for reclassification of the bank;

(3) The date by which the bank subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(c) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(1) An explanation of why the bank is not in unsafe or unsound condition or otherwise should not be reclassified;

(2) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the reclassification.

(d) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(e) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a

waiver of any right to present oral testimony or witnesses.

(f) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the bank. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(g) *Hearing procedures.* (1) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the bank upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(h) *Recommendation of presiding officer(s).* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(i) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the bank and notify the bank of the OCC's decision.

§ 19.222 Request for rescission of reclassification.

Any bank that has been reclassified under part 6 of this chapter and this subpart, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

Subpart N—Order To Dismiss a Director or Senior Executive Officer

§ 19.230 Scope.

This subpart applies to informal hearings afforded to any director or senior executive officer dismissed pursuant to an order issued under 12 U.S.C. 1831o and part 6 of this chapter.

§ 19.231 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a bank pursuant to subpart B of part 6 of this chapter requiring the bank to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officer.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

Dated: September 11, 1992.

Stephen R. Steinbrink,

Acting Comptroller of the Currency.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 325

For the reasons set forth in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends parts 308 and 325 of title 12 of the Code of Federal Regulations as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 504; 5 U.S.C. 554–557; 12 U.S.C. 1815(e), 1817(a) and 1818(j), 1818, 1820, 1828(j), 1829, 1831i, 1831o; 15 U.S.C. 781(h), 78m, 78n(a), 78n(c), 78n(d), 78n(f), 78o, 78o-4(c)(5), 78p, 78q, 78q-1, 78s.

2. Part 308 is amended by adding a new subpart Q to read as follows:

Subpart Q—Issuance and Review of Orders Pursuant to the Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

Sec.
308.200 Scope.
308.201 Directives to take prompt corrective action.
308.202 Procedures for reclassifying a bank based on criteria other than capital.
308.203 Order to dismiss a director or senior executive officer.
308.204 Enforcement of directives.

Subpart Q—Issuance and Review of Orders Pursuant to the Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

§ 308.200 Scope.

The rules and procedures set forth in this subpart apply to banks, insured branches of foreign banks and senior executive officers and directors of banks that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) (12 U.S.C. 1831o) and subpart 9 of Part 325 of this chapter.

§ 308.201 Directives to take prompt corrective action.

(a) *Notice of intent to issue directive.*—(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized bank prior written notice of the FDIC's intention to issue a directive requiring such bank to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including sections 38 (e)(5), (f)(2), (f)(3), or (f)(5). The bank shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a bank immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC's discretion to require or impose under section 38 of the FDI Act, including section 38 (e)(5), (f)(2), (f)(3), or (f)(5). A bank that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the bank's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the FDIC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the bank subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice.*—(1) *Time for response.* A bank may file a written response to a notice of intent to issue a directive within the time period set by the FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the FDIC is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank regarding the proposed directive.

(d) *FDIC consideration of response.* After considering the response, the FDIC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the bank; or

(3) Seek additional information or clarification of the response from the bank or any other relevant source.

(e) *Failure to file response.* Failure by a bank to file with the FDIC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any bank that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

§ 308.202 Procedures for reclassifying a bank based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice.*—(1) *Issuance of notice of proposed reclassification.*—(i) *Grounds for reclassification.* (A) Pursuant to § 325.103(d) of this chapter, the FDIC may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The FDIC determines that the bank is in unsafe or unsound condition; or

(*2*) The FDIC, pursuant to section 8(b)(8) of the FDI Act (12 U.S.C. 1818(b)(8)), deems the bank to be

engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as "reclassification."

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 325.103(d) of this chapter, the FDIC shall issue and serve on the bank a written notice of the FDIC's intention to reclassify the bank.

(2) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition shall include:

(i) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(ii) The reasons for reclassification of the bank;

(iii) The date by which the bank subject to the notice of reclassification may file with the FDIC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the FDIC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the FDIC. The response should include:

(i) An explanation of why the bank is not in an unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank regarding the reclassification.

(4) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the FDIC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the FDIC under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the bank requests a later date. The hearing shall be held in Washington, DC or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(7) *Hearing procedures.* (i) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the bank upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC will decide whether to reclassify the bank and notify the bank of the FDIC's decision.

(b) *Request for rescission of reclassification.* Any bank that has been reclassified under this section, may, upon a change in circumstances, request in writing that the FDIC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the FDIC, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the FDIC.

§ 308.203 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the FDIC issues and serves a directive on a bank pursuant to § 308.201 of this part requiring the bank to dismiss from office any director or senior executive officer under § 38(f)(2)(F)(ii) of the FDI Act, the FDIC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive.*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the FDIC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the FDIC under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the FDIC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later

date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(d) *Hearing procedures.*—(1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in this part apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC shall grant or deny the request for reinstatement and notify the Respondent of the FDIC's decision. If the FDIC denies the request for reinstatement, the FDIC shall set forth in the notification the reasons for the FDIC's action.

§ 308.204 Enforcement of directives.

(a) *Judicial remedies.* Whenever a bank fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act (12 U.S.C. 1818(i)(1)).

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any bank that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of a bank to implement a capital restoration plan required under section 38, or subpart B of part 325 of this chapter, or the failure of a company having control of a bank to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the bank to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or subpart 8 of part 325 of this chapter through any other judicial or administrative proceeding authorized by law.

PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 is revised to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o; 3907, 3909; Pub. L. 102–233, 105 Stat. 1761, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2386 (12 U.S.C. 1828 note).

Subpart A—Minimum Capital Requirements

2. Part 325 is amended by designating §§ 325.1 through 325.6 as subpart A and adding the subpart heading to read as set forth above.

3. Appendixes A and B to part 325 are redesignated as appendixes A and B to subpart A of part 325 and the appendix headings are revised to read as follows:

Appendix A to Subpart A of Part 325—Statement of Policy on Risk-Based Capital

Appendix B to Subpart A of Part 325—Statement of Policy on Capital Adequacy

4. Section 325.2 is amended by redesignating paragraphs (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) as paragraphs (h), (i), (j), (m), (n), (o), (p), (r), (t), (v) and (x), respectively, and by adding new paragraphs (e), (f), (g), (k), (l), (q), (s), (u) and (w) to read as follows:

§ 325.2 Definitions.

* * * * *

(e)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term *controlled* shall be construed consistently with the term *control.*

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(f) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(g)(1) *Highly leveraged transaction* means an extension of credit to or investment in a business by an insured depository institution where the financing transaction involves a buyout, acquisition, or recapitalization of an existing business and one of the following criteria is met:

(i) The transaction results in a liabilities-to-assets leverage ratio higher than 75 percent; or

(ii) The transaction at least doubles the subject company's liabilities and results in a liabilities-to-assets leverage ratio higher than 50 percent; or

(iii) The transaction is designated an HLT by a syndication agent or a federal bank regulator.

(2) Notwithstanding paragraph (g)(1) of this section, loans and exposures to any obligor in which the total financing package, including all obligations held by all participants is $20 million or more, or such lower level as the FDIC may establish by order on a case-by-case basis, will be excluded from this definition.

* * * * *

(k) *Leverage ratio* means the ratio of Tier 1 capital to total assets, as calculated under this part.

(l) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the bank or related overhead expenses, including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the bank.

* * * * *

(q) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to subpart A of part 325).

* * * * *

(s) *Tangible equity* means the amount of core capital elements as defined in section I.A.1 of the FDIC's Statement of Policy on Risk-based Capital (appendix A to subpart A of part 325), plus the amount of outstanding cumulative perpetual preferred stock (including related surplus), minus all intangible assets except purchased mortgage servicing rights to the extent that the FDIC determines pursuant to section 475 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 1828 note) and § 325.5(f) of this part that purchased mortgage servicing rights may be included in calculating the bank's Tier 1 capital.

* * * * *

(u) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to subpart A of part 325).

* * * * *

(w) *Total risk-based capital ratio* means the ratio of qualifying total capital to risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to subpart A of part 325).

* * * * *

5. Part 325 is amended by adding a new subpart B to read as follows:

Subpart B—Prompt Corrective Action

Sec.
325.101 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.
325.102 Notice of capital category.
325.103 Capital measures and capital category definitions.
325.104 Capital restoration plans.
325.105 Mandatory and discretionary supervisory actions under section 38.

Subpart B—Prompt Corrective Action

§ 325.101 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.

(a) *Authority.* This subpart is issued by the FDIC pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act), as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for FDIC-insured state-chartered nonmember banks, the capital measures and capital levels, and for insured branches of foreign banks, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to FDIC-insured state-chartered nonmember banks and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Certain of these provisions also apply to officers, directors and employees of those insured institutions. In addition, certain provisions of this subpart apply to all insured depository institutions that are deemed critically undercapitalized.

(d) *Other supervisory authority.* Neither section 38 nor this subpart in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a bank or insured branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the FDIC or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the FDIC or any other federal banking agency has assigned the bank to a particular capital category.

§ 325.102 Notice of capital category.

(a) *Effective date of determination of capital category.* A bank shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart as of the date the bank is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A bank shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition and Income (Call Report) is required to be filed with the FDIC;

(2) A final report of examination is delivered to the bank; or

(3) Written notice is provided by the FDIC to the bank of its capital category for purposes of section 38 of the FDI Act and this subpart or that the bank's capital category has changed as provided in § 325.103(d).

(c) *Adjustments to reported capital levels and capital category*—(1) *Notice of adjustment by bank.* A bank shall provide the appropriate FDIC regional director with written notice that an adjustment to the bank's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the bank to be placed in a lower capital category from the category assigned to the bank for purposes of section 38 and this subpart on the basis of the bank's most recent Call Report or report of examination.

(2) *Determination by the FDIC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the FDIC shall determine whether to change the capital category

of the bank and shall notify the bank of the FDIC's determination.

§ 325.103 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this subpart, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this subpart, a bank shall be deemed to be:

(1) *Well capitalized* if the bank:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the bank:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth; and

(iv) Does not meet the definition of a *well capitalized* bank.

(3) *Undercapitalized* if the bank:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii)(A) Except as provided in paragraph (b)(3)(iii)(B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth.

(4) *Significantly undercapitalized* if the bank has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the insured depository institution has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Capital categories for insured branches of foreign banks.* For purposes of the provisions of section 38 and this subpart, a insured branch of a foreign bank shall be deemed to be:

(1) *Well capitalized* if the insured branch:

(i) Maintains the pledge of assets required under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.6(a), or to comply with asset maintenance requirements pursuant to 12 CFR 28.9; or

(B) The FDIC to pledge additional assets pursuant to 12 CFR 346.19 or to maintain a higher ratio of eligible assets pursuant to 12 CFR 346.20.

(2) *Adequately capitalized* if the insured branch:

(i) Maintains the pledge of assets required under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Does not meet the definition of a *well capitalized* insured branch.

(3) *Undercapitalized* if the insured branch:

(i) Fails to maintain the pledge of assets required under 12 CFR 346.19; or

(ii) Fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(4) *Significantly undercapitalized* if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 104 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(5) *Critically undercapitalized* if the insured depository institution fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 102 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(d) *Reclassifications based on supervisory criteria other than capital.* The FDIC may reclassify a well capitalized bank as adequately capitalized and may require an adequately capitalized bank or an undercapitalized bank to comply with certain mandatory or discretionary supervisory actions as if the bank were in the next lower capital category (except that the FDIC may not reclassify a significantly undercapitalized bank as critically undercapitalized) (each of these actions are hereinafter referred to generally as "reclassifications") in the following circumstances:

(1) *Unsafe or unsound condition.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that the bank is in unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that, in the most recent examination of the bank, the bank received and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

§ 325.104 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A bank shall file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the bank in writing that the plan is to be filed within a different period. An adequately capitalized bank that has been required pursuant to § 325.103(d) of this subpart to comply with supervisory actions as if the bank were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* A. Notwithstanding paragraph (a)(1) of this section, a bank that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 325.103 unless the FDIC notifies the bank that it must submit a new or revised capital plan. A bank that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate FDIC regional director

within 45 days of receiving such notice, unless the FDIC notifies the bank in writing that the plan must be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report, unless the FDIC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A bank that is required to submit a capital restoration plan as a result of a reclassification of the bank pursuant to § 325.103(d) of this subpart shall include a description of the steps the bank will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the bank.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the FDIC shall provide written notice to the bank of whether the plan has been approved. The FDIC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the FDIC, the bank shall submit a revised capital restoration plan within the time specified by the FDIC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized bank (as defined in § 325.103(b) of this subpart) shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the bank has been approved by the FDIC.

(e) *Failure to submit capital restoration plan.* A bank that is undercapitalized (as defined in § 325.103(b) of this subpart) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) *Failure to implement capital restoration plan.* Any undercapitalized bank that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(g) *Amendment of capital restoration plan.* A bank that has filed an approved capital restoration plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Performance guarantee by companies that control a bank*—(1) *Limitation on liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific bank that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the bank's total assets at the time the bank was notified or deemed to have notice that the bank was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the bank to the levels required for the bank to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the bank initially fails to comply with a capital restoration plan under this subpart.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this subpart shall expire after the FDIC notifies the bank that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same bank after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given bank shall be jointly and severally liable for the guarantee for such bank as required under section 38 and this subpart, and the FDIC may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a bank that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the bank shall, upon submission of the plan, be subject to the provisions of section 38 and this subpart that are applicable to banks that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a bank to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the bank shall be subject to the provisions of section 38 and this subpart that are applicable to banks that have failed in a material respect to implement a capital restoration plan.

§ 325.105 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all banks.* All banks are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks.* Immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the FDIC monitor the condition of the bank (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the bank's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the bank is significantly undercapitalized, or critically undercapitalized, or that the bank is subject to the provisions applicable to institutions that are significantly undercapitalized because the bank failed to submit or implement in any material respect an acceptable capital restoration plan, the bank shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive

officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized institutions.* (i) In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the insured depository institution is critically undercapitalized, the institution is prohibited from doing any of the following without the FDIC's prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action with respect to which the depository institution is required to provide notice to the appropriate Federal banking agency;

(B) Extending credit for any highly leveraged transaction;

(C) Amending the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(D) Making any material change in accounting methods;

(E) Engaging in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c(b)));

(F) Paying excessive compensation or bonuses;

(G) Paying interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market areas; and

(H) Making any principal or interest payment on subordinated debt beginning 60 days after becoming critically undercapitalized except that this restriction shall not apply, until July 15, 1996, with respect to any subordinated debt outstanding on July 15, 1991, and not extended or otherwise renegotiated after July 15, 1991.

(ii) In addition, the FDIC may further restrict the activities of any critically undercapitalized institution to carry out the purposes of section 38 of the FDI Act.

(5) *Exception for certain savings associations.* The restrictions in paragraph (a)(4) of this section shall not apply, before July 1, 1994, to any insured savings association if:

(i) The savings association had submitted a plan meeting the requirements of section 5(t)(6)(A)(ii) of the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)) prior to December 19, 1991;

(ii) The Director of OTS had accepted the plan prior to December 19, 1991; and

(iii) The savings association remains in compliance with the plan or is operating under a written agreement with the appropriate federal banking agency.

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the FDIC's discretion to take in connection with:

(1) An insured depository institution that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or

(2) An officer or director of such institution, the FDIC shall follow the procedures for issuing directives under §§ 308.201 and 308.203 of this chapter, unless otherwise provided in section 38 or this subpart.

By order of the Board of Directors.

Dated at Washington, DC, this 15th day of September, 1992.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 565

Accordingly, the Office of Thrift Supervision hereby amends subchapter D, chapter V, title 12, Code of Federal Regulations, by adding part 565 as set forth below.

SUBCHAPTER D—REGULATIONS APPLICABLE TO ALL SAVINGS ASSOCIATIONS

1. A new part 565 is added to read as follows:

PART 565–PROMPT CORRECTIVE ACTION

Sec.

565.1 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.
565.2 Definitions.
565.3 Notice of capital category.
565.4 Capital measures and capital category definitions.
565.5 Capital restoration plans.
565.6 Mandatory and discretionary supervisory actions under section 38.
565.7 Directives to take prompt corrective action.
565.8 Procedures for reclassifying a savings association based on criteria other than capital.
565.9 Order to dismiss a director or senior executive officer.
565.10 Enforcement of directives.

Authority: 12 U.S.C. 1831o.

§ 565.1 Authority, purpose, scope, other Supervisory authority, and disclosure of capital categories.

(a) *Authority.* This part is issued by the OTS pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this part is to define, for savings associations, the capital measures and capital levels that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This part also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This part implements the provisions of section 38 of the FDI Act as they apply to savings associations. Certain of these provisions also apply to officers, directors and employees of savings associations. Other provisions apply to any company that controls a savings association and to the affiliates of a savings association.

(d) *Other supervisory authority.* Neither section 38 nor this part in any way limits the authority of the OTS under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OTS, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a savings association under this part within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the OTS or otherwise required by law, no savings association may state in any advertisement or promotional material its capital category under this subpart or that the OTS or any other federal banking agency has assigned the savings association to a particular category.

§ 565.2 Definitions.

For purposes of this part, except as modified in this section or unless the context otherwise requires, the terms used in this part have the same meanings as set forth in sections 38 and 3 of the FDI Act.

(a)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term "controlled" shall be construed consistently with the term "control."

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with part 567 of this subchapter.

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the savings association or related overhead expenses, including payments related to supervisory, executive, managerial or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the savings association.

(e) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with part 567 of this subchapter.

(f) *Tangible equity* means the amount of a savings association's core capital as defined in part 567 of this subchapter plus the amount of outstanding cumulative perpetual preferred stock (including related surplus), minus all intangible assets not previously deducted except:

(1) Purchased mortgage servicing rights to the extent that the OTS determines pursuant to section 475 of FDICIA that purchased mortgage servicing rights may be included in calculating the savings association's core capital; and

(2) Qualifying supervisory goodwill authorized for inclusion in core capital pursuant to 12 CFR Part 567.

(g) *Tier 1 capital* means the amount of core capital as defined in part 567 of this subchapter.

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with part 567 of this subchapter.

(i) *Total assets,* for purposes of § 565.4(b)(5), means adjusted total assets as calculated in accordance with part 567 of this subchapter, minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of total capital to risk-weighted assets, as calculated in accordance with part 567 of this subchapter.

§ 565.3 Notice of capital category.

(a) *Effective date of determination of capital category.* A savings association shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the savings association is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A savings association shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Thrift Financial Report (TFR) is required to be filed with the OTS;

(2) A final report of examination is delivered to the savings association; or

(3) Written notice is provided by the OTS to the savings association of its capital category for purposes of section 38 of the FDI Act and this part or that the savings association's capital category has changed as provided in paragraph (c) of this section or § 565.4(c).

(c) *Adjustments to reported capital levels and category*—(1) *Notice of adjustment by savings association.* A savings association shall provide the OTS with written notice that an adjustment to the savings association's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the savings association to be placed in a lower capital category from the category assigned to the savings association for purposes of section 38 and this part on the basis of the savings association's most recent TFR or report of examination.

(2) *Determination by the OTS to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OTS shall determine whether to change the capital category of the savings association and shall notify the savings association of the OTS's determination.

§ 565.4 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio, and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this part, a savings association shall be deemed to be:

(1) *Well capitalized* if the savings association:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the OTS pursuant to section 8 of the FDI Act, the International Lending Supervision Act of 1983 (5 U.S.C. 3907), the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the savings association:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the savings association is rated composite 1 under the MACRO rating system in the most recent examination of the savings association; and

(iv) Does not meet the definition of a *well capitalized* savings association.

(3) *Undercapitalized* if the savings association:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii) (A) Except as provided in paragraph (b)(3)(iii) (B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the savings association is rated composite 1 under the MACRO rating system in the most recent examination of the savings association.

(4) *Significantly undercapitalized* if the savings association has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the savings association has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Reclassification based on supervisory criteria other than capital.* The OTS may reclassify a well capitalized savings association as adequately capitalized and may require an adequately capitalized or undercapitalized savings association to comply with certain mandatory or discretionary supervisory actions as if the savings association were in the next lower capital category (except that the OTS may not reclassify a significantly undercapitalized savings association as critically undercapitalized) (each of these actions are hereinafter referred to generally as "reclassifications") in the following circumstances:

(1) *Unsafe or unsound condition.* The OTS has determined, after notice and opportunity for hearing pursuant to § 565.8(a) of this part, that the savings association is in an unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The OTS has determined, after notice and opportunity for hearing pursuant to § 565.8(a) of this part, that, in the most recent examination of the savings association, the savings association received, and has not corrected, a less-than-satisfactory rating for any of the equivalent MACRO rating categories for asset quality, management, earnings, or liquidity.

§ 565.5 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A savings association shall file a written capital restoration plan with the appropriate Regional Office within 45 days of the date that the savings association receives notice or is deemed to have notice that the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the OTS notifies the savings association in writing that the plan is to be filed within a different period. An adequately capitalized savings association that has been required pursuant to § 565.4(c) to comply with supervisory actions as if the savings association were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a savings association that has already submitted and is operating under a capital restoration plan approved under section 38 and this part is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 565.4(c) unless the OTS notifies the savings association that it must submit a new or revised capital plan. A savings association that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate Regional Office within 45 days of receiving such notice, unless the OTS notifies the savings association in writing that the plan is to be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the TFR, unless the OTS instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A savings association that is required to submit a capital restoration plan as the result of a reclassification of the savings association pursuant to § 565.4(c) of this part shall include a description of the steps the savings association will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the savings association.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this part, the OTS shall provide written notice to the savings association of whether the plan has been approved. The OTS may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the OTS, the savings association shall submit a revised capital restoration plan, when directed to do so, within the time specified by the OTS. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized savings association (as defined in § 565.4(b)(3) of this part) shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the savings association has been approved by the OTS.

(e) *Failure to submit a capital restoration plan.* A savings association that is undercapitalized (as defined in § 565.4(b)(3) of this part) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions.

(f) *Failure to implement a capital restoration plan.* Any undercapitalized savings association that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions.

(g) *Amendment of capital plan.* A savings association that has filed an approved capital restoration plan may, after prior written notice to and approval by the OTS, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the savings association shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Notice to FDIC.* Within 45 days of the effective date of OTS approval of a capital restoration plan, or any amendment to a capital restoration plan, the OTS shall provide a copy of the plan or amendment to the FDIC.

(i) *Performance guarantee by companies that control a savings association.*—(1) *Limitation on liability.*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this part for all companies that control a specific savings association that is required to submit a capital restoration plan under this part shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the savings association's total assets at the time the savings association was notified or deemed to have notice that the savings association was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the savings association to the levels required for the savings association to

be classified as adequately capitalized, as those capital measures and levels are defined at the time that the savings association initially fails to comply with a capital restoration plan under this part.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this part shall expire after the OTS notifies the savings association that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same savings association after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given savings association shall be jointly and severally liable for the guarantee for such savings association as required under section 38 and this part, and the OTS may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a savings association that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the savings association shall, upon submission of the plan, be subject to the provisions of section 38 and this part that are applicable to savings associations that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a savings association to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the savings association shall be subject to the provisions of section 38 and this part that are applicable to savings associations that have failed in a material respect to implement a capital restoration plan.

§ 565.6 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions.*—(1) *Provisions applicable to all savings associations.* All savings associations are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized savings associations.* Immediately upon receiving notice or being deemed to have notice, as provided in § 565.3 or § 565.5 of this part, that the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, the savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the OTS monitor the condition of the savings association (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this part (section 38(e)(2));

(iv) Restricting the growth of the savings association's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 565.3 or § 565.5 of this part, that the savings association is significantly undercapitalized, or critically undercapitalized, or that the savings association is subject to the provisions applicable to institutions that are significantly undercapitalized because the savings association failed to submit or implement in any material respect an acceptable capital restoration plan, the savings association shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 565.3 of this part, that the savings association is critically undercapitalized, the savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting the activities of the savings association (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the savings association (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the OTS's discretion to take in connection with: A savings association that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such savings association; or a company that controls such savings association, the OTS shall follow the procedures for issuing directives under §§ 565.7 and 565.9 of this part unless otherwise provided in section 38 or this part.

§ 565.7 Directives to take prompt corrective action.

(a) *Notice of intent to issue a directive.*—(1) *In general.* The OTS shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized savings association or, where appropriate, any company that controls the savings association, prior written notice of the OTS's intention to issue a directive requiring such savings association or company to take actions or to follow proscriptions described in section 38 that are within the OTS's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The savings association shall have such time to respond to a proposed directive as provided by the OTS under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the OTS finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the OTS may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a savings association or any company that controls a savings association immediately to take actions or to follow proscriptions described in section 38 that are within the OTS's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the OTS. Such an appeal must be received by the OTS within 14 calendar days of the issuance of the directive, unless the OTS permits a longer period. The OTS shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the OTS, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the savings association's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the OTS proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the savings association or company subject to the directive may file with the OTS a written response to the notice.

(c) *Response to notice.*—(1) *Time for response.* A savings association or company may file a written response to a notice of intent to issue a directive within the time period set by the OTS. The date shall be at least 14 calendar days from the date of the notice unless the OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the OTS is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the proposed directive.

(d) *OTS consideration of response.* After considering the response, the OTS may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the savings association or company; or

(3) Seek additional information or clarification of the response from the savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a savings association or company to file with the OTS, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any savings association or company that is subject to a directive under this part may, upon a change in circumstances, request in writing that the OTS reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the OTS, the directive shall continue in place while such request is pending before the OTS.

§ 565.8 Procedures for reclassifying a savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.* (A) Pursuant to § 565.4(c) of this part, the OTS may reclassify a well capitalized savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The OTS determines that the savings association is in unsafe or unsound condition; or

(*2*) The OTS deems the savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as "reclassification."

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 565.4(c)(1), the OTS shall issue and serve on the savings association a written notice of the OTS's intention to reclassify the savings association.

(2) *Contents of notice.* A notice of intention to reclassify a savings association based on unsafe or unsound condition shall include:

(i) A statement of the savings association's capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OTS a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OTS determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A savings association may file a written response to a notice of proposed reclassification within the time period set by the OTS. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a savings association to file, within the specified time period, a written response with the OTS to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OTS or its designee under this section. If the savings association desires to present oral testimony or witnesses at the hearing, the savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OTS shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OTS allows further time at the request of the savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the OTS, before a presiding officer(s) designated by the OTS to conduct the hearing.

(7) *Hearing procedures.* (i) The savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The savings association may introduce oral testimony and present witnesses only if expressly authorized by the OTS or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor part 509 of this chapter apply to an informal hearing under this section unless the OTS orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OTS on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OTS will decide whether to reclassify the savings association and notify the savings association of the OTS's decision.

(b) *Request for rescission of reclassification.* Any savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the OTS reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OTS, the savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OTS.

§ 565.9 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OTS issues and serves a directive on a savings association pursuant to section 565.8 requiring the savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OTS shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OTS at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OTS or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OTS, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a savings association to dismiss from office any director or senior executive officer, the OTS shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OTS, before a presiding officer(s) designated by the OTS to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OTS or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor part 509 of this chapter apply to an informal hearing under this section unless the OTS orders that such procedures shall apply.

(2) The informal hearing shall be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the savings association would materially strengthen the savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the savings association's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OTS concerning the Respondent's request for reinstatement with the savings association.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing has been requested, the OTS shall grant or deny the request for reinstatement and notify the Respondent of the OTS's decision. If the OTS denies the request for reinstatement, the OTS shall set forth in the notification the reasons for the OTS's action.

§ 565.10 Enforcement of directives.

(a) *Judicial remedies.* Whenever a savings association or company that controls a savings association fails to comply with a directive issued under section 38, the OTS may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the OTS may assess a civil money penalty against any savings association or company that controls a savings association that violates or otherwise fails to comply with any final directive issued under section 38 and against any

institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of a savings association to implement a capital restoration plan required under section 38, or this part, or the failure of a company having control of a savings association to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the savings association or company to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the OTS may seek enforcement of the provisions of section 38 or this part through any other judicial or administrative proceeding authorized by law.

Dated: September 16, 1992.

By the Office of Thrift Supervision.

Timothy Ryan,

Director.

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Tuesday
September 29, 1992

Part V

Department of Transportation

Coast Guard

33 CFR Part 155

Discharge Removal Equipment for Vessels Carrying Oil; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 155

[CGD 90-068]

RIN 2115-AD66

Discharge Removal Equipment for Vessels Carrying Oil

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish regulations requiring vessels carrying oil in bulk as cargo to carry discharge removal equipment to contain and remove on-deck oil spills, install spill prevention coamings, and install emergency towing arrangements. The proposed regulations would implement provisions of the Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990. The purpose of these regulations is to reduce the risk of oil spills, improve vessel oil spill response capabilities, and minimize the impact of oil spills on the environment. Proposed requirements for vessels to carry equipment for the removal of discharges of hazardous substances will be the subject of a separate rulemaking.

DATES: Comments must be received on or before October 29, 1992.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD 90-068), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, or may be delivered to Room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-1477.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at Room 3406, U.S. Coast Guard Headquarters.

A copy of the material listed in "Incorporation by Reference" of this preamble is available for inspection at Room B-731, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Frank Wood, Project Manager, Oil Pollution Act (OPA 90) Staff, (202) 267-6739. This telephone is equipped to record messages on a 24-hour basis.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast guard encourages interested persons to participate in this rulemaking by submitting written views, data, or arguments. Persons submitting comments should include their name and address, identify this rulemaking (CGD 90-068) and the specific section of this proposal to which each comment applies, and give the basis for each comment. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of the comments.

The Coast Guard plans no public hearing at this time. Persons may request a public hearing by writing to the Marine Safety Council at the address under "ADDRESSES." If the Coast Guard determines that the opportunity for oral presentations will aid this rulemaking, it will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Drafting Information

The principal persons involved in drafting this document are Frank Wood, Project Manager, OPA 90 Staff, and Joan Tilghman, Project Counsel, OPA 90 Staff.

Statutory Authority and Background

In recent years, #several catastrophic oil spills have threatened the marine environment along the coastal areas of the United States. Among these spills were the EXXON VALDEZ in Prince William Sound, the AMERICAN TRADER in California's coastal waters, the PRESIDENTE RIVERA in the Delaware River, and the MEGA BORG in the Gulf of Mexico. The spills resulted in extensive damage to the marine environment, including the loss of fish and wildlife. In response to these disasters and others, Congress passed the Oil Pollution Act of 1990 (OPA 90) (Pub. L. 101-380, August 18, 1990).

Section 4202(a)(6) of OPA 90 amended section 311(j) of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. 1321) by adding a new paragraph (6) to require vessels that are operating on the navigable waters of the U.S. and that are carrying oil or a hazardous substance in bulk as cargo to carry appropriate discharge removal equipment on board. This equipment must employ the best technology economically feasible and be compatible with the safe operation of the vessel.

The President delegated the authority to implement this provision to the Secretary of Transportation in Executive Order 12777 (3 CFR, 1991 Comp.; 56 FR 54757) published in the **Federal Register** on October 22, 1991. The Secretary further delegated the authority to the Commandant of the Coast Guard in 49 CFR 1.46(m) on March 3, 1992.

Because the statutory requirements for vessels to carry discharge removal equipment for oil spills and to have oil spill response plans are related, the Coast Guard has considered both rulemakings concurrently. The Coast Guard is limiting this rulemaking to requirements for vessels carrying oil because of the statutory deadline for these vessels to submit response plans. For vessels that carry hazardous substances in bulk as cargo, regulations requiring carriage of discharge removal equipment will be the subject of a separate rulemaking.

Section 311(a)(8) of the FWPCA defines "remove or removal" as the "containment and removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare." For purposes of this proposed rule, removal equipment includes salvage equipment, lightering equipment, towing arrangements, sorbents, and other equipment that may be used to minimize or mitigate environmental damage from oil spills.

Section 311(j)(6) requirements apply to all vessels certificated as tank vessels under 46 CFR chapter I, subchapter D, all other certificated vessels that are permitted to carry limited quantities of oil as defined in section 311(a)(1) of the FWPCA, and any uninspected vessel, including foreign flag vessels, that carry oil in bulk as cargo or cargo residue. As used in this proposed rule, oil includes, but is not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with waste other than dredge spoils. This definition includes animal and vegetable oils.

Regulatory History

The Coast Guard published an advance notice of proposed rulemaking (ANPRM) on August 30, 1991 (56 FR 43534). In the ANPRM, the Coast Guard raised 59 questions for public comment and gave notice of a workshop scheduled for November 14, 1991. The Coast Guard received 147 comments on the questions posed on removal equipment in the ANPRM, and considered all of the comments in drafting the proposed rule.

The majority of the comments on the ANPRM stated that removal equipment should be carried on board vessels that carry oil in bulk as cargo. Comments on the type and amount of equipment to be carried ranged from extensive

containment and removal equipment for off-ship deployment to sorbents and mops for on-deck cleanup.

Many comments interpreted the statutory requirement to carry removal equipment as a requirement to carry booms and skimmers. A few comments proposed that self-inflating boom be installed on board vessels for remote deployment by crew members. Most agreed that anchoring boom in deep water was difficult, if not impossible. One suggested the use of sea anchors to maintain the boom in deep water. The majority indicated that, regardless of the equipment required, crew members should remain on board the vessel during an oil spill response and leave off-ship response to shore-based responders.

Comments varied regarding equipment capabilities. Suggested capabilities ranged from containment of the entire cargo to containment of deck spills of less than 10 barrels.

The public workshop was held in Washington, DC on November 14, 1991, with 196 participants. The Coast Guard prepared papers to focus discussion. The issue paper presented on requirements for vessel-carried equipment focused on the following: (1) Requirements for equipment for use on board the vessel to remove on-deck spills, assist in damage control and salvage, and lighter "over the top" to control the source of the discharge; (2) requirements for booms and skimmers on board vessels that transit remote areas or areas where contracted resources are not available; (3) deploying, securing, and maintaining containment booms, particularly in deep water, without physically tending booms from workboats in other than ideal conditions; and (4) warehousing removal equipment, specifically booms and skimmers, on board vessels for deployment by spill response contractors.

The discussions were generally consistent with comments to the ANPRM, but they clarified several options and better defined areas of agreement. Most participants identified emergency towing gear as appropriate equipment that should be required aboard tankers to facilitate assistance by a rescue vessel. (Under 46 U.S.C. 2101, "*tanker* means a self-propelled tank vessel constructed or adapted primarily to carry oil or hazardous material in bulk in the cargo spaces.") Although tankers often use single point mooring connections or the vessel's anchor chain for on-board towing capability, these connections are often unrigged and require considerable effort by the ship's crew to make the tanker ready for towing. The discussions did not address a design or specific requirements for an emergency towing package.

There was no agreement that it was appropriate to carry high-capacity, over-the-top lightering equipment aboard a vessel. Some participants recommended that tankers not carry high-capacity pumps on board for lightering or emergency cargo transfer because of safety concerns for the crew. Others expressed the opinion that only trained professionals should provide salvage and lightering equipment.

In response to an ANPRM question about boom technology, no one was able to verify proven technology for deploying and maintaining containment boom, particularly in deep water, in other than ideal conditions, without physically tending it from dedicated workboats. The majority of participants did not recommend requiring a boom that is designed for automatic deployment over the side and remote tending by the crew.

Most participants advised against warehousing removal equipment, such as booms and skimmers, aboard a vessel for deployment by contracted personnel. However, a minority of participants felt that warehoused containment boom might provide the only readily available source of equipment in some incidents, and the boom may significantly enhance an initial response effort. No one recommended that vessels carry portable storage tanks on board.

The Coast Guard taped the workshop proceedings and considered all comments in preparing the proposed rule. Audio tapes and a summary of the proceedings are available for review and copying in the public docket.

Because of the diversity of views and the absence of clearly preferable solutions, the Coast Guard published a notice of intent to form a negotiated rulemaking committee on November 18, 1991 (56 FR 58202). Based on the comments received on this notice, the Coast Guard established the Oil Spill Response Plan Negotiated Rulemaking Committee (the Committee). A notice announcing the establishment of the Committee was published on January 10, 1992 (57 FR 1139). The Committee sessions were held between January 8 and March 27, 1992, in Washington, DC.

In forming the Committee, the Coast Guard brought together representatives from various interests that would be affected by the proposed rules on vessel response plans and the proposed rules on carriage and inspection of discharge removal equipment. A Coast Guard representative was a member of the Committee. The Coast Guard used the information gathered from the public in comments to the ANPRM and from discussions at the public workshop that was held on November 14, 1991, to narrow the focus of the Committee discussions. The Coast Guard developed and identified issue-related questions for resolution by the Committee.

The Coast Guard agreed in the organizational protocols to consider the written statement of the Committee as the basis of this NPRM, consistent with the Coast Guard's legal obligations, and to draft the proposed regulations and preambles with the same substance and effect as the Committee statement. The consensus recommendations included in the Committee statement reflect the agreement of all Committee members, including the Coast Guard. The Coast Guard used the Committee consensus recommendations in drafting this proposed rule and identified the recommendations in the preamble discussion of the proposed rule. The Committee statement is filed in the public docket.

Committee Recommendations and Discussion of Proposed Regulations

In discussing requirements for vessels to carry discharge removal equipment, the Committee made recommendations concerning vessels to which the rules should apply. The Committee recommended that vessels that carry oil as primary cargo be separated into four categories: tankers, offshore tank barges, coastal tank barges, and inland tank barges. For the purposes of this proposed rule, a tanker is a self-propelled vessel engaged in the carriage of oil in bulk as cargo that has a Certificate of Inspection issued under 46 CFR chapter I, subchapter D, a Certificate of Compliance, or a Tank Vessel Examination letter. The definition of "tanker" includes integrated tug-barges (ITBs) that are designed for push-mode only.

An offshore tank barge is defined as any tank barge that is certificated under 46 CFR chapter I, subchapter D, for navigation in waters more than 20 nautical miles offshore in any ocean or the Gulf of Mexico, any tank barge in Great Lakes service, or any foreign flag tank barge. The definition of offshore tank barge includes ITBs that are designed for dual-mode navigation.

A coastal tank barge is any tank barge that is certificated under 46 CFR chapter I, subchapter D, for coastwise service. The definition of coastal tank barge includes ITBs that are designed for dual-mode navigation. An inland tank barge is any tank barge certificated

under 46 CFR chapter I, subchapter D, for river service or lakes, bays, and sounds service.

In addition to these vessel categories, the Committee discussed applying requirements for vessel-carried equipment to vessels that carry oil in bulk as secondary cargo. Vessels that carry oil as secondary cargo are those that are not principally engaged in the carriage of oil in bulk as cargo, but that are certificated under subchapters H or I and permitted to carry limited quantities of oil in bulk, and similar foreign flag vessels. Although the Committee did not make a recommendation concerning vessels that carry oil as secondary cargo, the Coast Guard is proposing vessel-carried equipment requirements for these vessels.

Discharge Removal Equipment for On-Deck Spills

In discussing on-deck spills, the Committee first considered the amount of oil that the equipment should be able to contain and remove from the deck of the vessel. The Committee recommended that ocean-going and coastal vessels less than 400 feet long carry equipment capable of containing and removing a spill of at least seven barrels (42 U.S. gallons/barrel) of oil from the deck of the vessel. For ocean-going and coastal vessels 400 feet long or longer, the Committee recommended that the vessel carry equipment capable of containing and removing a spill of at least 12 barrels of oil. For inland tank barges, the Committee recommended that the tank barge have equipment available that is capable of containing and removing a spill of at least one barrel of oil. The Committee derived these proposed volumes from suggestions in the public comments to the ANPRM.

Under the proposed rule, tankers, offshore tank barges, and coastal tank barges will be subject to the same requirements for equipment carriage for on-deck spills. The equipment specifically recommended by the Committee for onboard carriage includes non-sparking hand shovels and scoops, non-sparking portable pumps, sorbents, containers for holding recovered waste, personal protective clothing, and emulsifiers to clean the deck. The Coast Guard recognizes that emulsifiers may be necessary to remove oil from the deck to make the deck less slippery and safer for crew members. However, the Coast Guard emphasizes that emulsions and oily residue must be retained on board until the emulsions and oily residue can be safely discharged into a suitable receiving vessel or facility. It is illegal to discharge emulsions and oily residue into the marine environment.

Because most on-deck spills are small, sorbents, portable pumps and hand tools are the most effective equipment for containing and removing them. The Committee recommended that portable pumps be rigged and ready for use on the vessel during transfer operations in case an on-deck spill occurs. The Committee also recommended that containers, scoops, buckets, and shovels be required on deck to aid the crew in removing and containing the waste from the on-deck spill; and that protective clothing be available to protect the crew members or other responders who will be removing the on-deck spill.

The proposed requirements for inland tank barges differ from tankers, offshore tank barges, and coastal tank barges because inland tank barges are typically unmanned and have little or no secure stowage capacity for carried equipment. Therefore, for inland tank barges, the Committee recommended that the equipment for containment and removal of on-deck spills be immediately available for use on board the barge during cargo transfer operations, but not necessarily carried on board. The proposed rule would allow the vessel owner or operator to rely on equipment available at a facility, provided its use for vessel spills has been prearranged by contract or other means approved by the Coast Guard.

Although the Committee made no recommendation on requiring vessels carrying oil as secondary cargo to carry discharge removal equipment, the Coast Guard is proposing equipment carriage requirements for vessels carrying oil as secondary cargo because on-deck spills on these vessels also pose a risk to the environment. Under the proposed rule, the equipment must be capable of removing on-deck spills of at least one-half barrel.

Except as noted, the proposed rules for vessels to carry equipment to remove on-deck spills reflect the recommendations of the Committee.

Deck Edge Coamings for On-Deck Spills

In addition to recommending equipment carriage to remove on-deck spills, the Committee recommended that tankers install deck-edge coamings sufficient to contain on-deck spills of 7 barrels for vessels under 400 feet, and 12 barrels for vessels 400 feet and over, with the vessel on an even keel. The Committee did not recommend that offshore and coastal tank barges install deck-edge coamings, but did agree that the Coast Guard should publish deck-edge coaming requirements for these barges for public comment. The Committee made no recommendations with respect to deck coamings on inland tank barges. The Coast Guard reviewed the Committee's recommendation in light of existing coaming regulations (33 CFR 155.310), and is proposing requirements for deck-edge coamings that support the Committee's recommendation.

Existing 33 CFR 155.310 applies to all tank vessels, as "tank vessel" is defined in 33 CFR 154.105, of 250 barrel capacity or larger that carry oil or hazardous materials, regardless of service and overall length. Section 155.310 requires tank vessels other than tank barges to install a fixed container or enclosed deck area around the manifolds and transfer connections, the capacities of which range from one-half barrel to four barrels, depending upon the pipe sizes within the contained area.

This existing regulation requires that tank barges either (1) install the same containers or enclosures as required for other tank vessels, or (2) have a smaller container at the manifolds and transfer connections and install deck coamings sufficient to contain a one-half barrel spill per cargo hatch, manifold, and transfer connection within the enclosed deck area, under all expected conditions of vessel list and trim encountered during the loading operation. Coaming height for tank barges must be at least four inches but not more than eight inches. Under these regulations, it is not necessary for tank barges to locate the coamings along the deck edge, although this appears to be the common practice for many barges.

The proposed rule reflects the Committee's recommendation for installation of deck-edge coamings to contain oil on deck and prevent its discharge into navigable waters. However, the Committee's recommendation that the coaming be sufficient to contain a spill of 7 or 12 barrels of oil, depending on the length of the vessel, with the vessel on an even keel, could result in a coaming only a fraction of an inch high. Although a low-profile coaming may be sufficient to contain these spills on a vessel on an even keel, it would be insufficient to contain them with the vessel under even modest degrees of heel and trim.

Rather than proposing new requirements that are less protective of the environment than existing regulations, the Coast Guard proposes that the rules for deck-edge coamings be consistent with the requirements of 33 CFR 155.310, with respect to coaming height and with respect to conditions of heel and trim during loading, transfer, and discharge operations. The Coast

Guard proposes that two new paragraphs be added to 33 CFR 155.310 that require tankers and offshore and coastal tank barges carrying oil as cargo to install a peripheral coaming enclosing the cargo transfer connections, manifolds, and cargo hatches. The Coast Guard believes that this proposal reflects the substance and effect of the Committee's recommendation.

Although the Committee recommended that the requirement for deck-edge coamings apply to tankers, the Coast Guard proposes that these requirements be consistent with 33 CFR 155.310 with respect to vessel applicability and that they include offshore tank barges and coastal tank barges. The Coast Guard also proposes that these requirements apply to tankers and offshore and coastal tank barges that carry 250 barrels of oil or more, irrespective of length overall.

This proposed regulation would impose a new requirement on tankers, offshore tank barges, and coastal tank barges to install deck-edge coamings within 3 years of the publication date of the final rule. It would also eliminate the currently available option for offshore and coastal tank barges that carry oil to choose between compliance with the tanker requirements in paragraph (a) of 33 CFR 155.310 or the barge requirements in paragraph (b) of the same section. The Coast Guard is not proposing that inland tank barges install deck-edge coamings. Inland tank barges that carry oil will continue to have the option to choose between compliance with the requirements in paragraph (a) or the requirements in paragraph (b) of 33 CFR 155.310.

On-Water Containment and Removal Equipment

The Committee discussed whether vessels should warehouse equipment on board for use by shore-based response personnel. Suggestions for the types of equipment to be warehoused included sorbents, booms, and skimmers.

The Committee considered the issues of stowage, maintenance, equipment compatibility, and the crew safety in determining if warehousing was appropriate or economically feasible. One advantage of carrying response equipment aboard the vessel is that the equipment is readily available in the event of a discharge. The Committee considered and rejected requirements for the vessel's crew to be deployed off the vessel or to use this equipment in on-water recovery. It is the Coast Guard's position that the crew's primary responsibilities are the safety of the vessel and containment of the cargo. Deploying crew members over the side of the vessel may jeopardize their safety and the safety of the vessel.

The Committee also considered the requirements for vessel response plans to determine whether response requirements could be better met with shore-based equipment or vessel-carried equipment. The Committee did not recommend that vessels warehouse equipment on board, but agreed to set on-scene planning criteria for on-water containment and removal of spilled oil. Vessel owners or operators could meet these planning criteria with carried equipment or rapid mobilization of shore-based equipment.

Consistent with the Committee's recommendation, the Coast Guard is not proposing warehousing equipment on board for responses to discharges off the ship. Although some vessel operators do carry removal equipment on board, the Coast Guard does not believe that requiring all vessels to warehouse oil spill response equipment is practical, economically feasible, or always compatible with the safe operation of the vessel.

Internal Cargo Transfer Capability

The Committee recommended that if the vessel's existing cargo piping system is designed to facilitate cargo transfer in the event of damage to the vessel or the piping system, the vessel should not be required to carry additional hoses or reducers. However, the Committee recommended that all other tankers, offshore tank barges, and coastal tank barges carry hoses and reducers to facilitate internal transfer of cargo. Requiring vessels to have equipment that is appropriate and readily available could facilitate containment of the cargo on the vessel.

Several Committee members indicated that requiring hoses and reducers on board should not have a significant economic impact on tanker owners or operators because most tankers already have protected or redundant piping systems. Finally, the Committee did not recommend that inland tank barges carry additional hoses and reducers. The proposed rule reflects the Committee recommendations.

Lightering Equipment

The Committee discussed the possibility of requiring tankers, offshore tank barges, and coastal tank barges to carry high-capacity, portable, submersible pumps to facilitate both lightering and salvage operations and the intraship transfer of cargo. The Committee recognized the value of these pumps in lightering, but also recognized that pumping equipment is often available from shore-based locations. Several Committee members expressed concern that requiring these pumps to be carried on board the vessel was not economically feasible. Further, the pumps may be incompatible with the safe operation of the vessel if the pumps are employed before adequate stability information is available.

The Committee agreed that, before using pumps to transfer liquid cargo, the vessel's crew must be able to assess damage and have access to the vessel's calculated damage stability and residual structural strength characteristics. Considering the time required to adequately assess damage and perform the necessary stability calculations, some members noted that the difference in availability of pumps carried on board and those brought from shore may not be significant.

The Committee members recommended that a vessel develop an emergency lightering plan to identify the availability and location of necessary lightering resources, including fenders, transfer hoses and connections, portable pumps, lightering and mooring masters, and vessel and barge brokers. Further, the Committee recommended that lightering equipment not be required aboard vessels, but be available from shore-based locations to meet regulatory guidelines.

The Committee recommended that requirements for lightering plans be addressed in a separate rulemaking on vessel response plans (CGD 91–034). The proposed rule on vessel response plans incorporates the Committee recommendations.

Spill Tracking Devices

The Committee agreed that it would be desirable for vessels to carry a simple, spill tracking device. The tracking device would be deployed by the vessel at the time of the discharge to facilitate location of the leading edge of the spill by first responders for 12–24 hours, even in darkness and adverse weather.

The Coast Guard Research and Development (R&D) Center has evaluated several buoy designs for tracking oil spills. However, most were designed for satellite tracking, used more sophisticated technology, and were powered for longer periods of time than was recommended by the Committee for this application.

The Committee recommended that, within two years of the date of the final rule, the R&D Center undertake and complete research, development, and evaluation of a suitable design for a simple spill tracking device. Some

Committee members suggested that the Coast Guard evaluation include, as one of the potential designs, a device with the following characteristics:

(1) A 4–6 meter vertical component with a one-foot diameter radar reflector.

(2) A strobe light was a 24 hour battery.

(3) A counterweight capable of maintaining the device in a vertical position.

(4) A float capable of supporting the entire assembly.

The Committee recommended that the Coast Guard consider using OPA 90 title VII funds to conduct this research, and that tankers and offshore tank barges carry a device that is approved by the Coast Guard no later than 3 years after the publication of the final rule.

Based on the Committee's recommendation, the Coast Guard R&D Center will reevaluate tracking devices and determine if a device with these characteristics would be suitable. If this evaluation identifies a suitable device, the Coast Guard may propose in a separate rulemaking that tankers and offshore tank barges carry the device.

The Coast Guard invites public comment on a reliable practical device to facilitate the location of the leading edge of an oil spill.

Damage Stability Information

The Committee recommended that an owner or operator of a tanker, offshore tank barge, or coastal tank barge have prearranged, prompt access to computerized on-board or shore-based damage stability and residual structural strength calculation programs. The Committee stressed the importance of requiring an owner or operator to maintain vessel strength and stability characteristics on file in the program. Damage stability information is important in developing an effective response when hull failure, groundings, or strandings occur. The Committee recommended that the means of access to this program be identified in the vessel response plan. The proposed rule incorporates these recommendations.

Emergency Towing Capability for Certain Tank Barges

The Committee recommended that offshore and coastal tank barges carry an emergency tow wire rigged and ready for use.

Coast Guard policy has been to distinguish between integrated tug-barges (ITBs) that are designed for push-mode and those designed for dual-mode operation (capable of being pushed or towed). Previously, the Coast Guard has regulated these two designs separately. The Coast Guard invites public comment on emergency towing package requirements for ITBs.

Emergency Towing Capability for Tankers

The Coast Guard issued Navigation and Inspection Circular (NVIC) No. 8–89 on January 8, 1990, endorsing International Maritime Organization (IMO) Resolution A.535(13), Recommendations on Emergency Towing Requirements for Tankers, dated November 17, 1983. NVIC No. 8–89 is an official recommendation. The NVIC has no regulatory authority and cannot be enforced. The salient points of the Resolution include applicability provisions, and provisions for towing system components and connecting fittings.

First, the Resolution recommends strongpoints, chafing chains, and fairleads at the bow and stern of a vessel. Second, it requires fittings to facilitate passing the towing pennant from the rescue vessel using the rescue vessel's power. The Resolution recommends installation of these emergency towing components on all tankers greater than 50,000 deadweight tons (dwt) built after adoption of the Resolution, and on tankers greater than 100,000 dwt built before adoption of the Resolution. It requires installation on tankers built before the date of adoption (November 17, 1983) at the first drydocking, but not later than five years after adoption.

Some Committee members strongly recommended that the Coast Guard adopt the provisions of IMO Resolution A.535(13) in the proposed regulations. Adopting these provisions as regulation would go beyond the existing NVIC and make compliance mandatory and enforceable. Proponents of this position argued that the Resolution is an international standard that was developed by the International Maritime Organization, of which the United States is a member. Therefore, any regulations derived from the Resolution would be more readily enforceable, particularly with respect to foreign flag tankers, than regulations imposed unilaterally by the United States without international consensus.

Other Committee members proposed alternative regulations that would require a towing arrangement similar to that installed on many Trans Alaska Pipeline System (TAPS)-trade tankers. The Committee could not achieve a consensus on minimum emergency towing requirements and was unable to recommend one option. As a result, the Committee developed two regulatory options and recommended that both be published for comment in the NPRM.

Under the first option (Option 1), the Committee recommended that the applicability of the IMO towing requirements be extended. The Committee recommended that all tankers between 20,000 dwt and 50,000 dwt be required to install a strongpoint, fairlead, and chafing chain on one end of the vessel. The Committee also recommended that all tankers 50,000 dwt or greater, irrespective of their construction date, be required to install strongpoints, fairleads, and chafing chains on both ends of the vessel.

Further under Option 1, the Committee discussed modifying the phase-in period for the IMO provisions, and recommended that all tankers of 20,000 dwt and greater be required to install the emergency towing arrangements within three years of the date of the final regulation.

Proponents of the alternative option felt that IMO Resolution A.535(13) was not sufficient to facilitate connection between the rescuing and the rescued vessel in adverse weather. Consequently, these members recommended a second regulatory option.

Option 2 combines features of the IMO-recommended towing package and the requirements included in the Prince William Sound Emergency Towing Package, as identified in the Prince William Sound Tanker Spill Prevention and Response Plan, Volume 2. Towing packages containing features of these two standards are currently installed on many Trans-Alaska Pipeline System (TAPS) trade tankers that transit Prince William Sound, Alaska.

Under Option 2, tankers of 20,000 dwt and above would be required to comply with the recommendations of IMO Resolution A.535(13) regarding the provisions for strongpoints, fairleads, and chafing chains. In addition, Option 2 would require that tankers have on one end a 400 foot long towing wire pendant; a 600 foot long, floating, polypropylene pickup line; and a floating pickup buoy. The towing wire pendant would be constructed of 2½ to 3 inch diameter, 6×37 to 6×41, extra-improved plow steel, IWRC (independent wire rope core), galvanized wire. This option would also require that vessels preconnect and store the chafing chain, pendant wire, and polypropylene line to facilitate the deployment of the pendant by no more than three crew members on a vessel with no power (deadship).

The proponents of Option 2 argued that requiring the tanker to provide a pendant wire and pickup line would facilitate the connection between the tanker and the rescue vessel.

particularly in adverse weather, and minimize the need for tanker crew to rig and deploy the towing arrangement. The proponents of Option 1 argued that the crew of a rescue vessel (typically a tug) would prefer to use the tug's main tow wire than rely on a tanker's emergency wire which the tug crew neither inspected nor maintained.

To reach consensus, proponents of Option 1 recommended that the Coast Guard, in conjunction with the international shipping and salvage community, promote the evaluation and design of an emergency towing package to facilitate a rescue vessel taking a tanker under tow with minimum involvement by the tanker crew in rigging and deploying the towing arrangement. These Committee members recommended that the evaluation consider maintenance, costs, and retrofitting requirements. Under this option, the Coast Guard would propose that the Maritime Safety Committee (MSC) of IMO consider within a 2 year period the design and evaluation of a towing package, which could then be recommended to the Assembly for adoption.

The proponents of the second option agreed that there should be an evaluation, but recommended that within 18 months, the Coast Guard complete a study to evaluate recommended components of the combined towing package and promulgate minimum standards. The regulation would set out minimum design and performance specifications for a system that would provide for storage and facilitate the deployment of an emergency towing arrangement on a vessel without power. The regulations would require installation of the emergency towing arrangement on at least one end of the vessel. The towing arrangement would include a chafing chain, pre-rigged or designed for deployment without the crew physically handling it.

The proponents of the second option made further recommendations. First, they recommended that the approved system be required on all new tankers of 20,000 dwt and above and on existing tankers of 50,000 dwt and above within three years of the date of the regulation establishing the standards (approximately 4 years after the publication of the final rule for this rulemaking). Second, they recommended that the Coast Guard, supported by the involved shipping and towing industry who participated in the evaluation, forward minimum specifications to the IMO and propose that the Assembly update and reissue IMO Resolution A.535(13) to include the regulations for pendant-wire carriage arrangements. Finally, option 2 proponents recommended grandfathering emergency towing arrangements that are already installed on vessels engaged in the TAPS trade. The Coast Guard interprets this to apply to arrangements that are consistent with the arrangements identified in the Prince William Sound Tanker Spill Prevention and Response Plan, Volume 2, so long as they were maintained on board the tanker.

The Coast Guard has included draft regulatory language that would implement Option 2 in § 155.235 and is proceeding with further study and evaluation of these requirements. Comments that will aid this study are solicited. Any recommendation resulting from the evaluation would be the subject of future rulemaking. It should be noted that the effective date for paragraph (b) under Option 2 would be established by this separate rulemaking.

The Committee recommended that existing single hull vessels scheduled to be taken out of service before age thirty (calculated from the keel laying date, as defined in 46 CFR 30.10–37), rather than comply with the requirements of IMO Draft Regulation 13G of Annex I of MARPOL 73/78, be exempt from requirements to install the emergency towing equipment for 5 years after the date of the final regulation, if they are 20 years old or older as of the publication date of the final rule. The Committee made this recommendation to eliminate the cost of upgrading vessels whose deactivation was planned.

There is no practicable regulatory means of exempting some 20 year old tankers, but not others, on the basis of an owner/operator's discretionary schedule to deactivate a tanker or continue it in service. Therefore, in § 155.235 of the proposed rule, five-year phase-in periods are proposed for all tankers 20 year old or older as of the date the final rule is published. The Coast Guard requests comments on this provision because older vessels which benefit from this lengthened phase-in period probably pose a similar risk to the environment, and may pose a greater risk, than newer tankers whose proposed phase-in period is 3 years.

The Committee recommended that the Coast Guard publish both alternatives in the notice of proposed rulemaking. Section 155.235 of the proposed rule incorporates this recommendation, and presents both options for public comment.

Incorporation by Reference

The following material would be incorporated by reference in § 155.140: IMO Resolution A.535(13), Recommendations on Emergency Towing Arrangements for Tankers, dated November 17, 1983. Copies of the material are available for inspection where indicated under "ADDRESSES." Copies of the material are available at the addresses in § 155.140.

Regulatory Evaluation

This proposal is not major under Executive Order 12291. This proposed regulation is significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979) because of substantial public interest in the proposed rule. A draft Regulatory Evaluation is available in the docket for inspection or copying where indicated under "ADDRESSES."

The Coast Guard does not expect this proposal to impose substantial new costs on tanker owners and operators for acquiring discharge-removal equipment to carry on board. The proposed equipment for containing and removing on-deck spills includes deck-edge coamings, athwartship barriers, sorbents, hand scoops, mops, buckets, and small portable pumps. Tankers already are in substantial compliance with the proposed requirements for on-board equipment. For owners or operators of offshore and coastal barges, the annualized costs of on-board spill response equipment is approximately $0.01 million; and for owners and operators of inland barges, $0.09 million. (Under the proposed rule, inland tank barges are not required to install deck-edge coamings.) The annualized costs of this equipment for vessels carrying oil in bulk as secondary cargo will amount to $0.5 million. The present value costs of the discharge removal equipment for the period 1993–2015 is $0.12 million for coastal and offshore barges, $.838 million for inland barges, and $4.45 million for secondary cargo carriers.

Proposed requirements for source control equipment (hoses) will impose an annualized cost of $7.37 million on tankers and $.72 million on offshore and coastal barges. The present value costs for source control are $73.66 million for tankers and $7.19 million for coastal and offshore barges.

Annual costs of the damage stability and structural strength calculation programs will be approximately $0.69 million for tankers and $0.09 million for offshore and coastal barges. The present value costs of the damage stability calculation programs are $5.8 million for tankers and $1 million for coastal and offshore barges.

The Coast Guard projects that the annualized cost of equipping tankers with an emergency towing package will be about $6.66 million. The annualized cost of equipping offshore and coastal tank barges will be about $1.84 million. The present value cost of the towing equipment is $62.85 million for tankers and $18 million for coastal and offshore barges.

The total annualized costs of this proposed regulation are $17.97 million, which amount to a per barrel cost of $0.003 to consumers. The total present value cost of the proposed rule is $142.43 million for tankers, $.838 million for inland barges, $26.31 million for coastal and offshore barges, and $4.45 million for secondary cargo carriers. The total present value cost for the proposed rule is $174.028 million. Therefore, this proposal will not result in annual costs of $100 million or more; will have no significant adverse effects on competition, employment, or other aspects of the economy; and will not result in a major increase in costs and prices.

The major benefit of the proposed rule is that it will reduce the risk of oil spills, improve vessel oil spill response capabilities, and mitigate oil spill damage to the environment by helping to ensure that on-deck spills will be contained on the vessel and removed quickly. Further, the proposed emergency towing package requirements will minimize the risk of a spill from a disabled or drifting vessel. Monetary benefits cannot be calculated for an emergency towing package. The benefit is the satisfaction of an international resolution and the ability to quickly and safely rig a tow for a stricken or disabled vessel and, thereby, prevent some of the problems that precipitated the breakup of the AMOCO CADIZ.

The Coast Guard estimates that the proposed requirements for equipment to contain on-deck spills will prevent 477.7 barrels of oil from spilling into the marine environment of the U.S. from 1992 to 2015. This amount includes 12.2 barrels for oceangoing and coastal barges, 21.6 barrels for inland barges, and 443.9 barrels for secondary carriers. The requirements for source control equipment for tank vessels will prevent 2,082 barrels of oil from spilling. The total amount of oil prevented from spilling is estimated to be 2,559.7 barrels over the 23 year period. To compare the costs and benefits of the proposed rule over the next twenty-three years in terms of cost per barrel prevented from spilling, we have discounted the number of barrels that would not be spilled.

It is estimated that the requirements for equipment to contain on-deck spills will prevent 158.67 discounted barrels of oil from spilling, using a 10% discount rate. This estimate includes 1 barrel for oceangoing and coastal barges, 1.77 barrels for inland barges, and 155.9 barrels for secondary carriers. The requirements for source control equipment are estimated to prevent 754 discounted barrels of oil from spilling. The total discounted barrels prevented from spilling over the twenty-three year period is 912.67. Based on the discount rate, we calculate the present value cost per barrel prevented from spilling to be $190,680.

One alternative to the proposed rule is requiring inland tank barges to install deck-edge coamings. The annualized costs of this provision would have been $1.54 million, with a present value cost of $17.66. The Coast Guard rejected this alternative because coamings on inland barges pose safety problems during barge operations and may be costly for older barges with external frames.

A second alternative is to require warehoused equipment on board tank vessels. The present value cost of this requirement would be $666 million over the period 1993–2015. Although some vessel operators do carry removal equipment on board, the Coast Guard rejected this alternative because requiring all vessels to warehouse oil spill response equipment is not practical, economically feasible, or always compatible with the safe operation of the vessel. At the recommendation of the Committee, the Coast Guard decided to propose strict response requirements and allow the vessel owner or operator to decide how best to meet these requirements with warehoused or shore-based equipment. The proposed rules do not preclude the vessel owner or operator from deciding what equipment should be carried on board.

Finally, the Coast Guard considered requiring pumps on board tankships to facilitate lightering and salvage operations and the intraship transfer of cargo. The annualized cost of the pump requirement would be $41.53 million, and the net present value cost for the period 1993–2015 would be $288.69 million. The Coast Guard rejected this alternative because pumps may be incompatible with the safe operation of the vessel. The Coast Guard recognizes the value of these pumps in lightering, but also recognizes that pumping equipment is often available from shore-based locations. Considering the time required to adequately assess damage and perform the necessary stability calculations, the difference in availability of pumps carried on board and those brought from shore may not be significant.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). "Small entities" also includes small, not-for-profit organizations and small governmental jurisdictions.

Most of the small businesses in the marine transportation industry are inland barges and vessels which carry oil in bulk as secondary cargo. This rule imposes costs of less than $0.1 million annually for inland barges and approximately $500,000 annually for secondary vessel industries, with annual costs per company of less than $250 for inland barge companies and less than $1,000 for secondary vessel companies. For barge and secondary vessel owners and operators, the Coast Guard expects the cost burden for equipment to be considerably less than the costs for tankers. Ninety-six percent or $17.38 million of the total annualized costs will be paid by the tanker industry.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities. If, however, you think that your business qualifies as a small entity and that this proposal will have a significant economic impact on your business, please submit a comment (see "**ADDRESSES**") explaining why you think your business qualifies and in what way and to what degree this proposal, alone or in combination with other Coast Guard rulemaking initiatives under OPA 90, will economically affect your business.

Collection of Information

Under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) reviews each proposed regulation that contains a collection of information requirement to determine whether the practical value of the information is worth the burden imposed by its collection. Collection of information requirements include reporting, recordkeeping, notification, and other similar requirements. The proposed rule contains no new collection of information requirement.

Federalism

The Coast Guard has analyzed this proposed rule under the principals and criteria contained in Executive Order 12612, Federalism, and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This proposed rule would establish regulations requiring certain vessels to carry discharge removal equipment. In *Ray* v. *Atlantic Richfield*, (435 U.S. 51, 98 S.Ct. 988, [1978]), the Supreme Court found that vessel design and equipment standards fall within the exclusive province of the Federal Government. The OPA 90 Conference Report explicitly says that provisions in section 1018 of OPA 90 preserving certain State authority are not meant to disturb this Supreme Court decision (House Conf. Rep., p. 122). Therefore, the Coast Guard intends this final rule to preempt State action addressing the same subject matter.

Environmental Impact

The Coast Guard has prepared a preliminary Environmental Assessment (EA) for this action under the Council on Environmental Quality regulations (40 CFR parts 1500–1800), and Coast Guard policy (COMDTINST M16475.1B) implementing the National Environmental Policy Act (NEPA). The EA discusses the environmental consequences of the proposed action and alternatives, including a no-action alternative. The preliminary EA is available in the docket. After receipt of all comments to this proposed rulemaking action and comments to the EA, the Coast Guard will make a final decision whether to draft an Environmental Impact Statement (EIS).

List of Subjects in 33 CFR Part 155

Hazardous substances, Incorporation by reference, Oil pollution, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR part 155 as follows:

PART 155—OIL OR HAZARDOUS MATERIAL POLLUTION PREVENTION REGULATIONS FOR VESSELS

1. The authority citation for part 155 is revised to read as follows:

Authority: 33 U.S.C. 1231, 1321(j)(1)(C), (j)(5), and (j)(6); sec. 2, E.O. 12777, 56 FR 54757; 49 CFR 1.46. Sections 155.100 through 155.130, 155.350 through 155.400, 155.430, 155.440, and 155.470 also issued under 33 U.S.C. 1903(b), and sections 155.830 and 155.880 issued under 33 U.S.C. 2735.

Supart A—[Amended]

2. Section 155.140 is added to subpart A to read as follows:

§ 155.140 Incorporation by reference.

(a) Certain material is incorporated by reference in this part with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in paragraph (b) of this section, the Coast Guard must publish a notice of change in the **Federal Register** and the materials must be available to the public. All approved material is on file at the Office of the Federal Register, 800 North Capitol Street NW., Washington, DC, 20002 and at the U.S. Coast Guard, Marine Environmental Protection Division (G–MEP), 2100 Second Street SW., Washington, DC 20593–0001, and is available from the sources indicated in paragraph (b) of this section.

(b) The material approved for incorporation by reference in this part and the sections affected are:

International Maritime Organization (IMO)

Publications Section, 4 Albert Embankment, London SE1 75R, United Kingdom, Telex 23588

Resolution A.535(13), Recommendations on Emergency Towing Requirements for Tankers, November 17, 1983 ..... 155.235

3. The table of contents for subpart B is amended by adding entries for §§ 155.200 through 155.240 and revising the entry for § 155.310 to read as follows:

Subpart B—Vessel Equipment

155.200 Definitions.
155.205 Discharge-removal equipment for vessels 400 feet or greater in length.
155.210 Discharge-removal equipment for vessels less than 400 feet in length.
155.215 Discharge-removal equipment for inland tank barges.
155.220 Discharge-removal equipment for vessel carrying oil as a secondary cargo.
155.225 Internal cargo transfer capability.
155.230 Emergency towing capability for tank barges.
155.235 Emergency towing capability for tankers.
155.240 Damage stability information.
155.310 Containment of oil and hazardous material cargo discharges.

* * * * *

4. Sections 155.200 through 155.240 are added to subpart B to read as follows:

§ 155.200 Definitions.

As used in this subpart:

Coastal tank barge means a tank barge, including dual-mode integrated tug-barges, certificated under 46 CFR chapter I, subchapter D, for coastwise service.

Inland tank barge means a tank barge certificated under 46 CFR chapter I, subchapter D, for river service or lakes, bays, and sounds service.

Offshore tank barge means a tank barge, including dual-mode integrated tug-barges, certificated under 46 CFR Chapter I, subchapter D, for ocean service or Great Lakes service, or any foreign flag tank barge.

Tanker means a self-propelled vessel, including push-mode integrated tug-barges, with the principle purpose of carrying oil in bulk as cargo and that has a Certificate of Inspection issued under 46 CFR chapter I, subchapter D, a Certificate of Compliance, or a Tank Vessel Examination letter.

Vessel carrying oil as secondary cargo means a vessel carrying oil pursuant to a permit under 46 CFR 30.01–5, 46 CFR 70.05–30, or 46 CFR 90.05–35 or pursuant to an International Oil Pollution Prevention (IOPP) or Noxious Liquid Substance (NLS) certificate required by §§ 151.33 or 151.35 of this chapter; or any uninspected vessel that carries oil in bulk as cargo.

§ 155.205 Discharge-removal equipment for vessels 400 feet or greater in length.

(a) Tankers, offshore tank barges, and coastal tank barges with an overall length of 400 feet or more must carry appropriate equipment and supplies for the containment and removal of on-deck oil cargo spills of at least 12 barrels.

(b) The equipment and supplies must include—

(1) Sorbents;

(2) Non-sparking hand scoops, shovels, and buckets;

(3) Containers suitable for holding recovered waste;

(4) Emulsifiers for deck cleaning;

(5) Protective clothing; and

(6) Non-sparking portable pumps and hoses.

(c) During cargo transfer operations, the equipment and supplies must remain ready, and pumps and hoses must be rigged, for immediate use.

§ 155.210 Discharge-removal equipment for vessels less than 400 feet in length.

(a) Tankers, offshore tank barges, and coastal tank barges with an overall length of less than 400 feet must carry appropriate equipment and supplies for the containment and removal of on-deck oil cargo spills of at least 7 barrels.

(b) The equipment and supplies must include—

(1) Sorbents;

(2) Non-sparking hand scoops, shovels, and buckets;

(3) Containers suitable for holding recovered waste;

(4) Emulsifiers for deck cleaning;

(5) Protective clothing; and

(6) Non-sparking portable pumps and hoses.

(c) During cargo transfer operations, the equipment and supplies must remain ready, and pumps and hoses must be rigged, for immediate use.

§ 155.215 Discharge-removal equipment for inland tank barges.

(a) During cargo transfer operations, inland tank barges must have appropriate equipment and supplies ready for immediate use to control and remove on-deck oil cargo spills of at least one barrel.

(b) The equipment and supplies must include—

(1) Sorbents;

(2) Non-sparking hand scoops, shovels, and buckets;

(3) Containers suitable for holding recovered waste;

(4) Emulsifiers for deck cleaning;

(5) Protective clothing; and

(c) The tank barge owner or operator may rely on facility-provided equipment if the equipment availability has been pre-arranged by contract or other means approved by the Coast Guard.

§ 155.220 Discharge-removal equipment for vessels carrying oil as secondary cargo.

(a) Vessels carrying oil as secondary cargo must carry appropriate equipment and supplies for the containment and removal of on-deck oil cargo spills of at least one-half barrel.

(b) The equipment and supplies must include—

(1) Sorbents;

(2) Non-sparking hand scoops, shovels, and buckets;

(3) Containers suitable for holding recovered waste;

(4) Emulsifiers for deck cleaning;

(5) Protective clothing.

(c) The equipment and supplies must be ready for immediate use during cargo transfer operations.

§ 155.225 Internal cargo transfer capability.

Tankers, offshore tank barges, and coastal tank barges must carry suitable hoses and reducers for internal transfer of cargo to tanks or other spaces within the cargo block, unless the vessel's installed cargo piping system is capable of performing this function.

§ 155.230 Emergency towing capability for tank barges.

(a) Offshore and coastal tank barges must carry an emergency tow wire or tow line rigged and ready for use.

(b) The emergency tow wire or tow line must have the same towing characteristics as the primary tow wire or tow line.

§ 155.235 Emergency towing capability for tankers.

OPTION 1 FOR § 155.235

(a) Except as provided in paragraph (c) of this section, by [*Insert date 3 years after the effective date of the final rule.*], all tankers of 20,000 deadweight tons (dwt) or more but less than 50,000 dwt must comply with the emergency towing provisions of sections 2.2 through 2.7 of IMO Resolution A.535(13) on at least one end of the vessel.

(b) Except as provided in paragraph (c) of this section, by [*Insert date 3 years after the effective date of the final rule.*], all tankers of 50,000 dwt or more must comply with the emergency towing provisions of sections 2.2 through 2.7 of IMO Resolution A.535(13) on both ends of the vessel.

(c) Tankers that are at least 20 years old (calculated from the keel laying date, as defined in 46 CFR 30.10–37) as of [*Insert the effective date of the final rule.*] must comply with the requirements of paragraphs (a) and (b) of this section by [*Insert date 5 years from the effective date of the final rule.*].

OPTION 2 FOR § 155.235

(a) By [*Insert date 3 years after the effective date of the final rule.*], all tankers of 20,000 deadweight tons (dwt) or more must comply with the emergency towing provisions of sections 2.2 through 2.7 of IMO Resolution A.535(13) on both ends of the vessel.

(b) All tankers of 20,000 dwt or more, constructed after [*Insert the effective date of the final rule.*], must be fitted on at least one end of the vessel with—

(1) A 400 foot long towing wire pendant constructed of 2½ to 3 inch diameter, 6×37 to 6×41, extra-improved plow steel, IWRC, galvanized wire;

(2) A 600 foot long, floating, polypropylene pickup line; and

(3) A floating pickup buoy.

(c) The equipment required in paragraph (b) of this section must be preconnected and stored in a manner that will facilitate the deployment of the pendant on a vessel with no power (deadship) by no more than three crew members.

(d) Tankers of 50,000 dwt or more, delivered before [*Insert the effective date of the final rule.*], must comply with the provisions of paragraph (b) of this section by [*Insert date 3 years after the effective date of the final rule.*].

(e) Tankers engaged in the Trans-Alaska Pipeline System (TAPS) trade and fitted with the emergency towing package described in paragraph (b) of this section as of [*Insert the effective date of the final rule.*] are exempted from the requirements in paragraphs (a) and (c) of this section as long as the emergency towing package is maintained on board the tanker.

(f) Tankers that are at least 20 years old (calculated from the keel laying date, as defined in 46 CFR 30.10–37 as of [*Insert the effective date of the final rule.*] must comply with the requirements of paragraphs (a) through (d) of this section by [*Insert date five years from the effective date of the final rule.*].

§ 155.240 Damage stability information.

(a) Owners or operators of tankers, offshore tank barges, and coastal tank barges shall ensure that their vessels have prearranged, prompt access to computerized onboard or shore-based damage stability and residual structural strength calculation programs.

(b) Vessel baseline strength and stability characteristics must be pre-entered into such programs and be consistent with the vessel's existing configuration.

(c) Access to the calculation program must be available 24 hours a day.

(d) The means of access to the calculation program must be identified in the vessel response plan required in subpart D of this part.

5. In § 155.310, the section heading and paragraph (b) introductory text are revised and paragraphs (c) and (d) are added to read as follows:

§ 155.310 Containment of oil and hazardous material cargo discharges.

* * * * *

(b) An offshore or coastal tank barge with a capacity of 250 or more barrels that is carrying hazardous material as cargo, and an inland barge with the capacity of 250 or more barrels that is carrying oil or a hazardous material as cargo must meet paragraph (a) of this section or be equipped with—

* * * * * *

(c) In addition to the requirements of paragraphs (a) and (b) of this section, by [*Insert date 3 years after the effective date of the final rule.*], all tankers and offshore and coastal tank barges with a capacity of 250 or more barrels that are carrying oil as cargo must have peripheral coamings, including port and starboard deck-edge coamings and

forward and aft athwarships coamings, completely enclosing the cargo deck area, cargo hatches, manifolds, transfer connections, and any other openings where cargo may overflow or leak.

(1) Coamings must be at least 4 inches high except in the aft corners.

(2) In the aft corners (port and starboard) of a vessel, the coamings must be at least 8 inches high and extend—

(i) Forward at least 14 feet from each corner; and

(ii) Inboard at least 8 feet from each corner.

(3) Each area enclosed by the coaming required under this paragraphs must have—

(i) A means of draining or removing oil from the enclosed deck area without discharging oil into the water; and

(ii) A mechanical means of closing each drain and scupper in the enclosed deck-area.

(4) For tankships, as "tankship" is defined in 46 CFR 30.10–67, the coaming or other barrier required in 46 CFR 32.56–15 may serve as the aft athwarships coaming if the tankship is otherwise in compliance with the requirements of this paragraph(s).

(d) In addition to the requirements of paragraphs (a) and (b) of this section, an offshore or coastal tank barge, as defined in § 155.200, with a capacity of 250 or more barrels that is carrying oil as cargo must have—

(1) A fixed or portable container under each oil loading manifold and each oil transfer connection within the coaming, that holds at least one-half barrel;

(2) A mechanical means of closing each drain and scupper within the coaming; and

(3) A means of draining or removing discharged oil from the fixed or portable container and from within the coamings without discharging the oil into the water.

Dated: September 23, 1992.

J.W. Kime,

Admiral, U.S. Coast Guard, Commandant.

[FR Doc. 92–23562 Filed 9–28–92; 8:45 am]

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Tuesday
September 29, 1992

Part VI

Department of Transportation

Federal Aviation Administration

14 CFR Part 121

Aircraft and Proposed Advisory Circular on Ground Deicing and Anti-Icing Program; Interim Final Rule and Notice

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. 26930; Amendment No. 121-231]

RIN 212-AE51

Aircraft Ground Deicing and Anti-Icing Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: This amendment establishes a requirement for part 121 certificate holders to develop an FAA-approved ground deicing/anti-icing program.

This rule is necessary because several accidents and the 1992 International Conference on Airplane Ground Deicing indicate that, under present procedures, the pilot in command may be unable to effectively determine whether the aircraft's critical surfaces are free of all frost, ice, or snow prior to attempting a takeoff.

The rule is intended to provide an added level of safety to flight operations in adverse weather conditions. This rule and associated airport and air traffic control procedures will provide enhanced procedures for safe takeoffs during adverse weather conditions.

DATES: This interim final rule is effective November 1, 1992. Additional comments must be received not later than April 15, 1993.

ADDRESSES: Comments on this interim final rule should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 26930, 800 Independence Ave., SW., Washington, DC 20591. Comments delivered must be marked Docket No. 26930. Comments may be examined in room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Larry Youngblut, Flight Standards Service, Regulations Branch, AFS-240, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-3755.

SUPPLEMENTARY INFORMATION:

Background

On July 23, 1992 (47 FR 32846) the FAA published a Notice of Proposed Rulemaking that would establish requirements for part 121 certificate holders to develop and comply with an FAA-approved ground deicing/anti-icing program. The proposed rule was developed in response to a number of airplane accidents caused in part by icing and to recommendations from an international conference on deicing/anti-icing that considered measures that could be taken to prevent such accidents.

Section 121.629(a) of the Federal Aviation Regulations (14 CFR 121.629(a)) states, in pertinent part, that no person may dispatch or release an aircraft when, in the opinion of the pilot in command or aircraft dispatcher, icing conditions are expected or met that might adversely affect the safety of flight. Section 121.629(b) states, in pertinent part, that no person may take off an aircraft when frost, ice, or snow is adhering to the wings, control surfaces, or propellers of the aircraft. These requirements, which have been virtually unchanged for over 40 years, are based on what is commonly referred to as the "clean aircraft concept." The basis of this concept is that the presence of even minute amounts of frost, ice, or snow (referred to as "contamintion") on particular aircraft surfaces, can cause degradation of aircraft performance and changes in aircraft flight characteristics.

Under the Federal Aviation Regulations, in icing conditions, as in all other conditions, ultimate responsibility for determining whether the aircraft is free of contamination—which is necessary for the aircraft to be airworthy—resets with the pilot in command. When conditions conducive to the formation of frost, ice, or snow or aircraft surfaces exist at the time of takeoff, or it is suspected that these contaminants are adhering to aircraft surfaces, common practice developed by the North American and European aviation communities over many years of operational experience is to deice and/or anti-ice the aircraft before takeoff.

Deicing is a procedure by which frost, ice, or snow is removed from the aircraft in order to provide clean surfaces. Anti-icing is a precautionary procedure which provides protection against the formation of frost or ice and accumulation of snow to treated surfaces of the aircraft for a limited period of time. Two principal types of deicing/anti-icing fluids are used. Type I fluids are unthickened fluids that are normally applied as a mixture of glycol and water. These fluids mainly provide protection against refreezing when no delays or only short delays occur between deicing and takeoff. Type II fluids are thickened fluids. They provide protection against refreezing for longer periods and can be used when longer delays can be anticipated. Type II fluid is used extensively in Canada and Europe, but is used less often in the United States. Type II fluid provides longer holdover times. Holdover time is the estimated time deicing/anti-icing fluid will prevent the formation of frost or ice and the accumulation of snow on the protected surfaces of an aircraft.

According to the National Transportation Safety Board (NTSB), in the last 23 years there have been 15 accidents related to the failure to deice aircraft adequately before takeoff. In all of these accidents, contamination on the aircraft surfaces during takeoff was the cause or a contributing cause of the accident. On March 22, 1992, USAir flight 405 crashed on takeoff from La Guardia Airport in a snowstorm during nighttime operations. While the NTSB has not yet issued a probable cause finding for this accident, the FAA has proceeded on the assumption that the accident was caused, at least in part, by icing. The airplane had been deiced approximately 35 minutes before takeoff.

As a result of this and earlier accidents, the FAA mounted a sharply focused effort to address the issues surrounding ground deicing before the winter of 1992/1993. On May 28 and 29, 1992, the FAA held the International Conference on Airplane Ground Deicing in Reston, Virginia. The conference brought together leading experts from all over the world to share information on ground deicing/anti-icing of transport category airplanes and to recommend actions for preventing accidents caused by icing, and for continuing improvement of flight safety under adverse weather conditions.

The two-day conference was attended by representatives from air carriers and air carrier associations, crewmember associations, manufacturers and manufacturing associations, airport operators, and air traffic controllers and other FAA personnel, as well as by scientific experts on weather, deicing fluids, and deicing equipment. Over 800 people attended the conference. Areas covered by working groups at the conference were aircraft design; ground deicing and anti-icing systems; air traffic control and sequencing; deicing personnel, procedures, and training; and ice detection, recognition, and crew training.

Two major recommendations, which support this rulemaking, made by the working groups are: (1) Critical aircraft surfaces must be kept free of frost, ice, and snow; and (2) Each air carrier should have an approved aircraft deicing program that will ensure full

compliance with the clean aircraft concept. The program should include ground deicing procedures, a comprehensive training program for flight crewmembers, holdover timetables to be used as guidelines, and criteria for determining if a pretakeoff check after deicing is needed.

The FAA based the proposed rule on these recommendations and accident history. As proposed, the rule would require part 121 certificate holders to develop and comply with an FAA-approved ground deicing/anti-icing program that includes procedures that must be followed whenever ground conditions exist that might result in frost, ice, or snow adhering to the aircraft surfaces, unless it uses the alternate check procedures described below under "Implementation of Program." The program is intended to provide the pilot in command with more complete information, training procedures, and ground support, which he or she needs for deciding if takeoff can be safely accomplished. Each program would include a detailed description of how the certificate holder determines that ground deicing/anti-icing procedures must be in effect, who is responsible for deciding that such procedures must be in effect, the operational procedures for implementing ground deicing, and the specific duties and responsibilities of each operational position or group responsible for getting the aircraft safely airborne while such procedures are in effect.

To be approved, each ground deicing/anti-icing program would have to cover at least the following areas:

(1) Ground training and testing requirements for all flight crewmembers and qualification requirements for all other personnel the certificate holder uses in implementing the approved ground deicing/anti-icing program.

(2) Procedures for the use of holdover times.

(3) Deicing/anti-icing and accompanying checking procedures.

Differences between the proposed rule and the final rule involve pretakeoff check requirements, short term training and qualification/testing requirements, implementation plans, use of holdover timetables, definitional changes, and flight with underwing frost under certain conditions. These changes are discussed in the "Discussion of Comments" section of this preamble.

This rule, when implemented, will ensure that the FAA and part 121 certificate holders have taken every practical step possible to improve safety in icing conditions before the 1992/1993 winter season. In this regard, the FAA is aware that part 121 certificate holders have already, under the leadership of the ATA, taken steps to develop a standard model industry training program that would meet the goals of this rulemaking.

NTSB Recommendations

As a result of accident investigations, the NTSB has issued 30 safety recommendations that address issues involving aircraft ground icing and deicing.

These recommendations cover such subjects as informing operators about the characteristics of deicing/anti-icing fluids; informing flight crews about ice formation after deicing; reviewing information that air carrier operators provide to flight crews on runway contamination and engine anti-ice during ground operations; requiring flight crew checks before takeoff if takeoff is delayed following deicing; emphasizing to air carrier maintenance departments the importance of maintaining ground support equipment; and requiring air carrier training programs to cover the effect of wing leading edge contamination on aerodynamic performance.

This final rule as well as previous FAA actions address these recommendations. Previous actions included dissemination of advisory circulars, bulletins, memoranda, informative articles, and notices related to winter operations, as well as publishing Air Carrier Operations Bulletins, Maintenance Bulletins, and Maintenance Action Notices. These materials were intended to impress upon operators the dangers of aircraft wing and control surface contamination and the need to assist the pilot in determining if the aircraft is free of contamination before takeoff.

Long-Term FAA Actions

The problem of airplane ground deicing/anti-icing is much broader than just the issue of the last-minute decision of a pilot in command on whether to attempt a takeoff. Airport and air traffic control procedures, airplane design, pilot awareness training, airplane performance characteristics, and other factors have been considered in NTSB recommendations, and many of them were addressed at the Reston conference. The FAA and the aviation industry are continuing their efforts to address these and other related issues. Efforts in some areas, such as airport and air traffic control procedures, are already underway and will continue during this rulemaking. Other issues, such as the effects of airplane design and their interaction with wing contamination and pilot flying technique, for example, require research. The potential value of aircraft type specific pilot training on procedures for use during ground icing conditions will also be studied, either by the FAA alone or as joint government/industry projects. Many aspects of aircraft design, performance characteristics, handling qualities, and flying technique must be examined along with their interactions, in order to fully understand why the accident history appears to reflect an imbalance among accident rates experienced by different aircraft designs.

Discussion of Comments

Additional Comment Period

A number of commenters object to the 15-day comment period and the rush to place this rule in effect before the 1992–1993 winter season. As discussed elsewhere in this preamble and as was discussed in the NPRM, the FAA has determined that it is in the interest of aviation safety to establish additional ground deicing/anti-icing rules before this winter. The International Conference on Airplane Ground Deicing in general supports the FAA's decision. Nevertheless, the FAA recognizes that less than four months have elapsed between the International Conference and this final rule and that the general public had only 15 days to comment on the NPRM. Therefore, the FAA has determined that it is in the public interest to make this an interim final rule and provide an additional comment period to obtain comments on the actual implementation of this rule this winter. All comments received before April 15, 1993 will be carefully considered. If warranted, the FAA will make changes to the rule before the next winter season.

Comments should identify the regulatory docket number to the Rules Docket address specified above. Commenters wishing the FAA to acknowledge receipt of their comments must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26930." The postcard will be date stamped and mailed to the commenter.

General

Over 40 comments were submitted by associations representing airlines, pilots, and dispatchers and by parts 121 and 135 certificate holders, the NTSB, and other interested individuals. While most of the commenters generally favor FAA action to improve aviation safety in potential icing conditions, virtually all of

the commenters make recommendations in specific areas, and a number of commenters express concern that the FAA's short timetable could lead to less than the most effective regulatory action. As indicated, several commenters asked that the comment period be extended. The FAA has carefully considered all of the comments received and has modified the proposal in some instances. A full discussion of comments and FAA responses follows.

Applicability and Justification

Several commenters questioned the applicability of the proposed rule to part 121 certificate holders. A number of commenters (including the National Transportation Safety Board) state that the proposed requirements should also apply to operations under parts 125 and 135. These commenters state that icing conditions apply equally to smaller aircraft and larger aircraft, and that there should be no difference in the level of safety required. One commenter states that since all aircraft are required to comply with the clean aircraft concept, the required deicing program should apply to operations under parts 91, 125, and 135. Several commenters stated that the supporting data cited by the FAA justifies the proposed rule's applicability to turbojet aircraft but not to turbopropeller aircraft, and one commenter states that most jet or turbine powered aircraft have operated safely under current rules and recommends that the proposed rule should only address specific aircraft types that have a history of icing related problems. A few commenters suggest that the proposed rule is an overreaction by FAA, since the accidents cited in the supporting data can be explained and distinguished in a way that could lead the FAA to conclude that better monitoring of compliance with existing regulations would address any problems that exist.

Several commenters state that it is unfair to U.S. carriers for the proposed rule not to apply to foreign air carriers. One foreign air carrier states that it and other foreign operators that use Type II fluids could be adversely affected, apparently on the assumption that its takeoff could be delayed to allow the takeoff of a U.S. aircraft that must take off within five minutes after the aircraft has been determined to be free of frost, ice, and snow (see § 121.629 (c)(4) and (d)).

FAA Response

The intent of this interim final rule is to put in place before this winter a rule to improve safety during icing conditions. The FAA determined that limiting the rule's application to operations under part 121 would have the most far-reaching impact. The FAA will continue to study part 125 and 135 operations to determine if future rulemaking is required. Although most icing related accidents have involved turbojet aircraft, the FAA believes part 121 turbopropeller aircraft should be included in this rule since the very real potential for problems in icing conditions exists and there does not appear to be any technical reason for saying that turbopropeller aircraft are immune from wing contamination related icing accidents. The FAA believes, as stated in the preamble to the proposed rule, that this rule is needed based on the accidents discussed and on the recommendations of the Reston Conference described previously in this preamble. These recommendations were not limited to specific aircraft types.

As to the comments that part 129 foreign air carriers will have an unfair advantage, while the FAA does not believe that foreign air carriers will have any significant competitive advantage, the FAA, as stated in the NPRM, will request that the ICAO initiate a review of deicing and anti-icing procedures used by all air carriers. The FAA will continue to work aggressively with other nations' civil aviation authorities to learn from their safety regulatory experiences and to share those of the U.S. so that we all may develop and adopt the most effective and efficient regulations to improve the safety of all aircraft during icing conditions.

The FAA does not envision a situation in which a foreign operator would be adversely affected by a U.S. operator who is subject to this rule because, in the circumstances described above, normal air traffic control procedures would be observed.

In any case, the FAA solicits continued information from anyone who sees specific instances in which a competitive advantage has been obtained by any air carrier as a result of the application of this rule. The competitive effect of the FAA's rules is an important consideration, and, if there is an adverse result on competition, the FAA would consider amendments that do not degrade the overall level of safety achieved by this rule.

Note on Terminology Change

(1) The notice of proposed rulemaking provided alternative conditions for taking off after expiration of a holdover time. One condition was that a takeoff could occur after a "pretakeoff inspection" determines that the aircraft is clean. This procedure is more properly called a "check," since airworthiness related "inspections" are usually performed by certified mechanics, and this procedure will in most instances be performed by the flight crew. Therefore, throughout this document the term "pretakeoff contamination check" is used, even when referring to the NPRM.

(2) The notice of proposed rulemaking in proposed § 121.629(d) provided an alternative procedure for certificate holders that do not have an approved anti-icing/deicing program. Throughout this document the paragraph (d) procedure is referred to as an "outside-the-aircraft check."

In addition, this document uses two terms "aircraft deicing/anti-icing procedure" and "pretakeoff check", which were not used in the NPRM. These terms are discussed and explained later in this section of the preamble.

The Use of Holdover Times

Over half of the commenters to the NPRM address the issue of the use of holdover times. The majority of these comments concern the following issues: (1) appropriateness of holdover times being specific either to a certificate holder or to an aircraft type; (2) use of holdover times as mandatory rather than as guidelines; (3) determining or changing holdover times.

General Discussion of Holdover Times

This rule requires certificate holders to develop holdover times with data acceptable to the Administrator. The only holdover time date currently readily available to the industry and acceptable to the FAA is that developed by the Society of Automotive Engineers (SAE) and the International Organization for Standardization (ISO). Certificate holders may develop other tables; however, certificate holders should be aware that the FAA may need considerable time to verify the acceptability of newly developed tables.

Holdover times developed by the SAE/ISO have been compiled into tables that are specific to fluid type, Type I or Type II, rather than being specific to any particular aircraft type. The tables use outside air temperature (OAT) ranges, fluid concentrations or freezing point (FP) limitations, and the general type of contamination existing, (i.e., frost, freezing fog, snow, freezing rain, and rain on a cold soaked wing) to determine an approximate holdover time range. See figure 1 reproduced from the draft FAA advisory circular, "*Pilots Guide to Large Aircraft Ground Deicing.*"

The tables specifically state that "the responsibility for the application of these data remains with the user". The tables caution they are for use in departure planning only and shall be used in conjunction with pretakeoff check procedures. These tables only provide approximate time ranges and are subject to individual interpretation. The FAA has determined that takeoff after exceeding any maximum holdover time in a certificate holder's table, for the existing weather conditions, is permitted only when other actions are taken.

It should be noted that the FAA and the SAE have initiated studies to develop more precise holdover timetables and as new data becomes available new tables will be developed and made available to the industry.

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Table 1. Guideline for Holdover Times Anticipated by SAE Type II and ISO Type II Fluid Mixtures as a Function of Weather Conditions and OAT.

CAUTION! THIS TABLE IS FOR USE IN DEPARTURE PLANNING ONLY.
IT SHOULD BE USED IN CONJUNCTION WITH PRE-TAKEOFF CHECK PROCEDURES.

OAT		Type II Fluid Concentration Neat-Fluid /Water [% by Volume]	Approximate Holdover Times Anticipated Under Various Weather Conditions (hours: minutes)				
°C	°F		FROST	FREEZING FOG	SNOW	FREEZING RAIN	RAIN ON COLD SOAKED WING
0 and above	32 and above	100/0	12:00	1:15-3:00	0:25-1:00	0:08-0:20	0:24-1:00
		75/25	6:00	0:50-2:00	0:20-0:45	0:04-0:10	0:18-0:45
		50/50	4:00	0:35-1:30	0:15-0:30	0:02-0:05	0:12-0:30
below 0 to -7	below 32 to 19	100/0	8:00	0:35-1:30	0:20-0:45	0:08-0:20	CAUTION! clear ice may require touch for confirmation
		75/25	5:00	0:25-1:00	0:15-0:30	0:04-0:10	
		50/50	3:00	0:20-0:45	0:05-0:15	0:01-0:03	
below -7 to -14	below 19 to 7	100/0	8:00	0:35-1:30	0:20-0:45	List of Symbols °C = Celsius °F = Fahrenheit Vol = Volume OAT = Outside Air Temp.	
		75/25	5:00	0:25-1:00	0:15-0:30		
below -14 to -25	below 7 to -13	100/0	8:00	0:35-1:30	0:20-0:45		
below -25	below -13	100/0 if 7°C(13°F) Buffer is maintained	A buffer of at least 7°C(13°F) must be maintained for Type II used for anti-icing at OAT below -25°C(-13°F). Consider use of Type I fluids where SAE or ISO Type II cannot be used.				

THIS TABLE DOES NOT APPLY TO OTHER THAN SAE OR ISO TYPE II FPD FLUIDS.

THE RESPONSIBILITY FOR THE APPLICATION OF THESE DATA REMAINS WITH THE USER.

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Table 2. Guideline for Holdover Times Anticipated by SAE Type I, and ISO Type I Fluid Mixtures as a Function of Weather Conditions and OAT.

CAUTION! THIS TABLE IS FOR USE IN DEPARTURE PLANNING ONLY. IT SHOULD BE USED IN CONJUNCTION WITH PRE-TAKEOFF CHECK PROCEDURES.

Freezing Point of Type I fluid mixture used must be at least 10°C(18°F) below OAT.

Outside Air Temperature		Approximate Holdover Times Anticipated Under Various Weather Conditions (hours:minutes)				
°C	°F	FROST	FREEZING FOG	SNOW	FREEZING RAIN	RAIN ON COLD SOAKED WING
0 & above	32 & above	0:18-0:45	0:12-0:30	0:06-0:15	0:02-0:05	0:06-0:15
below 0 to -7	below 32 to 19	0:18-0:45	0:06-0:15	0:06-0:15	0:01-0:03	CAUTION! Clear ice may require touch for confirmation
below -7	below 19	0:12-0:30	0:06-0:15	0:06-0:15		

THIS TABLE DOES NOT APPLY TO OTHER THAN SAE OR ISO TYPE I FPD FLUIDS.

THE RESPONSIBILITY FOR THE APPLICATION OF THESE DATA REMAINS WITH THE USER.

A specific discussion of comments on the three major issues and FAA responses follows.

• *Certificate Holder or Aircraft Specific Holdover Times*

Several commenters object to the proposed language of § 121.629(c)(3) which states that an approved deicing program must include "the certificate holder's holdover times, specific to each aircraft type * * *." These commenters state that holdover time should not be aircraft type specific. Most of these commenters also believe that holdover times should be standard for all certificate holders. One commenter states that holdover times, while not aircraft type specific, are specific to the type of fluid used and that the FAA should establish "not to exceed" times when aircraft are dependent on Type I fluids.

FAA Response

As previously stated, the only holdover timetables readily available to the industry and acceptable to the FAA are those developed by the SAE/ISO and these holdover times are not aircraft type specific. Because holdover times are generally given as acceptable ranges, however, it is quite conceivable that a rational analysis could lead to an acceptable deicing program in which type-specific holdover times are provided within the ranges of acceptable holdover times given in the SAE/ISO tables. The language in the final rule, therefore, does not prohibit the use of type-specific holdover times, but they are not required.

• *Mandatory vs. Guideline Holdover Times*

Several commenters state that holdover times were developed to be used as guidelines and not as mandatory times. One commenter states that the holdover time guidance provided in current and proposed advisory circulars is too general to be of real use, and that the FAA should immediately commission SAE to "recalibrate" its charts to match standard National Weather Service reporting criteria.

FAA Response

As stated above, each certificate holder must develop its own holdover times with data acceptable to the Administrator and if the maximum holdover time developed by the certificate holder is exceeded, other actions must be accomplished before the aircraft can take off. The FAA will continue to work with the National Weather Service to enhance reporting criteria in order to provide flight crewmembers with current information required in the use of holdover timetables.

• *Determining or Changing Holdover Times*

Two commenters (the Airline Dispatchers Federation and an individual dispatcher) state that the proposed rule does not adequately reflect the role of the dispatcher under existing part 121 rules. These commenters recommend that the dispatcher's role be reflected in the rule language and that the dispatcher and pilot in command must work together in determining holdover times. One suggests that the dispatcher is in a better position to enforce holdover times than is the pilot in command. Several commenters suggest that the proposed rule language places an unreasonable burden on the pilot in command, particularly in a case where a pilot in command would be expected to

increase or decrease the determined holdover time based on changing conditions. Commenters suggest that it would be better to establish at each airport one central agency to determine and revise as appropriate holdover times for all certificate holders operating at that airport.

FAA Response

The information required to determine or change the proper holdover time includes outside air temperature, type and concentration of fluid, weather conditions, and time the last application of fluid began. This information is most readily available to the pilot in command, allowing him or her to determine quickly from the holdover timetable the appropriate holdover time. The certificate holder's program may include holdover time coordination with the dispatcher; however, the information required to determine or change the proper holdover time may be available only to the pilot in command.

Type I and Type II Fluids

A number of commenters expressed views on the potential uses of Types I and II fluids under the proposed rule. Several commenters recommend that the FAA mandate or at least encourage the use of Type II fluids. Others raised questions about the use of Type II fluids, ranging from potential environmental problems (dealt with elsewhere in this preamble) to higher cost and limited availability for the 1992/1993 winter. One commenter questions whether Type II fluids are better in most situations and states that Type II usage in Europe is declining.

FAA Response

Each specific certificate holder determines the type of fluids used in its operations. As stated in the NPRM and in this preamble, each type fluid has its benefits and intended usage. All the information presently available to the FAA indicates that there is no availability problem associated with Type II fluids and that their use continues to grow in Europe and Canada.

Pretakeoff Contamination Check

A number of commenters raise questions concerning the proposed pretakeoff contamination check defined in proposed § 121.629(c)(4) and the optional outside the aircraft check in proposed § 129.629(d). The most frequently raised concern is that the proposed five-minute limitation in § 121.629(c)(4) and (d) is impractical because most airports do not now have a facility at a location near enough to the end of the takeoff runway to perform these checks.

Other concerns are: (1) Pretakeoff contamination checks with the engines running (particularly propeller driven aircraft) are inherently unsafe; (2) a pretakeoff contamination check should be required following ground operations in all icing condition operations, not just when holdover times are exceeded; (3) checks from within the aircraft should be allowed in all cases according to some commenters and should never be allowed according to others.

FAA Response

Section 121.629(c)(3) and (c)(4) of the proposed rule would allow a takeoff after the expiration of a holdover time if a check conducted within five minutes prior to takeoff determines that the wings, control surfaces, and other critical surfaces are free of frost, ice, or snow, and if the check is "accomplished from outside the aircraft unless the program specifies otherwise." Section 121.629(d) of the proposed rule would also allow for a check that must be conducted within five minutes prior to takeoff as an optional alternative for a certificate holder who does not have a deicing program but this check must be accomplished from outside the aircraft.

Some commenters have confused the pretakeoff contamination check referenced in proposed § 121.629(c)(3) and (c)(4) with the outside-the-aircraft check that is required by § 121.629(d). The following describes the different procedures, and checks contained in the final rule. (See Figure 2)

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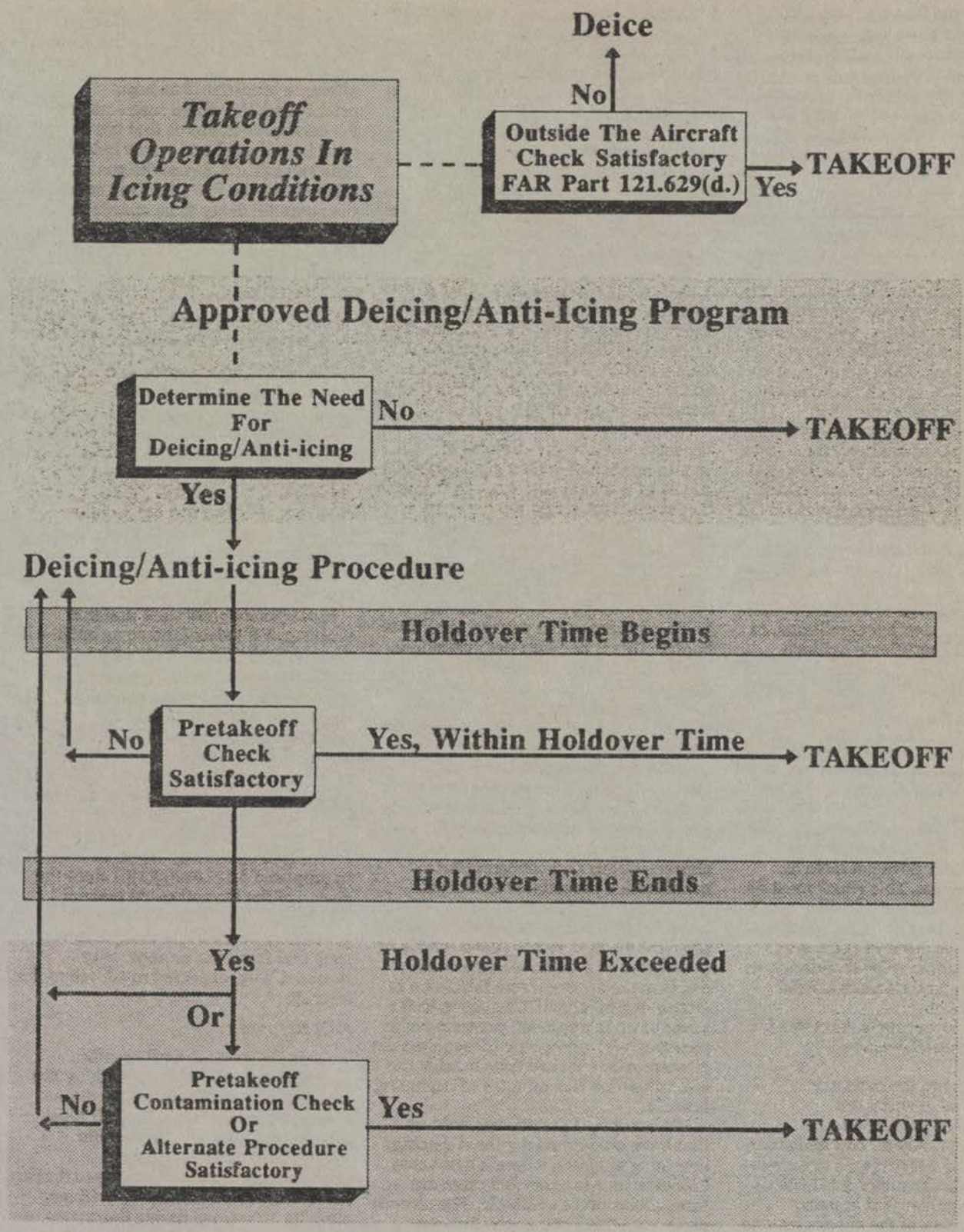

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(1) *Aircraft deicing/anti-icing procedure.* This procedure is completed by ground personnel. The procedure includes checking wings, control surfaces, propellers, engine inlets, and other critical surfaces as defined in the aircraft manufacturer's maintenance manual or Advisory Circular (AC) 121-XXX Aircraft Ground Deicing and Anti-Icing Program and is an integral part of the deicing process. It is referenced in the beginning of § 121.629(c)(4).

(2) *Pretakeoff check.* This check is completed any time the aircraft is deiced or anti-iced and is integral to the use of holdover times. It is accomplished within the holdover time, and normally is accomplished by the flight crew from inside the aircraft. The aircraft's wings or representative aircraft surfaces are checked for contamination. For clarification, and to be consistent with the intended use of holdover timetables, this check is included in § 121.629(c)(4).

(3) *Pretakeoff contamination check.* This check is to determine the condition of an aircraft after the maximum holdover time has been exceeded. This check may be performed from either the inside or the outside of the aircraft depending upon type of aircraft, lighting conditions, and weather conditions, as specified in the certificate holder's approved program. When the pretakeoff contamination check is used, it must be accomplished within five minutes of beginning the takeoff. The aircraft's wings, control surfaces, and other critical surfaces, as defined in the certificate holder's program, must be checked.

(4) *Part 121.629(d) outside-the-aircraft check.* This check is required only if a certificate holder does not have an approved program. This check must be accomplished from outside the aircraft within five minutes of beginning the takeoff. The aircraft's wings, control surfaces, and other critical surfaces, as defined in the manufacturer's AFM, must be checked.

These checks are not substitutes for an Airworthiness Directive requirements.

With respect to the concerns commenters raise about the practicability of the five minute limitation on pretakeoff contamination checks under § 121.629(c)(4) or outside-the-aircraft checks under § 121.629(d), the FAA recognizes that in many situations neither of the checks may be viable at certain airports, at certain peak departure times, and during certain weather conditions. Over the long term, as airport remote deicing and checking facilities are built or expanded, those checks may become more feasible. However, the FAA points out that the five minute limitation arises only in two situations. One is when a certificate holder does not have an approved ground deicing/anti-icing program. The other is after a maximum holdover time is exceeded.

The FAA assumes that a certificate holder will elect not to have an approved ground deicing/anti-icing program only if it concludes that it would be more cost effective to operate without such a program. In electing not to have an approved program the certificate holder has taken into consideration the possibility that it would have to delay or even cancel flights in icing conditions. As a practical matter, the FAA does not expect that such a certificate holder's operations under this rule will differ significantly from its past operations.

The outside-the-aircraft check conducted within five minutes of beginning takeoff is the only alternative means of operating in icing conditions in the absence of an approved program under paragraph (c). That is, even if a certificate holder was to use the deicing facilities of another certificate holder who has an approved program, the first certificate holder could not use the holdover times of the deicing certificate holder. This is because the five-minute limitation under § 121.629(d) recognizes that pilots who operate without an operator approved program, as compared to pilots who operate under an approved program, may lack proper training and the knowledge to effectively determine whether the aircraft is free of contamination prior to takeoff. Proper training includes reviewing precipitation categories, fluid characteristics and concentrations, coordination procedures and check requirements. Without the proper training provided under an approved program the pilot in command who is in possession of a holdover time could easily make an uninformed decision in attempting to takeoff. Therefore, in the absence of an approved program under paragraph (c), paragraph (d) requires the aircraft to be checked from outside the aircraft within five minutes of beginning takeoff.

With respect to certificate holders that have an approved ground deicing/anti-icing program, where a maximum holdover time is exceeded there are three alternatives available. The aircraft can be redeiced and a new holdover time established. The aircraft can takeoff if the certificate holder has obtained approval of an alternate procedure (e.g. a new technology) that is capable of determining that the wings, etc., are clean. The third alternative is to accomplish a pretakeoff contamination check and begin the takeoff within five minutes of completing the check. Thus, if the takeoff could not be initiated within the five minute limitation, and if no alternate procedure has been established, the worse case scenario for the certificate holder is that the aircraft must be redeiced and a new holdover time established. Given the goals of this rulemaking, the FAA does not consider the potential delay to be unacceptable given the risks of taking off when there would be considerable uncertainty about the possibility of aircraft surface contamination.

Inspections for Specific Airplane Types by Airworthiness Directive (AD)

The NPRM preamble pointed out that the FAA had previously issued ADs requiring a tactile inspection any time ground icing conditions might exist for certain airplanes without wing leading edge devices (i.e., airplanes commonly referred to as "hard wing"). FAA invited comments on the need for a similar mandatory requirement for any other airplane types. Several commenters address this request, but none recommend additional airplane types.

Most commenters state that this problem, if it exists (and some believe it does not), should be dealt with by the FAA as it has been in the past by issuance of an AD when warranted. One commenter states that the FAA's belief that non-slatted wings are more susceptible to loss of lift than wings with leading edge slats is not supported by any known aerodynamic data. One commenter recommends that the significance of airplane design be recognized by adding "or on an aircraft" to proposed § 121.639(c)(1)(i) since the design of the aircraft could make it susceptible to contamination while conditions at the airport may not be such that frost, ice, or snow may reasonably be expected to adhere to the aircraft.

FAA Response

As in the past, aircraft specific requirements will be dealt with by the issuance of ADs. Commenters did not indicate any additional aircraft types that warrant a mandatory tactile inspection at this time. Any manufacturer that does not agree that an AD is warranted when proposed may state its objections during the course of that rulemaking.

Deicing programs for aircraft not covered by an AD may voluntarily include a tactile inspection of an aircraft's wing; this could be done immediately after deicing is accomplished or to determine if deicing

is even necessary. Certificate holders should specify in their deicing/anti-icing program any intended use of tactile inspections. As to adding "or on an aircraft" to § 121.629(c)(1)(i), the FAA has determined that the words "at an airport" should be deleted so that the paragraph includes any conditions where frost, ice, or snow may reasonably be expected to adhere to the aircraft.

Takeoff Decision

Several commenters express concern that nothing in the proposed rulemaking should change the existing policy that places the ultimate responsibility for a takeoff on the pilot in command. Two commenters believe that the dispatcher's role in releasing an aircraft, possibly including the determination of holdover times jointly with the pilot in command, should be spelled out in the final rule language.

FAA Response

The FAA agrees that nothing in this rule changes § 91.3(a) which states that "The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." As stated in the preamble to the NPRM, the new approach taken by this rulemaking is to give the pilot in command additional guidance and certificate holder-developed procedures and, under certain conditions, ground personnel support, in determining the aircraft's airworthiness in potential icing conditions. While this rule will ensure that the pilot in command and supporting personnel receive additional training and that the certificate holder establishes additional procedures for potential icing situations, the ultimate authority and responsibility for the operation of the aircraft remain with the pilot in command.

The FAA does not agree that the role of the dispatcher needs to be further addressed in § 121.629(c). Paragraph (c) states clearly that "no person may dispatch * * * an aircraft any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft, unless the certificate holder has an approved deicing program and unless the dispatch, release, and takeoff comply with that program." Thus, the dispatcher is part of the team that will initially determine whether it is safe for a flight to be dispatched in existing and anticipated icing conditions. As discussed elsewhere in this preamble, a dispatcher might not have all or the most current icing and weather information that becomes available to the pilot in command, and that is used by the pilot in command in initially determining and possibly changing a holdover time.

Training of Flight Crewmembers and Other Personnel

A number of commenters express concerns with the proposed training provisions of the certificate holder's approved deicing program. The most significant concerns deal with the short time available to train and qualify affected personnel, training requirements for ground personnel employed by contractors rather than by certificate holders, and the need to ensure that FAA's principal operations inspectors are themselves trained. Commenters also make a few specific training recommendations. Each of these areas and others are specifically addressed below.

• *Training and Qualification Deadline*

Several commenters state that it is impractical to train and complete testing or qualification before November 1, 1992, particularly for ground personnel who work for contractors and not directly for the certificate holder. Suggested solutions are: to require only written notice of new procedures to affected persons before November 1, 1992; to require training only, with testing or qualification delayed until the next scheduled recurrent training program; and to develop a universal training program that could be used for all ground personnel.

One commenter stated its concern that FAA's principal operations inspectors are themselves in need of more effective training if they are to determine the adequacy of a proposed program.

FAA Response

The FAA agrees that it would be impractical to complete both formal training and testing for flight crewmembers and formal training and qualification for other affected personnel before November 1, 1992. Therefore, in order to complete flight crewmember training and testing and training and qualification for other affected personnel for this first year, the FAA will allow certificate holders maximum flexibility in providing the required training and testing/qualifications (e.g., take home brochures, video tapes, self-grading quizzes, or other appropriate review materials). With respect to the training and qualification of persons who work for contractors, the FAA believes that certificate holders must be held responsible for these personnel as they are for their own employees. For those contract personnel who do not normally provide deicing/anti-icing service to the certificate holder, proper deicing/anti-icing procedures and supervision must be assured by a trained flight crewmember, mechanic, or other person employed by the certificate holder using the procedures authorized in their approved program. While training of FAA principal operations inspectors is addressed later in this preamble under the "Program Implementation" section, FAA agrees that thorough and better training of all personnel in government and industry is vital to reducing the incidence of icing-related accidents.

Certificate holders who cannot complete training and qualification of their personnel before the effective date of this rule have the option of using the alternative procedure in § 121.629(d).

• *Dispatcher Training*

The Airline Dispatchers Federation recommends that dispatchers be specifically included in § 121.629(c)(2)(iii) to ensure that dispatchers are trained so that they can carry out with the pilot in command and with Air Traffic Control (ATC), the duties imposed by §§ 121.99, 121.533(c)(d), and 121.535(c)(d).

FAA Response

Section 121.629(c)(2) specifically identifies "aircraft dispatchers" as one of the groups of personnel covered by the term "all other affected personnel." It is not, therefore, necessary to identify dispatchers specifically in the list of areas to be covered under § 121.629(c)(2).

• *Training Program Content*

The Airline Pilots Association (ALPA) states that Advisory Circular (AC) 20-117 has not been as widely distributed to pilots or incorporated into specific training programs as the FAA originally intended, and recommends that approved deicing training programs mandate that all pertinent advisory circulars become an integral part of the training program. Fokker Aircraft recommends that pilot training programs emphasize again the effect of airframe icing on the aircraft's ability to fly. Fokker recommends that training programs include a takeoff technique, recommended by it and other aircraft manufacturers that during ground icing conditions pilots should use a slower rate of rotation to a lower pitch angle. Fokker also recommends that an air carrier's ground deicing program address the advantages of Type II fluids and the disadvantage of Type I fluids in detail.

FAA Response

One of the major areas included in this rule is training of all those personnel involved in the ground deicing/anti-icing process. Each certificate holder in its approved program must include all the applicable material and guidance regarding deicing/anti-icing operations to ensure its personnel are properly trained. The FAA is developing a new Advisory Circular to provide additional guidance to certificate holders. In addition, the following documents are excellent sources for obtaining guidance material:

Advisory Circular 20–117, "Hazards Following Ground Deicing and Ground Operations in Conditions Conducive to Aircraft Icing"

International Standard Organization (ISO) 11075, "Aircraft Deicing/Anti-icing Newtonian Fluids ISO Type I"

ISO 11076, "Aircraft Deicing/Anti-icing Methods with Fluids"

ISO 11077, "Deicing/Anti-icing Self-Propelled Vehicles—Functional Requirements"

ISO 11078, "Aircraft Deicing/Anti-icing Non-Newtonian Fluids ISO Type II"

Society of Automotive Engineers (SAE) Aerospace Recommended Practice (ARP) 4737, "Aircraft Deicing/Anti-icing Methods with Fluids, for Large Transport Aircraft"

FAA Order 8400.10, Air Transportation Operations Inspector's Handbook, Volume 4, chapter 8, Sections 1 and 2.

The FAA also agrees that pilot training for ground icing conditions should include recognition of changes in aircraft handling characteristics and instruction on the takeoff techniques to use, such as decreasing the rotation rate and reducing the angle of rotation of different aircraft types. The FAA plans to work with aircraft manufacturers and industry associations to develop appropriate training material as early as possible.

Airport/ATC Roles

Two commenters state that deicing/anti-icing programs should be jointly developed and implemented by air carriers and airports to ensure fair and uniform procedures and to reduce the burden on air carriers. One commenter discusses a number of airport responsibilities that relate to deicing, for example, ensuring that any materials used will not cause harm or endanger aircraft or their systems, and ensuring that these materials are disposed of properly. This commenter recommends that airports meet with air carriers in developing sound deicing programs.

Other commenters say that the role of ATC must be fully coordinated with that of the air carriers and airports to ensure the proper use of holdover times, to prevent delays after deicing, and to ensure a smooth traffic flow during icing conditions. ATC should also be aware of the differences related to deicing procedures for Part 121 and 135 operations and ensure that both types of operations are treated fairly.

One commenter states that many airports are already developing deicing/anti-icing programs and that these may not be compatible with the proposed rule or part 121 programs under development. Another commenter states that if airports, air carriers, and ATC were to coordinate their efforts, it would be difficult to implement any programs before the November 1, 1992 deadline.

Some commenters provide specific recommendations for airports and ATC in implementing deicing programs. One commenter says that airports should make provisions for end-of-the-runway deicing to reduce delays. Another says that the FAA should review ATC responsibilities related to flow times, take-off and landing sequencing in adverse weather conditions.

FAA Response

The FAA agrees that involvement of airport operators and ATC is essential to increasing aviation safety in potential icing conditions. Officials in FAA's Flight Standards Service have been working with ATC and FAA's airport offices throughout the course of this rulemaking. This effort is short term to ensure the maximum possible effort for this winter and long term to deal with actions that cannot be accomplished quickly. The FAA also agrees that certificate holders should coordinate their deicing/anti-icing programs with the operators of each specific airport where they will be using their deicing program.

Prevention of Delays

Some commenters express concern about delays resulting from deicing, checking, and re-deicing. This could create gridlock in air traffic flow and be extremely costly to airlines and inconvenient for passengers. Commenters also argue that the proposed rule poses a disadvantage to domestic carriers who would face delays from checking requirements while foreign carriers will be able to depart without such delays; this, it is suggested, would create competitive inequality for U.S. carriers and lead to an erosion of revenue for these carriers. Alternatively, one commenter says that the proposal would force foreign airports to deal with disruption to traffic flows due to U.S. carrier deicing and check requirements; this could result in discrimination against U.S. carriers.

Two commenters recommend utilizing gate-hold procedures to reduce delays between deicing and takeoff. In addition, one commenter recommends that the FAA re-examine the Enroute Spacing Program to allow aircraft to be released immediately when cleared.

One commenter recommends that to reduce competitive inequality the FAA should hold discussions with Joint Airworthiness authorities about compatible standards and practices.

FAA Response

The FAA recognizes that there may be some additional delays resulting from this rule if airplanes return for redeicing or if a pretakeoff contamination check is accomplished. However, most weather-related delays already occur under the existing rule and, as discussed under the "Economic Evaluation" section of this preamble, the FAA does not believe that the delay costs associated with this amendment will be significant. As discussed in the preamble to the proposed rule, while this rule does not directly affect operations of foreign air carriers, the FAA will continue to work aggressively with other nations' civil aviation authorities and will request that ICAO initiate a review of pretakeoff deicing and checking procedures used by all air carriers. In the meantime, as is discussed more fully under "International Trade Impact Statement," the FAA does not believe that the competitive disadvantage to U.S. operators is significant.

Underwing Frost

Several commenters express concern that the proposed rule language could lead to rescinding previous FAA policy that allows takeoffs with a small amount of frost on the underside of the wing in the area of fuel tanks when consistent with the aircraft manufacturer's operating and servicing instructions.

FAA Response

The FAA does not intend to change its policy of permitting takeoff with small amounts of frost on the underwings of airplanes caused by cold soaked fuel within aircraft manufacturer established limits accepted by FAA aircraft certification offices and stated in aircraft maintenance manuals and aircraft flight manuals. Language has been added to the final rule to make it clear that takeoffs with frost under the wing in the area of the fuel tanks are

permitted if authorized by the Administrator. Affected certificate holders should include the type of aircraft involved and justification for these operations, including manufacturer supplied data showing how these operations are safely accomplished, as part of their proposed deicing program.

Program Implementation

Some commenters state that implementation of deicing programs should be done by a central organization to ensure uniform standards. One supports an industry-wide solution, rather than delegating the approval of each program to the local level. One commenter states that the rule provides too much discretion to local FAA offices in approving deicing plans which could cause operational discrepancies among carriers and airports. This commenter recommends that the FAA provide comprehensive guidance to local offices in developing deicing programs. Another commenter says that, because the timeline for compliance is so short, implementation should be flexible and determined locally.

Another commenter recommends that the FAA monitor implementation of FAA-approved deicing programs this winter. In addition, the FAA should continue to address actions designed to reduce the time that airplanes are exposed to icing conditions between deicing/anti-icing and takeoff (e.g., aircraft design, deicing/anti-icing technology, air traffic control).

Another commenter recommends that the FAA provide inspectors for post-deicing checks and this could be funded by the aviation trust fund. One commenter is against locating deicing program requirements in current operations specifications; minor modifications to deicing practices will require specifications amendments, resulting in delays. This commenter recommends that FAR 121.629 mandate that air carriers have approved programs in place and follow these programs (which would be monitored by each carrier's principal operations inspector). Details of an approved deicing program should be outlined in an Advisory Circular that facilitates getting as much implemented as possible by November 1, 1992. Several other commenters support using an advisory circular either in addition to or instead of a rule.

One commenter discusses the safety problems for passengers who must walk through deicing fluid in ramp areas to board aircraft; this could also damage the interior of the aircraft.

Two commenters discuss their products related to deicing and express interest in collaborating with the FAA in using these products. One product is a detection system for overwing clear ice or measurement of contamination on the surface. Another product is an anti-icing product. This latter commenter also maintains that the proposed rule could adversely affect its patent as well as its ability to compete with foreign producers of Type II fluids; and that the FAA should shape the rule so as not to diminish the value of the patent nor impede the marketing of the product.

FAA Response

The FAA has conducted and continues to provide training in this area for all principal operations inspectors and principal maintenance inspectors. In addition to this training to facilitate the review of certificate holder programs, the FAA has appointed regional coordinators who will assist local inspectors and who will forward issues to the FAA Headquarters that cannot be resolved locally. The FAA, besides developing Inspector Handbook guidance, is also developing an Advisory Circular that provides guidance to certificate holders and principal inspectors.

The FAA will be closely monitoring the implementation of this rule and, as stated previously, will continue to work with all involved parties to smoothly implement the requirements of this rule.

As previously stated in this preamble, it is ultimately the responsibility of each pilot in command to determine whether his or her aircraft is free of contamination and thus airworthy. The responsibility for checks after deicing cannot be delegated to the FAA. Each certificate holder's operations specifications should refer to the specific locations in the certificate holder's manuals that contain its approved deicing/anti-icing program. The whole program does not have to be physically included with the certificate holder's operations specifications. Finally, ACs provide examples and one method of complying with regulations. They are not mandatory.

The ramp area safety issues mentioned should be addressed in each certificate holder's program.

The FAA encourages innovation to solve the problem of identifying contamination on the aircraft surface and § 121.629(c)(3)(ii) provides an alternate procedure for obtaining approval by the Administrator of an appropriate innovative approach. Also, the FAA does not recommend which type of fluid a certificate holder should use, Type I or Type II, and does not recommend any particular company's product in this rule.

As stated previously in the "Applicability and Justification" section of this preamble, the FAA has determined that all part 121 turboprop aircraft should be included in this rulemaking and will continue to analyze operations under other parts to determine if future rulemaking is required.

Miscellaneous

Other general comments about the proposed rule include discussions of the accidents cited in the NPRM. One commenter says that NTSB accident statistics related to icing problems do not address the thousands of successful takeoffs made annually during icing conditions. Another commenter says that the NTSB investigation of the 1982 Air Florida accident shows that improper engine thrust was the main cause and that perhaps icing problems alone were not the problem. Another commenter says that in the section of the NPRM entitled "Part 121 Passenger Carrier Benefits Section," paragraph (2) should clarify that the five mentioned accidents involved large passenger-carrying air carriers.

One commenter says that the FAA should include in the docket any studies that it relied upon to reach its conclusions in the NPRM, such as the conclusion that non-slatted wing aircraft are more susceptible to lift loss than slatted aircraft.

FAA Response

The NTSB's recommendations are based on its accident investigations and its other studies and thus do, in effect, consider successful operations. Also the NTSB in its investigation of the Air Florida accident cites as one of the probable causes the flight crew's decision to take off with snow and ice on the aircraft's airfoil surfaces.

The FAA has included in the docket a summary of wind tunnel tests of hard leading edge wings and slatted leading edge wings completed by the NASA Lewis Research Center, though the difference in accident history of these designs may not be fully explained by design differences. Pilot techniques, including rotation rates and angles, are also important factors to be considered in assessing stall propensity, along with the rotation speed and the initially computed climb speed. One factor alone has not been isolated as the major explanation for differences in accident rates which have been experienced.

Cost

The comments in this section are separated into subject categories: Delay costs, deicing fluid costs, international trade impact, training and personnel costs, and other costs.

Comments on Delay Costs

One commenter states that the cost of implementing the proposed rule should be calculated including input from the part 121 air carriers and should include estimated delay costs using air carrier data and input.

Another commenter states that checking the upper surfaces of a B–747 would be impractical, would cause delays, and would impose severe restrictions on the departing aircraft flow. The commenter also states that such a requirement would preclude their ad hoc charter operations from many airports during adverse weather, thus imposing a severe economic penalty on them.

Another commenter states that some elements of the proposed rule, as confirmed by the FAA in the NPRM, may not be amenable to accurate cost analysis. The impact on flight delays is difficult to project on short notice, and would require a study beyond the range of the 15-day comment period provided by FAA. The commenter describes a worse case scenario in which approved deicing programs are not completed, and numerous carriers at a large airport are attempting to perform external checks on a 5-minute cycle. This would effectively close the airport under conditions which were previously negotiable. The expense of airport closures is extremely high, as passengers have to be accommodated over a period of a day or more, and airport and crew rotations have to be unscrambled.

A commenter states that they are unable to provide cost data related to specific provisions of the rule in the time permitted for comments. They point out the differences between passenger carriers and integrated express carriers such as UPS. A single aircraft missing the national sort requires them to charter up to thirty executive jets to make their service commitment. In light of the nature of the business, they believe the FAA cost estimates are grossly understated.

One commenter stated that airports will experience various degrees of gridlock from airplanes requiring external checks or returning to be deiced. The increase in delays is estimated to be ten fold during freezing precipitation. During 1991/1992, the commenter claims it suffered 802 deicing delays. It estimated that 700 of these occurred during periods of precipitation. They believe that this could explode to 7,000 delays in 1992/1993. These delays could produce external checking and equipment costs of $30 million.

FAA's Response

The NPRM requested cost information, including estimated delay costs, from part 121 air carriers. Reliable information from commenters is considered in this evaluation.

The proposed rule could increase delays by requiring longer and more detailed inspections of airplane surfaces. However, it would provide flexibility by allowing either the use of an approved deicing program or an outside check five minutes before takeoff. In some instances, the proposed rule could decrease delays. For example, if the pilot decides to return for re-deicing, an outside check could reveal that the airplane surface is actually clear of ice, thereby avoiding a needless deicing.

There are two types of delays: (1) Delays due to the existing rule and (2) delays due to the proposed rule. In either case, an airplane may not take off if its surface is contaminated. The cost information that the commenter provided does not differentiate between these two types of delays, nor does the commenter explain how it arrived at these estimates.

Consequently, the FAA is not able to respond to the specific cost estimates provided by the commenters. However, the FAA does agree with the commenters to the extent that their estimates demonstrate that delay costs could increase.

Deicing Fluid Costs

One commenter believes that the costs are very conservative and do not present a true total, and that, regardless of the cost, the traveling public will ultimately pay for it. The commenter indicates that delays are the same regardless of the type of fluid since delays could result from weather, staff, equipment failure, etc." Also, the type fluid used does not matter because ground holdover times can expire with either fluid. Type II fluids may be beneficial for long term/overnight requirements, but is very costly and impractical for the average ground time of a turn-around type operation that is less than 3-4 hours on the ground.

Another commenter states that carriers have committed from $1–5 million each for plans to acquire new anti-icing equipment and convert old deicing equipment for application of Type II fluids. In addition, the total cost of Type II fluids applied is 3–4 times the cost of Type I fluids. The commenter also states that of the two glycols (ethylene and propylene glycol), ethylene glycol appears to be the most cost effective product due to the fact that there are more suppliers of ethylene glycol; therefore, the competitive influences in the marketplace dictate a lower cost. Ethylene glycol is an inherently less costly molecule to manufacture than propylene glycol. Consequently, by focusing on overall cost effectiveness, and because the possibility exists that propylene glycol may be applied in undiluted form in circumstances where it is not recommended by the aircraft manufacturer, economic and safety considerations give ethylene glycol a preference.

One commenter believes that the FAA concludes erroneously that this is not a major rule. This commenter believes that the shift from Type I to Type II fluids will increase airline unit fluid costs by the difference in price between Type II and Type I fluids, and may also result in a requirement for increased fluid volume. Competition will be lessened because the FAA's encouragement of the use of Type II fluid will likely inhibit and possibly preclude this commenter's entry into the airline market, thereby negating the competitive restraint which Type I anti-adhesion Airborne 99 would otherwise have on Type II pricing.

In addition to the above problems, the commenter states that the NPRM does not fully address the potential adverse effects specified in 5 U.S.C. 601 which specifies the following additional concerns: Employment, investment, productivity innovation, and the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or foreign export markets. For example, some deicing fluids have the potential to improve airport productivity by providing prolonged anti-icing protection through prevention of ice adhesion. In the event that aircraft were delayed on the taxiway beyond the nonformation holdover time of their Type II fluids, they would presumably have to be brought back to the deicing facility for another treatment.

The commenter also states that if the FAA promulgates the proposed rule, it will effectively define anti-icing as the use of Type II thickened fluids. This will create a major barrier both to the use of existing alternative anti-icing systems like Airborne 99 and to the development of innovative new anti-icing technologies. Also, the commenter states that if the proposed regulation in any

way unnecessarily impedes the marketing of the commenter's products, foreign suppliers of Type II fluids will receive an improper benefit from the reduced domestic investment.

FAA's Response

The FAA disagrees with the commenters for several reasons. First, the rule does not mandate the usage of Type II fluid. Second, the holdover tables of the final rule do not differ from the current industry standards enough to cause a significant shift in deicing fluid usage. Third, the FAA recognizes the increasing acceptance of Type II fluid among U.S. carriers. This acceptance is the result of an already wide acceptance by European and Canadian carriers. One of the advantages of using Type II fluid is its longer holdover time. Another advantage is that less fluid is required than Type I fluid.

International Trade Impact

A commenter states that unlike the reasonably uniform levels of safety and economic cost sharing between domestic and foreign air carriers in the aircraft security program, no such attempt has been made with this program. This virtually assures inequalities in airline costs not to mention foreign government cooperation. This issue will pose significant problems for U.S. supplemental air carriers attempting to take advantage of opportunity markets. Accordingly, alternatives must be found to prevent U.S. carriers from suffering even further from regulations of this type.

The commenter further argues that in the International Trade Impact discussion of the docket, a case is made that average costs would increase approximately 4 cents per round trip ticket. Although this might be true for a carrier operating to a scheduled location where ongoing training would be possible, this is not true for operators taking advantage of unscheduled opportunities. In these instances the costs could be prohibitive. As an example, a typical round trip cost between the East Coast and Europe might be $36,000. If it were possible, and enough lead time given, an individual could be sent ahead of the aircraft, conduct training, and assure compliance with the current NPRM. The cost of compliance would be approximately $2,500, or approximately a 14 percent increase. This increase would pose a significant economic burden on a carrier that might operate to a particular location once every 2–5 years. This seems unreasonable and contrary to the assurances that a "competitive disadvantage" is remote as stated in the NPRM.

Another commenter questions the reasoning that domestic carriers should bear the training and equipment costs of the proposed rule, while foreign carriers do not.

Another commenter states that the FAA misunderstands the competitive issues involved in a rule exempting foreign carriers. As suggested above, pretakeoff contamination checking requirements imposed by the rule could introduce serious delays for U.S. carriers. If, under these circumstances, foreign carriers could depart from the same airport without the delays and confusion, passengers and shippers would rush to those carriers if consistent with their travel or shipping needs.

They go on to say that it is not the out-of-pocket costs of the proposed rule which make the most significant difference in international competition; it is the potential perception by laymen that foreign carriers can safely depart without delay under conditions requiring domestic carriers to take delays. The unfair bias will apply under the proposal both at domestic origins as well as foreign ones. The FAA must not create this inequality leading to erosion of U.S. carrier revenues.

FAA's Response

While it is true that foreign air carriers would not incur costs imposed by the proposed rule, they would hardly have a competitive advantage. This is because the cost of compliance incurred by U.S. air carriers is expected to be offset by an increase in aviation safety both real and perceived by the flying public. The expected increase of 4 cents in cost of an average international round trip ticket would not be high enough to lower the demand of travel from U.S. and foreign consumers. The United States has always been perceived as pioneers in aeronautical engineering and especially aviation safety. The rule continues that track record.

In addressing another comment, any air carrier engaged in non-scheduled services does not compete in the same market as scheduled air carriers. Therefore, no adverse impact is expected to be incurred by U.S. scheduled air carriers.

Training and Personnel Costs

One commenter argues that during winter months, they visit 50 cities in North America that are subjected to severe, moderate, or light winter conditions. They argue that the cost per day to send a qualified person to verify that each deicing contractor meets the requirements of the proposed rule is at or above $500 per day not including travel expense.

One commenter states that their flight crewmembers receive ground training on the subjects of deicing/anti-icing and the effects of ice, snow and frost on aircraft performance. These subjects are included in all of the initial and recurrent courses in their approved training program.

A commenter states that up to 20,000 personnel would be covered by the training and qualification testing requirement at the larger companies. This commenter also questions the FAA estimate of training costs. The proposed rule could require initial and recurrent training and qualification costs for over 100,000 employees. A first estimate is one-half day of training for each employee each year, which would indicate over $20 million per year. The present value of 10 years training costs at this rate would exceed FAA's estimate of total cost.

One commenter estimates the annual cost of additional training for flight crewmembers and other affected personnel, as required by the rule, to be $2.5 million.

FAA's Response

The NPRM does not require that each air carrier send a qualified person to verify that each deicing contractor meets the requirements of the proposed rule, therefore, the air carrier would not be required to incur this cost.

Information available to the FAA indicates that air carriers already provide initial and recurrent training in the subject areas of ground deicing and anti-icing. The FAA calculated the incremental cost of added training associated with the requirements of the proposed rule.

The FAA has calculated an initial cost of training for the proposed rule. In subsequent years, however, the added training should be incorporated as a part of the current training that is already taking place. The FAA does not expect any additional future training cost because air carrier employees are routinely provided on-going training to keep them up to date on a number of aviation related issues and practices. The additional procedures required by this rule will likely be a continuation of existing training.

Other Cost Comments

A commenter argues that gate returns for re-deicing will be extremely costly as equipment needed for re-deicing will be in use. This same commenter questions whether the FAA considered a percentage factor of accidents to actual

take-offs made in the 15 year time frame involving ice, snow, and frost or freezing conditions.

Another commenter argues that the FAA has clouded the main issue of deicing/anti-icing costs with cost diagnostics, international trade impact, etc. They argue that these issues are very small contributory items and should not be the concern of the FAA.

One commenter believes that it will cost at least $450 million "to deal with space and environmental issues at the 30 airports required by the FAA to submit de-icing plans."

FAA's Response

The cost of any airplane returning for another re-deicing is not a cost of the current rule since it mandates that no aircraft may take off if ice, snow, or frost is adhering to the surfaces. The FAA recognizes that the proposed rule could result in more airplanes being redeiced due to improved detection procedures. However, the cost of these additional redeicings is difficult to estimate.

There may be some costs associated with dealing with space and environmental issues. The FAA is not convinced that these estimates would be considered reasonable because many variables will affect the final cost outcome. For example, some air carriers are already shifting to Type II fluids and would have switched regardless of the final rule. In addition, flow control procedures at some airports might negate the need for additional space. That is, airplanes as a result of this final rule may line up in queue at the gate instead of the taxiway.

Finally, the FAA is required by mandates from Congress, the President, and the Office of Management and Budget to address the impact that FAA regulations have on small businesses and on international trade. Thus, these topics are very much the concern of the FAA.

Rule Language Changes

The following is a paragraph by paragraph description of significant changes in the final rule language that have been discussed in this preamble. In addition minor editorial changes have been made.

In § 121.629(b) the following sentence has been added: "Takeoffs with frost under the wing in the area of the fuel tanks may be authorized by the Administrator."

In § 121.629(c) the following changes are made:

In paragraph (c)(1)(i) the words "at an airport" are deleted.

In the introductory paragraph of paragraph (c)(3) the words "times, specific to each aircraft type" are deleted and the word "timetables" inserted; the words "the final application of" are added to the description of holdover times; and the words "wings, control surfaces, propellers, engine inlets, and other critical surfaces" are deleted.

In § 121.629 (c)(3)(i) the word "inspection" is replaced by "contamination check" and in § 121.629(c) (3)(i) and (ii) the phrase "as defined in the certificate holder's program" is inserted after "critical surfaces." In § 121.629(c)(3) (i), (ii), and (iii) the words "propellers, engine inlets" are deleted.

In § 121.629(c)(4) the term "pretakeoff check" and the following definition of this term are added: "A pretakeoff check is a check of the aircraft's wings or representative aircraft surfaces for frost, ice, or snow within the aircraft's holdover time." In addition in paragraph (c)(4) the term "pretakeoff inspection" is changed to "pretakeoff contamination check."

Environmental Analysis

This rule is a federal action that is subject to the National Environmental Policy Act (NEPA). Under applicable guidelines of the President's Council on Environmental Quality and agency procedures implementing NEPA, the FAA normally prepares an environmental assessment (EA) to determine the need for an environmental impact statement (EIS) or whether a finding of no significant impact (FONSI) would be appropriate. (40 CFR 1501.3; FAA Order 1050.1D appendix 7. par. 3(a)). In the NPRM the FAA invited comments on any environmental issues associated with the proposed rule, and specifically requested comments on the following: (1) Whether the proposed rule will increase the use of Type I deicing fluid, (2) whether the proposed rule will encourage the use of Type II deicing fluid, (3) the impact, if any, of using these deicing fluids on taxiways "just prior to takeoff," and (4) containment methods currently used that can be adapted to other locations on an airport. Only a few commenters address these environmental issues and most of these commenters focus more on the effect of Federal, State, and local environmental requirements and the lack of local facilities, than on the questions of the potential environmental impact of deicing fluids. A summary of the comments received, the FAA's response and the findings of the FAA's Environmental Assessment follow.

Some commenters say that both Type I and Type II fluids cause environmental problems. One commenter says that the rule would require increased use of Type I fluids to clean aircraft wings prior to Type II application, and that this combination is environmentally hazardous.

One commenter questions what it characterizes as discussions in the United States that Type II fluids are less environmentally acceptable than Type I fluids since, as this commenter points out, both are based on glycols.

Another commenter questions whether airports have the facilities to collect and recycle deicing fluids at takeoff points.

Two commenters believe that environmental constraints will inhibit the operation of remote deicing facilities and recommend that the FAA seek relief from EPA reporting requirements for remote facilities for one to two years. Alternatively, one commenter recommends that the FAA petition the EPA to raise the reportable quantity of ethylene glycol (Type I) from one pound to 1,000 pounds or to exempt the airline industry from all ethylene glycol reporting due to critical safety requirements.

Other commenters also recommend that air carriers be exempt from state and local environmental regulations, which may be even more restrictive than EPA regulations.

One commenter recommends that current environmental constraints be reviewed and additional flexibility for deicing operations be provided in order for the rule's objectives to be met.

One commenter provides recommendations to reduce the discharge of deicing fluids into streams and states that an environmental impact statement should be required where such discharge seems likely.

FAA Response

An Environmental Assessment (EA) that supports a Finding of No Significant Impact (FONSI) is included in the docket for this rulemaking. The EA discusses in detail the potential effect of this rule and addresses in general terms the issues raised by the comments summarized above. The following discussion addresses the major issues raised by commenters.

Presently § 121.629(b) states that no person may takeoff an aircraft when frost, snow, or ice is adhering to the wings, control surfaces, or propellers of the aircraft. As the NPRM preamble, this preamble, and the EA point out, this rule is necessary because several accidents, and recommendations of the 1992

Conference on Airplane Ground Deicing, which was held as a result of these accidents, indicate that under present procedures, the pilot in command may be unable to determine effectively whether the aircraft's critical surfaces are free of all frost, ice, or snow prior to attempting a takeoff. This rule addresses this problem by requiring increased training of appropriate personnel, the use of holdover times, and additional checks of the aircraft's surfaces, all of which are to ensure that an aircraft does not take off if critical aircraft surfaces are contaminated. In essence, this interim final rule, which is necessary before the winter of 1992–1993, requires certain certificate holders to develop a program that will provide the pilot in command with more complete information which he or she needs for deciding whether takeoff can be safely accomplished. Concern with the environmental impacts of this rule emanate principally from the chemical composition of deicing fluids e.g. ethylene glycol has been listed as a hazardous air pollutant under Title III of the Clean Air Act Amendments of 1990. While this rule does not mandate additional use of either Type I or Type II fluids, it could accelerate somewhat the existing trend for U.S. air carriers to follow the European and Canadian practice of increased use of Type II fluids because of the longer holdover times associated with Type II fluids. However, although Type II fluid has a higher biochemical oxygen demand (BOD) that impacts surface water and the fish and other marine life than Type I fluid, it requires approximately 50% less fluid to effectively deice and anti-ice a typical aircraft. Also the use of Type II fluids will significantly reduce the number of redeicings that would be required if Type I fluids were used. These factors along with improved ATC and airport procedures should reduce the use of deicing/anti-icing fluids over the long term.

With respect to the potential environmental effects of both type fluids, as the EA discusses, because of their low volatilities, low ecotoxicities, low toxicity to humans, and biodegradibility, no additional impacts are expected over those already experienced for deicing/anti-icing operations carried out under the current regulations.

With respect to the issues of reporting requirements, relief from state and local environmental requirements, and the availability of collection/recycling facilities, certificate holders that presently use deicing fluids and the operators of airports at which these fluids are used must already comply with all of these requirements when they are applicable. Since this rule requires no additional use of fluids than currently required under the existing clean aircraft requirement, if there are increases in the use of fluids that trigger environmental requirements, those requirements must be met by the airport operator, certificate holder, or other appropriate party, as they would under the present rule. If any of these requirements, or the lack of facilities limit the use of deicing/anti-icing fluids, the result would be that the certificate holder would have to find another means of ensuring that the critical aircraft surfaces are clean before a takeoff is attempted or discontinue operations. Nonetheless, as part of its long term efforts, the FAA will work with certificate holders and with airport operators to monitor the actual and potential environmental effects of this rule and help address any problems that might arise.

Paperwork Reduction Act

Information collection requirements in the amendment to § 121.629 have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB Control Number 2120–0567.

Regulatory Evaluation Summary

This section summarizes the regulatory evaluation prepared by the FAA. The regulatory evaluation provides more detailed information on estimates of the potential economic consequences of this rule. This summary and the evaluation quantify, to the extent practicable, the estimated costs of the rule to the private sector, consumers, and Federal, State, and local governments, and also the anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A " major" rule is one that is likely to result in an annual effect on the economy of $100 million or more, a major increase in consumer costs, or a significant adverse effect on competition.

The FAA has determined that this rule is not "major" as defined in the executive order. Therefore, a full regulatory impact analysis, which includes the identification and evaluation of cost-reducing alternatives to the rule, has not been prepared. Instead, the agency has prepared a more concise document termed a "regulatory evaluation," which analyzes only this rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains a final regulatory flexibility determination required by the 1980 Regulatory Flexibility Act (Pub. L. 96–354) and an international trade impact assessment. If the reader desires more detailed economic information than this summary contains, then he or she should consult the regulatory evaluation contained in the docket.

Costs

This rule will increase costs to the industry and to society in five ways. First, airlines will have to develop a deicing program and the FAA will have to approve it. Second, flight and ground crews will have to be trained for and tested in the new procedures. Third, pretakeoff contamination check procedures will have to be implemented. Fourth, airlines, as an option, could purchase additional deicing equipment to deice closer to the takeoff point. Finally, air carriers and passengers could experience an increase in delays.

The total costs are separated into two categories—small and large air carriers. This was done because this rule will impact small carriers differently than it will large carriers.

Small and Large Part 121 Air Carriers

Small carriers are defined as those that own or operate nine or fewer aircraft under part 121. FAA information indicates that of the 53 part 121 air carriers, 31 are large and 22 are small. Of the 4,151 airplanes that are operated under part 121, small air carriers operate approximately 114 or 2.7 percent and large air carriers operate 4,037 or 97.3 percent.

The number of employees at large and small part 121 air carriers was estimated by allocating the total number of employees based on the number of airplanes that these carriers operate. Based upon information provided by the Airline Transport Association (ATA), approximately 20,000 pilots, 30,000 copilots, 10,000 engineers, and 20,000 mechanics work for part 121 air carriers. If the number of employees at large and small carriers is directly related to the number of airplanes that air carriers operate, then large part 121 carriers have 97.3 percent of the total number of

employees in each category and small carriers have 2.7 percent.

Deicing Program

The FAA expects that the industry will develop a generic deicing program as a normal course of business. This generic industry program is expected to have an initial development cost of $7,200. After the program is developed, each air carrier will likely modify the program for its own operations. The initial cost of the program refinement to all 31 large air carriers will be $224,000 and $5,100 to all 22 small air carriers.

Each air carrier's program will have to be approved and reviewed by the principal operations inspectors assigned to each of the air carriers. The FAA estimates that its initial or first year cost will be $15,300 for the review of all programs.

Training and Qualification Testing

Each certification operator that has a deicing program will be required to provide training for all personnel involved with deicing. The FAA estimates that the initial cost of training will be $8.04 million for large air carriers and $80,400 for small air carriers for a total of $8.1 million. Recurrent training is also required. However, the incremental cost of recurring training will be minimal because the air carrier employees are routinely provided on-going training and materials to keep them up to date on a number of aviation related issues and practices.

This final rule also requires testing for flight crewmembers and qualification for all other personnel concerning the specific requirements of the program and each person's responsibilities and duties under it. The recurrent qualification testing will require an additional 15 minutes per individual. The total annual cost will be $2.03 million ($2.01 million to large firms plus $20,109 to small firms). The initial cost associated with qualification testing is expected to be minimal.

Pretakeoff Contamination Checks

Pretakeoff contamination checks will be implemented under this rule. The program must provide that takeoff after the expiration of the holdover time will be permitted only when one of several conditions such as a pretakeoff contamination check takes place. For purposes of this analysis, the check will be made by individuals who operate the additional deicing equipment that will be purchased for redeicing airplanes at the runway. Thus, the cost of a check is incorporated in the labor costs associated with the additional deicing equipment.

Additional Deicing Equipment

Another cost component associated with the rule is deicing equipment, which consists of the capital equipment, operating and maintenance costs, and labor costs. The total one-time cost of the deicing equipment for all affected airports is estimated to be $10,720,000 to provide 67 portable deicing stations at 28 airports. The total recurring annual maintenance and operating costs at all affected airports will be $1,286,400. The FAA estimates the total recurring annual labor cost at all affected airports to be approximately $139,500.

The total undiscounted cost associated with deicing equipment over the next 10 years will be $25 million. This 10 year-cost is comprised of a one time cost of $10,720,000 for capital equipment, $12,864,000 maintenance and operating costs, and $1,395,000 in labor costs.

Delay Costs

In the NPRM, the FAA stated that delays could not be reliably estimated at that time. The Agency then presented a general step-by-step procedure to estimate potential delay costs. Comments from the industry were not useful in calculating these costs. Even though no additional data have been made available, the FAA has made an estimate of potential delay costs imposed by this rule. This estimate, however, as will be discussed later, should be viewed with its limitations.

As stated previously, after a holdover time has been exceeded a pretakeoff contamination check is one of the options available under this rule. Hence, the rule could increase air carrier delays during ice and snow conditions. Increased delays will increase costs to air carrier operators and passengers.

The FAA expects the pretakeoff contamination check to require between 5 to 15 minutes to complete. The regulatory evaluation assumes for the purposes of this estimate a delay of 10 minutes. The value of passenger time is estimated at $39 per passenger per hour and air carrier operating costs at $1,800 per hour. The delay cost estimate was based on 49 of the largest U.S. airports, for which the FAA had both icing and departure data. These 49 airports account for approximately two-thirds of part 121 operations.

The FAA has estimated a range of air carrier delay costs based on different assumptions about the number of aircraft receiving a pretakeoff contamination check. These estimates are based on data from the past three winters on delays that occurred during snow and ice conditions at U.S. airports. The lower of the two estimates measures delay costs to air carrier operators and passengers who were delayed 20 minutes or more due to snow and ice conditions. By looking only at departures with snow and ice delays of 20 or more minutes, the FAA tried to estimate those airplanes that exceeded their holdover times and would then undergo a 10 minute pretakeoff contamination check. The higher estimate assumes that all departures during snow and icing conditions experience a 10 minute pretakeoff contamination check delay.

Scenario One: This scenario represents the low end of the delay cost estimate. It measures delay costs to air carrier operators and passengers when all part 121 airplane departures that are delayed 20 minutes or more due to snow and ice conditions conduct a pretakeoff contamination check. Each pretakeoff contamination check is assumed to take 10 minutes. The 10-year discounted air carrier delay cost, assuming all aircraft experiencing a 20 minute delay during snow and ice conditions receive a pretakeoff check, is $15 million (discounted).

Scenario Two: The second scenario represents the high cost estimate. It measures delay costs to air carrier operators and passengers due to 10-minute pretakeoff checks for all part 121 departures during icing or snowing conditions. This estimate of the incremental air carrier delay costs is $41 million (discounted).

These estimates omit three critical factors that are needed to determine the total impact of the rule. First is the potential system impacts or "ripple effect" on air carrier delays. The FAA attempted to estimate the cost of this effect; however, it was unsuccessful due to the extreme complexity. Second, the potential decrease in delays due to a shift towards Type II deicing fluids is difficult to estimate because the data is not available to make this estimate. The third factor omitted from the delay cost estimate is the delays due to ice adhering to the surfaces of the aircraft. The estimated number of existing delays represents delays that occurred due to snow and ice (e.g., runway closures, poor braking action, etc.). The presence of delays due to snow and ice does not necessarily mean that snow or ice was adhering to the surfaces of the aircraft.

Re-deicing Delay Costs

The costs and benefits of this rule are a result of the increased checking for and detection of ice adhering to the surface of an airplane. This increased detection could result in additional

delays due to redeicing, though redeicing of contaminated airplanes is already a result of the existing rule. The exact number of delays that occurs as a result of having to return for redeicing cannot be determined at this time due to lack of data. The data needed to measure this cost would be the number of air carriers that have taken off with ice contamination. The FAA has no such measure. However, since Scenario Two above assumes that all future departures for part 121 airplanes will be delayed due to the new procedures of this rule, some of the potential re-deicing costs have been accounted for. In short, this scenario assumes that there would be delays due to pretakeoff contamination checks for all departures during ice and snow conditions. This is a worst case scenario for three reasons. First, not all airplanes would undergo such pretakeoff contamination checks because they would depart before their respective holdover times expire. Second, some airplanes would have alternate procedures to determine if the aircraft is free of contamination. Third, some aircraft would return for redeicing/anti-icing rather than accomplish a pretakeoff contamination check.

The total cost of the final rule is estimated to be between $52 million and $78 million (discounted). Of this total, air carriers would incur non-delay costs of $37 million and delay costs of between $15 million and $41 million.

Benefits

The benefit of the rule is enhanced safety. This safety will be achieved by ensuring that airplanes do not take off with contamination on the surfaces. The analytical approach employed to estimate the potential monetary benefits (safety) of achieving this goal focuses on two existing practices. First, the final rule will implement procedures (pretakeoff contamination checks) that will help prevent airplanes from taking off with ice on surfaces of the aircraft. Second, the final rule will ensure that aircraft that need deicing are actually deiced. Most of the benefits would come from the improved checking procedures (i.e., a formalized deicing/anti-icing procedure that includes standardized holdover tables). Under the current rule, the pilot would perform a visual contamination check before departure. Under this rule, the pilot will spend more time with better information to correctly ascertain whether ice is or is not on the surfaces of that aircraft. The remaining benefits will be derived from deicings due to contamination detected at the time of the check. The FAA cannot estimate the frequency of these occurrences.

The FAA expects the rule to generate total potential safety benefits over the next ten years estimated at $218 million ($1991). On a discounted basis, total potential benefits will amount to an estimated $131 million. This discounted total estimate of benefits is comprised of $125 million for significantly reducing the likelihood of ice-related accidents for passenger-carrying part 121 airplanes and $6 million for part 121 cargo airplanes.

Part 121 Passenger Carrier Benefits

Under the current rule, it is the responsibility of the pilot to decide whether ice, frost, or snow has accumulated on the structure of an airplane. This decision can be very difficult to make, especially when the airplane is sitting at the end of a runway waiting to take off during inclement weather. It is at these times that the likelihood of the pilot making the wrong decision is greatest. The benefits of the rule will come from reducing the likelihood of a pilot making the wrong decision.

Over the past 15 years, there have been five passenger-carrying air carrier accidents where ice, frost, or snow accumulations on the airplane was the primary factor. These accidents resulted in 135 fatalities and 66 serious injuries. In addition, four of the airplanes were destroyed and the other sustained substantial damage.

Based on historical accident and casualty rates, the FAA expects that over the next 10 years, approximately 4 accidents would occur, with 131 fatalities and 64 serious injuries. The present value dollar benefits of preventing these accidents and casualties is estimated to be $166 million (discounted 10 years, 10 percent).

The FAA has attempted to develop a rule that will be effective in preventing all accidents by incorporating program development, training, testing, capital equipment, maintenance, etc. There is some uncertainty, however, as to how effective these components will be. It is conceivable that some aircraft could pass through the system due, in part, to human error and adverse whether conditions, thereby, reducing the effectiveness of the rule. While the actual effectiveness rate would be lower than 100 percent, the FAA estimates that a rate of 75 percent would reflect the reality of correcting a problem that is influenced by a multitude of factors (whether, human error, etc.). Multiplying the $166 million benefits by the 75 percent effectiveness rate results in adjusted benefits of $125 million ($166 million × .75).

Part 121 Cargo Carrier Benefits

The rule will also potentially reduce accidents among large part 121 cargo aircraft. Over the past eight years, there have been three accidents involving large cargo aircraft. These three accidents resulted in two facilities and two serious injuries. Two of the aircraft were substantially damaged and one was destroyed.

Based on these rates the FAA estimates that over the next ten years, there will be approximately 2 accidents, 1 fatality, and 1 serious injury. The estimated value of preventing these accidents is estimated to be $8.4 million (discounted). Multiplying the $8.4 million in cargo benefits by the 75 percent effectiveness rate results in adjusted benefits of $6 million ($8.4 million × .75).

Summary of Benefits

In conclusion, the rule will enhance air carrier safety under conditions of ground icing. The rule will reduce pilot error related to taking off with ice on the airframe by using holdover times and pretakeoff contamination checks. The rule is expected to generate potential total part 121 passenger and cargo carrier benefits of $131 million ($125 million + $6 million).

Benefit-Cost Comparison

The present value cost of the rule, which now includes delay costs, is estimated to range between $52 million and $78 million over the next 10 years. These costs also include program development, training, qualification testing, and capital expenditures. These estimates also do not include the cost of overseas operations.

The benefits of the rule are estimated to be $131 million (discounted) over the next decade. These benefits are derived from preventing accidents due to reduced risk during ground icing conditions.

While the FAA has estimated the cost of delays, it was not able to estimate the ripple effect of those delays nor the effect of increased usage of Type II fluids. However, if the present value cost of the ripple effect of delays ranges between $53 million and $79 million, this rule will still be cost beneficial.

International Trade Impact

The rule is not expected to have a significant incremental impact on international trade. This assessment is based on the belief that while U.S. part 121 operators are expected to incur total

compliance costs of $122 million (undiscounted), they will not be placed at a competitive trade disadvantage.

The average cost of an international round trip airplane ticket is approximately $650. With a potential average cost increase of 4 cents per round trip ticket representing less than one-hundredth of a percent of the total cost of a ticket (without consideration of potential delay costs), the likelihood of U.S. air carriers being placed at a competitive trade disadvantage becomes extremely remote. For a now detailed analysis, the reader is referred to the full international trade impact assessment contained in the docket.

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities (small business and small not-for-profit organizations that are independently owned and operated, and small government jurisdictions) are not unnecessarily and disproportionately burdened by Federal regulations. The RFA requires regulatory agencies to review rules that may have "a significant economic impact on a substantial number of small entities." A substantial number of small entities means a number that is not less than eleven and that is more than one-third of the small entities subject to a proposed or existing rule.

The final rule potentially impacts operators of an aircraft for hire with nine aircraft owned but not necessarily operated. Of the 53 active U.S. commercial domestic carriers, the FAA has identified 22 that own or operate nine or fewer aircraft under part 121. The FAA has determined that this is a substantial number since all 22 of these small entities are expected to be affected by the final rule.

To determine whether there is a significant cost impact on small part 121 operators, the annualized cost of the rule must exceed the annualized cost threshold established by FAA Order 2100.14A. The threshold established by the Order for scheduled operators of aircraft for hire falls under two categories. The first category is scheduled operators whose entire fleet has a seating capacity of over 60. The cost threshold for these operators is $112,600. The second category is other scheduled operators with seating capacities less than 60. Their cost threshold is $62,900.

The FAA estimated the annualized cost of the rule to an individual small operator to be $20,800. This number was derived by first summing the undiscounted costs for small operators. These costs are:

Initial Program Development	$5,145
Initial Training	80,436
Qualification Testing	180,981
Initial Capital	289,440
Recurring Maintenance & Operating Costs	384,990
Potential Delay Costs ($69,265,870 x .027)	1,870,178
Total Undiscounted Costs	$2,811,170

The delay costs for small entities were estimated by multiplying the potential $70 million in undiscounted delay costs (high end of cost range) by the 2.7 percent of part 121 carriers that are small. This gives a cost of $1.9 million ($69,265,870 x .027).

The total undiscounted cost, $2.8 million, is then divided by the 22 small operators to get a $127,780 average undiscounted cost for any single small operator. This number is then multiplied by a capital recovery factor of .16275 (10% interest rate for 10 years) to give an annualized cost of $20,800.

The $20,800 annualized cost does not exceed the $62,900 cost threshold prescribed above. Thus, the final rule will not impose a significant cost on a substantial number of small part 121 operators.

Federalism Implications

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

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation is not major under Executive Order 12291. In addition, the FAA certifies that this regulation will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This regulation is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A final regulatory evaluation of the regulation, including a final Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "**FOR FURTHER INFORMATION CONTACT.**"

List of Subjects in 14 CFR Part 121

Air carriers, Air safety, Air transportation, Aircraft, Airmen, Aviation safety, Charter flights, Safety, Transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 121 of the Federal Aviation Regulations (14 CFR part 121) as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

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

Authority: 49 U.S.C. App. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g).

2. Section 121.629 is amended by revising paragraph (b) and by adding new paragraphs (c) and (d) to read as follows:

§ 121.629 Operation in icing conditions.

* * * * *

(b) No person may take off an aircraft when frost, ice, or snow is adhering to the wings, control surfaces, propellers, engine inlets, or other critical surfaces of the aircraft or when the takeoff would not be in compliance with paragraph (c) of this section. Takeoffs with frost under the wing in the area of the fuel tanks may be authorized by the Administrator.

(c) Except as provided in paragraph (d) of this section, no person may dispatch, release, or take off an aircraft any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft, unless the certificate holder has an approved ground deicing/anti-icing program in its operations specifications and unless the dispatch, release, and takeoff comply with that program. The approved ground deicing/anti-icing program must include at least the following items:

(1) A detailed description of—

(i) How the certificate holder determines that conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft and that ground deicing/anti-icing

operational procedures must be in effect;

(ii) Who is responsible for deciding that ground deicing/anti-icing operational procedures must be in effect;

(iii) The procedures for implementing ground deicing/anti-icing operational procedures;

(iv) The specific duties and responsibilities of each operational position or group responsible for getting the aircraft safely airborne while ground deicing/anti-icing operational procedures are in effect.

(2) Initial and annual recurrent ground training and testing for flight crewmembers and qualification for all other affected personnel (e.g., aircraft dispatchers, ground crews, contract personnel) concerning the specific requirements of the approved program and each person's responsibilities and duties under the approved program, specifically covering the following areas:

(i) The use of holdover times.

(ii) Aircraft deicing/anti-icing procedures, including inspection and check procedures and responsibilities.

(iii) Communications procedures.

(iv) Aircraft surface contamination (i.e., adherence of frost, ice, or snow) and critical area identification, and how contamination adversely affects aircraft performance and flight characteristics.

(v) Types and characteristics of deicing/anti-icing fluids.

(vi) Cold weather preflight inspection procedures.

(vii) Techniques for recognizing contamination on the aircraft.

(3) The certificate holder's holdover timetables and the procedures for the use of these tables by the certificate holder's personnel. Holdover time is the estimated time deicing/anti-icing fluid will prevent the formation of frost or ice and the accumulation of snow on the protected surfaces of an aircraft. Holdover time begins when the final application of deicing/anti-icing fluid commences and expires when the deicing/anti-icing fluid applied to the aircraft loses its effectiveness. The holdover times must be supported by data acceptable to the Administrator. The certificate holder's program must include procedures for flight crewmembers to increase or decrease the determined holdover time in changing conditions. The program must provide that takeoff after exceeding any maximum holdover time in the certificate holder's holdover timetable is permitted only when at least one of the following conditions exists:

(i) A pretakeoff contamination check, as defined in paragraph (c)(4) of this section, determines that the wings, control surfaces, and other critical surfaces, as defined in the certificate holder's program, are free of frost, ice, or snow.

(ii) It is otherwise determined by an alternate procedure approved by the Administrator in accordance with the certificate holder's approved program that the wings, control surfaces, and other critical surfaces, as defined in the certificate holder's program, are free of frost, ice, or snow.

(iii) The wings, control surfaces, and other critical surfaces are redeiced and a new holdover time is determined.

(4) Aircraft deicing/anti-icing procedures and responsibilities, pretakeoff check procedures and responsibilities, and pretakeoff contamination check procedures and responsibilities. A pretakeoff check is a check of the aircraft's wings or representative aircraft surfaces for frost, ice, or snow within the aircraft's holdover time. A pretakeoff contamination check is a check to make sure the wings, control surfaces, and other critical surfaces, as defined in the certificate holder's program, are free of frost, ice, and snow. It must be conducted within five minutes prior to beginning take off. This check must be accomplished from outside the aircraft unless the program specifies otherwise.

(d) A certificate holder may continue to operate under this section without a program as required in paragraph (c) of this section, if it includes in its operations specifications a requirement that, any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft, no aircraft will take off unless it has been checked to ensure that the wings, control surfaces, and other critical surfaces are free of frost, ice, and snow. The check must occur within five minutes prior to beginning takeoff. This check must be accomplished from outside the aircraft.

Issued in Washington, DC on September 24, 1992.

Thomas C. Richards,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[AC No. 121-XX]

Proposed Advisory Circular on Ground Deicing and Anti-Icing Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Request for comments on proposed advisory circular.

SUMMARY: Proposed advisory circular (AC) 121-xx Ground Deicing and Anti-Icing Program, provides guidance about the program elements that should be incorporated in an air carrier's approved ground deicing and anti-icing program. This AC would provide guidance about one method of complying with the requirements of revised Federal Aviation Regulation (FAR) section 121.629.

DATES: Comments must be received on or before October 14, 1992.

ADDRESSES: Written comments are invited on all aspects of the proposed AC. Commenters must identify file number AC 121-xx, Ground Deicing and Anti-Icing Program. Send all comments on the proposed AC to the following location: Federal Aviation Administration, Flight Standards Service, Air Carrier Branch (Attention: AFS-220), 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Katherine Hakala, Flight Standards Service, Air Carrier Branch, AFS-220, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-3762 (8 a.m. to 4:30 p.m. e.s.t.).

SUPPLEMENTARY INFORMATION: The guidance in this AC provides one method, but not the only method, of complying with the requirements of revised FAR 121.629. This guidance material supplements the interim final rule, FAR 121.629 published elsewhere in this issue of the **Federal Register**, 14 CFR 121.629. Due to the impending winter season and the critical safety nature of this proposed AC, it is published in its entirety in order to allow commenters expedient access to the document.

Issued in Washington, DC, on September 23, 1992.

William J. White,

Deputy Director, Flight Standards Service.

Ground Deicing and Anti-Icing Program AC No: 121-XX

1. Purpose.

This advisory circular (AC) provides one means, but not the only means, for obtaining approval of a Ground Deicing and Anti-Icing Program, and for ensuring compliance with Federal Aviation Regulations (FAR) Section 121.629.

2. Related FAR Sections.

121.105, 121.107, 121,123, 121,125, 121.127, 121.135, 121.363(b), 121.365, 121.367, 121.369, 121.375, 121.383(a)(3), 121.401, 121.403, 121.405, 121.415, 121.418, 121.419, 121.422, 121.427, 121.433, 121.463, 121.533, 121.537, 121.539, 121.629, and Special Federal Aviation Regulation (SFAR) No. 58.

3. Background.

a. Accidents Related to Icing.

According to information received in 1992 from the National Transportation Safety Board (NTSB), in the last 23 years there have been 15 accidents related to the failure to deice and/or anti-ice aircraft adequately before takeoff. On March 22, 1992, a U.S. air carrier crashed on takeoff from LaGuardia Airport in a snowstorm during nighttime operations. While the NTSB has not yet issued a probable cause finding for this accident, the FAA has proceeded on the assumption that the accident was caused, at least in part, by icing.

b. Reassessment of Icing Procedures.

Prior to the LaGuardia accident, the FAA and the aviation community in general had placed priority on emphasizing the need during icing conditions for the pilot-in-command (PIC) to ensure a "clean aircraft" before takeoff. The FAA believed that pilot education appeared key to combatting the threat of wing icing. Although the FAA still believes the PIC must ultimately make the decision on whether or not to take off, based on a thorough understanding of factors involved in aircraft icing, the FAA believes that certificate holders who conduct their operations under FAR part 121 must provide their PIC's with pertinent information and operator-developed procedures and criteria in order to make a proper decision.

c. Content of this AC.

Accordingly, this AC provides guidance about the program elements that should be incorporated in an air carrier's approved ground deicing and anti-icing program and provides guidance and suggestions about one method, but not the only method, of complying with all pertinent regulations.

4. Definitions

The terms used in this AC are not defined in FAR part 1, but are defined herein for better understanding of this material as follows:

a. *Holdover Time* is defined as the estimated time the application of deicing or anti-icing fluid will prevent the formation of frost or ice, and the accumulation of snow on the treated surfaces of an aircraft. Holdover time begins when the final application of deicing/anti-icing fluid commences, and it expires when the deicing/anti-icing fluid applied to the aircraft loses its effectiveness.

b. *Deicing* is a procedure by which frost, ice, or snow is removed from the aircraft in order to provide clean surfaces.

c. *Anti-Icing* is a precautionary procedure that provides protection against the formation of frost or ice and accumulation of snow on treated surfaces of the aircraft for a limited period of time.

5. Related Reading Material

The following material should be useful in developing training program subject material and instructions and procedures for incorporation in the certificate holder's manuals: AC 20-117, "Hazards Following Ground Deicing and Operations in Conditions Conducive to Aircraft Icing"; FAA publication, "Winter Operations Guidance for Air Carriers and Other Adverse Weather Topics"; and the following publications of the Society of Automotive Engineers (SAE): AMS 1424, "Deicing/Anti-Icing Fluid, Aircraft, Newtonian—SAE Type I"; AMS 1428, "Fluid, Aircraft Deicing/

Anti-Icing, Non-Newtonian, Pseudo-Plastic, SAE Type II"; and ARP 4737, "Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft"; AC 120–XX, "Pilot Guide—Large Aircraft Ground Deicing"; International Standards Organization (ISO) publications: ISO 11075, "Aerospace—Aircraft de-icing/anti-icing newtonian fluids ISO type I"; ISO 11076, "Aerospace—Aircraft de-icing/anti-icing methods with fluids"; ISO 11077, "Aerospace—De-icing/anti-icing self propelled vehicles—Functional requirements"; ISO 11078, "Aerospace—Aircraft de-icing/anti-icing non-newtonian fluids ISO type II."

6. Program Elements

A certificate holder's ground deicing and anti-icing program, as approved under FAR 121.629(c), should encompass at least the elements that follow (see paragraph 7 and following for detailed discussion of these elements):

a. Management plan detailing operational responsibilities and procedures.

b. Holdover timetables and procedures for their use.

c. Aircraft deicing/anti-icing procedures and responsibilities, pretakeoff check procedures and responsibilities, and pretakeoff contamination check procedures and responsibilities.

d. Initial and recurrent ground training and testing for flight crewmembers and qualification for all other affected personnel.

7. Management Plan

FAR 121.533, 121.535, and 121.537 state, respectively, that each domestic, flag, and supplemental air carrier and commercial operator is responsible for operational control. In order to properly exercise operational control (when conditions at an airport are such that frost, ice, or snow may reasonably be expected to adhere to its aircraft) the certificate holder should develop, coordinate with other affected parties, implement, and use a management plan to ensure proper execution of its approved deicing/anti-icing program. An operator's management plan should identify the manager responsible for the overall deicing/anti-icing program, identify each subordinate manager, and describe each manager's functions and responsibilities under the applicable FAR which are needed to properly manage the certificate holder's deicing/anti-icing program. The plan should encompass at least the elements discussed in the following paragraphs:

a. Operations

Determine the management position responsible for ensuring that all necessary elements of the management plan and the deicing/anti-icing program have been developed, properly integrated, and coordinated; that the plan and program have been disseminated to all those persons who have duties, responsibilities and functions to perform in accordance with them; and that adequate management oversight of the program continues to be maintained. The following actions should be taken:

(1) Determine who (position description) will be responsible, at each airport where operations are expected to be conducted in conditions conducive to ground icing, for deciding that ground deicing/anti-icing operational procedures are to be executed and when.

(2) Detail the functions, duties, responsibilities, instructions, and procedures to be used by flight crewmembers, aircraft dispatchers, and management personnel for safely dispatching or releasing the particular type aircraft used in its operations while ground deicing/anti-icing operational procedures are in effect. The program should contain a detailed description of how the certificate holder determines that the conditions at an airport are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft; and that ground deicing/anti-icing operational procedures must be in effect.

(3) Determine who (position description) will be responsible for coordinating the applicable portions of the management plan and the deicing/anti-icing program with the managers of the air traffic control tower (ATCT) and the airport.

(4) Determine who (position description) will be authorized to enter into agreements with the manager of the ATCT at each airport regarding particular gate hold procedures during icing conditions; and with the airport manager at each airport regarding aircraft secondary deicing/anti-icing locations and aircraft pretakeoff checking locations.

(5) Ensure that a detailed description of the deicing/anti-icing program is incorporated in the certificate holder's manuals (for the use and guidance of flight, ground operations, and management personnel) in conducting its operations under icing conditions.

b. Maintenance.

Determine who is responsible for ensuring that sufficient competent personnel and adequate facilities and equipment are available (at each airport where operations are expected to be conducted under conditions conducive to ground icing) for the proper deicing and anti-icing of the certificate holder's aircraft. The following actions should be taken:

(1) Ensure that all necessary maintenance elements of the management plan and the deicing/anti-icing program have been developed, properly integrated, and coordinated; that the maintenance plan and program have been disseminated to all those persons who have duties, responsibilities, and functions to perform in accordance with them; and that adequate management oversight of the program continues to be maintained.

(2) Detail the functions, duties, responsibilities, instructions, and procedures to be used by its ground personnel, maintenance personnel, and management personnel for safely dispatching or releasing the particular type aircraft used in its operations while ground deicing/anti-icing operational procedures are in effect.

(3) Ensure that a detailed description of the maintenance portion of the deicing/anti-icing program is incorporated in the certificate holder's manuals (for the use and guidance of maintenance, ground, and management personnel) in conducting its operations under icing conditions.

8. Holdover Timetables and Procedures for Their Use.

FAR 121.629(c)(3) requires that the deicing/anti-icing program include holdover timetables and the procedures for the use of these tables by the certificate holder's personnel. The program should also include procedures to be followed in the event that the certificate holder's established maximum holdover times are exceeded. Each of these areas is discussed in the following paragraphs and illustrated in figure 1.

Note: Use of the holdover timetables requires a pretakeoff check by the flightcrew. These holdover timetables must be available for use of the flightcrew in the cockpit.

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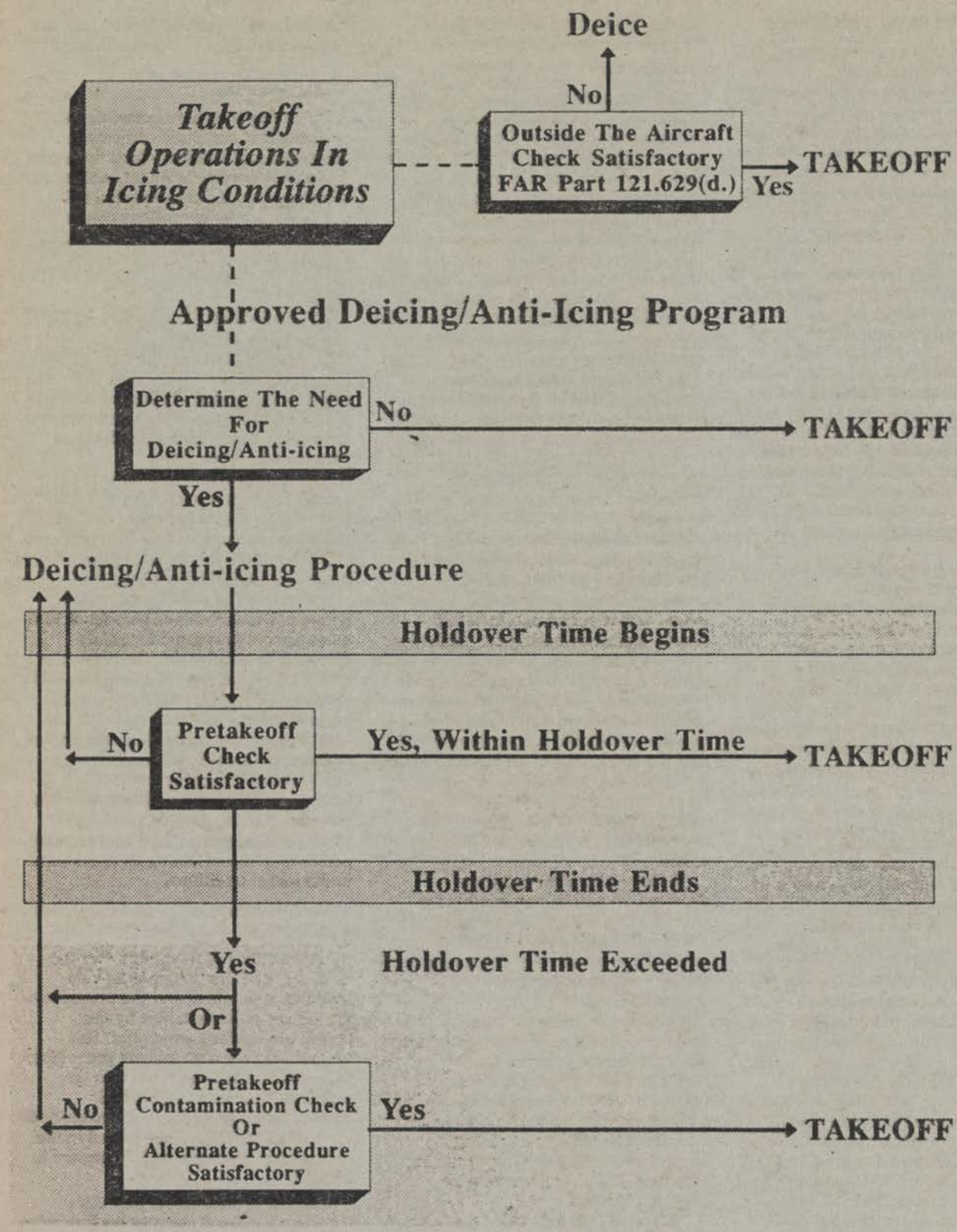

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a. Responsibilities and Procedures.

The certificate holder's program should define operational responsibilities and contain procedures for the flightcrew, aircraft dispatchers or flight followers, and maintenance and ground personnel applicable to the use of holdover times and resultant actions if the certificate holder's maximum holdover time is exceeded. These procedures should include gate procedures, communication between ground crew and flightcrew to establish the start of holdover time and to relay other pertinent information regarding the deicing/anti-icing process, flight crewmember use of the pertinent holdover timetables, and coordination with air traffic control (ATC).

b. Development of Holdover Timetables.

Each certificate holder is required under FAR 121.629(c)(3) to develop holdover timetables for use by its personnel. These timetables are required to be supported by data acceptable to the Administrator. Currently, the only acceptable data is that developed by the Society of Automotive Engineers (SAE) and the International Standards Organization (ISO). ARP 4737, "Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft," and ISO 11076, "Aerospace—Aircraft deicing/anti-icing methods with fluids," contain the tables that are currently considered acceptable for use by the certificate holders to develop their holdover timetables. Holdover times in excess of those specified in the current editions of the SAE/ISO holdover timetables are not acceptable; however, the certificate holder may require the use of more conservative times than those specified in the SAE/ISO tables. Appendix A of this AC contains the holdover timetables extracted from the current SAE/ISO documents.

c. Use of Holdover Timetables

Holdover times are only an estimate of the time of effectiveness for deicing/anti-icing fluids and are based on a number of variables. FAR section 121.629(c)(4) requires a pretakeoff check of the wings or representative surfaces to be completed by the flightcrew prior to takeoff and within the holdover time range. Air carrier manuals should contain detailed procedures regarding the use of the timetables in their operations. FAR section 121.629(c)(3) requires that the certificate holder's program contain procedures for flight crewmembers to increase or decrease the determined holdover time in changing conditions. Weather conditions that could result in a change to the determined holdover times include, but are not limited to, a significant rise in the ambient temperature to well above freezing, the end of precipitation, or other changes in temperature or precipitation type or intensity. Procedures should consider the certificate holder's capability to disseminate information, in real time, concerning changing weather conditions. Additional guidance regarding holdover timetables is contained in AC 20-117, "Hazards Following Ground Deicing and Ground Operations in Conditions Conducive to Aircraft Icing"; AC 120-XX, "Pilot Guide—Large Aircraft Ground Deicing"; SAE ARP 4737, "Aircraft Deicing/Anti-icing Methods with Fluids, for Large Transport Aircraft"; and ISO 11076, "Aerospace—Aircraft de-icing/anti-icing methods with fluids."

d. Takeoff After the Holdover Time is Exceeded

Under FAR § 121.629(c), takeoff after the maximum holdover time has been exceeded is permitted only if one or more of the following actions has been taken. The certificate holder's program should detail actions to be accomplished if the holdover time is exceeded.

(1) A pretakeoff contamination check is made to ensure that wings, control surfaces and other critical surfaces, as defined in the certificate holder's program, are free of frost, ice or snow. The operator's program should include detailed guidelines and criteria for flightcrew and ground personnel to follow to accomplish this checking requirement. This check is accomplished within five minutes before beginning takeoff and is generally conducted from outside the aircraft, unless the program specifies otherwise. Factors determining whether or not the check can be accomplished from within the aircraft include the ability of the flightcrew to see aircraft surfaces, lighting conditions, weather conditions and other factors which determine the ability to assess the condition of the aircraft; or

(2) It is otherwise determined by an alternate procedure, that wings, control surfaces, and other critical surfaces (as defined in the certificate holder's program) are free of frost, ice, or snow. Other means or determinations consist of procedures, techniques or equipment (such as wing icing sensors) to establish that critical surfaces are not contaminated. These means or determinations should be detailed and approved in the operator's program; or

(3) The wings, control surfaces, and other critical surfaces have been re-deiced and a new holdover time has been established. Coordination procedures should be detailed for the accomplishment of this re-deicing.

9. Aircraft Deicing Anti-Icing Procedures and Responsibilities, Pretakeoff Check Procedures and Responsibilities, and Pretakeoff Contamination Check Procedures and Responsibilities

Certificate holders' manuals should contain detailed procedures for the deicing and anti-icing process specific to each aircraft type. Certificate holders should have aircraft-specific instructions and checking guidelines and procedures for the use of their flight crewmembers and other personnel to determine whether or not aircraft critical surfaces are free of contaminants.

a. Identification of Critical Aircraft Surfaces

The critical aircraft surfaces which should be clear of contaminants before takeoff should be described in the aircraft manufacturers' maintenance manual or other manufacturer-developed documents, such as service or operations bulletins.

(1) Generally, the following should be considered to be critical aircraft surfaces, if the aircraft manufacturer information is not available:

(a) Before engine start, pitot heads, static ports, ram-air intakes for engine control and flight instruments, other kinds of instrument sensor pickup points, fuel vents, propellers and engine inlets.

(b) Wings, empennage, and control surfaces.

(c) Fuselage upper surfaces on center-engine aircraft.

(2) Certificate holders should list in the flight manual or the operations manual, for each type of aircraft used in their operations, the critical surfaces which should be checked on flight-crewmember-conducted, external-aircraft, preflight inspections and pretakeoff checks or pretakeoff contamination checks.

(3) Critical surfaces should be defined for the use of ground personnel for the conduct of required checks following deicing/anti-icing and the pretakeoff contamination check, when required.

b. Identification of Representative Aircraft Surfaces

Certificate holders should list in the flight manual or the operations manual, for each type of aircraft used in their operations, the representative surfaces which may be checked, in lieu of the critical aircraft surfaces, by flight

crewmembers in the conduct of pretakeoff checks.

(1) Some aircraft manufacturers have identified certain aircraft surfaces which the flightcrew can readily observe during day and night operations to determine whether or not ice, frost or snow is accumulating or forming on that surface, and, by using it as a representative surface, can make a reasoned judgement regarding whether or not ice is adhering to other aircraft surfaces. Certificate-holder operational experience can also be used to define representative surfaces. In the absence of this information, the following guidelines should be considered in identifying a representative aircraft surface:

(a) The surface can be clearly seen from inside the cockpit, and it is close enough to the viewer to be able to determine whether or not ice, frost, or snow is forming or accumulating on the surface.

(b) The surface should be unheated.

(c) The surface should have been treated with deicing/anti-icing fluid during the time that fluid was applied to the other aircraft surfaces; however, it is recognized that it is industry practice not to apply Type II fluid forward of the leading edge of the wings, and that Type I fluid may be applied only to the wing surfaces, without being applied to areas visible from the cockpit. Designation of representative surfaces is not limited to treated surfaces.

(d) Surfaces such as propeller spinners and windshield wipers should also be considered.

c. Techniques for Recognizing Contamination on Aircraft Critical or Representative Surfaces.

Certificate holders should have aircraft-specific techniques for the use of their flight crewmembers and other personnel to recognize contamination on critical or representative aircraft surfaces when the certificate holder has procedures for the conduct of preflight external aircraft icing checks, inside- and outside-the-aircraft pretakeoff checks, and pretakeoff contamination checks. Some indications for loss of effectiveness of deicing/anti-icing fluid or contamination on aircraft surfaces include progressive surface freezing or snow accumulation, or random snow accumulation or dulling of surface reflectivity (loss of gloss) caused by the gradual deterioration of the fluid to slush. Deicing/anti-icing fluid manufacturers should also be consulted for information on the fluid characteristics and indications that the fluid is losing its effectiveness.

d. Types of Icing Checks

FAR 121.629 identifies three different icing checks or procedures (to follow ground deicing/anti-icing) which may be required to be accomplished under an opertor's approved deicing/anti-icing program:

(1) *Aircraft deicing/anti-icing procedure.* Certificate holders should have procedures which ensure that, following aircraft deicing and anti-icing fluid application, a preflight external-aircraft icing check of the critical aircraft surfaces has been conducted by qualified ground personnel; this check determines whether or not the critical surfaces are free of frost, ice or snow before push-back or taxi; and the results of the check are communicated to the PIC by an acceptable means.

(2) *Pretakeoff check.* This check is required under FAR 121.629(c)(4) any time that ground icing conditions exist and the aircraft has been deiced/anti-iced and a holdover time is established. It is accomplished within the holdover time range, and normally is accomplished by the flightcrew from inside the cockpit. The aircraft's wings or representative aircraft surfaces are checked for contamination prior to takeoff. The surfaces to be checked are determined by manufacturer data, carrier operational experience, or guidance contained in this AC. The pretakeoff check is integral to the use of holdover times. Because of the variables involved in the determination of holdover times, it is necessary for the flightcrew to look outside the aircraft to assess current weather or other situational conditions, and the aircraft condition, and not rely on the holdover times as the sole determinant that the aircraft is free of contaminants.

(3) *Pretakeoff contamination check.* FAR 121.629(c)(3)(i) requires that certificate holders must have aircraft-specific procedures for use by flight crewmembers and qualified ground personnel to ensure that the aircraft wings, control surfaces, and other critical surfaces remain free of frost, ice, or snow when a holdover time has been exceeded. The pretakeoff contamination check, conducted within 5 minutes of takeoff, is one of three alternative actions to be taken if a holdover time is exceeded. The following should be considered in the development of the procedures.

(a) Certificate holders who operate hardwing airplanes with aft, fuselage-mounted, turbine-powered engines (excluding turbo-propeller-powered engines) should conduct this pretakeoff contamination check from outside the airplane. Because of the difficulty in detecting contaminants on these airplanes, the pretakeoff contamination check should include a physical (tactile) check of selected portions of the wing leading edges and the upper wing surfaces.

(b) Operators of other aircraft may conduct this check from inside or outside the aircraft as specified in the certificate holder's program. Certificate holders should consider the following in the development of guidelines to be used in conjunction with the techniques for flight crewmember recognition of contamination of critical aircraft surfaces and the procedures for conducting pretakeoff contamination checks inside the aircraft.

1. Can enough of the critical surfaces be seen to accurately determine whether or not they are free of contaminants? This determination should consider the aircraft type, the method of conducting the check—that is, from the cockpit or cabin; lighting; and atmospheric conditions.

2. Does the certificate holder have procedures to recognize, and have flight crewmembers been properly trained to recognize changes in weather conditions to allow the PIC to ascertain whether or not the critical aircraft surfaces could reasonably be expected to remain free of contaminates?

10. Initial and Recurrent Ground Training, Testing and Qualification

a. General/All Personnel.

The operator's training program should include initial and annual recurrent ground training, testing for flight crewmembers and qualification for all affected personnel concerning the specific requirements of the program and the duties, responsibilities, and functions detailed in the program. The effective date of FAR section 121.629 requires that initial program training, testing and qualification be completed prior to November 1, 1992. The FAA will allow maximum flexibility in providing the required training, testing, and qualification for this first winter season. Initial training and testing can be accomplished through the issue of bulletins, manual revisions, self-grading quizzes or other review materials. Receipt of training documents will satisfy the testing requirement for this initial winter season. Formal testing will be accomplished in the next recurrent training cycle. On-the-job qualification for ground personnel should include those elements specific to the final deicing/anti-icing rule to include use of holdover times, fluid application, and checking procedures.

b. Operations Ground Training

The following represents the recommended content for a certificate holder's operations ground training program in accordance with the general requirements of FAR section 121.415. Flight crewmembers and other operations personnel should receive training on at least the following subjects:

(1) *The use of holdover times.* Holdover times are a range of times derived from an analysis of airline service experience and the laboratory testing results of the freeze points of particular types of fluids (currently Type I and Type II) under various temperatures, fluid concentrations, and humidity conditions. A discussion of holdover times should include the following:

(a) Source of holdover time data.

(b) Precipitation category (for example, fog, drizzle, rain, snow).

1. Precipitation intensity.

2. Duration of precipitation.

3. Relationship of precipitation change to holdover time.

(c) Relationship of holdover time to particular fluid concentrations for both Type I and Type II fluids.

(d) Identification of when holdover time begins and ends.

(e) Communication procedures reference holdover times.

1. Communication between ground personnel and the flightcrew to determine the start of holdover time, and the particular holdover timetable to be used. Communications from the ground crew to the cockpit crew should consist of the following information:

(aa) Fluid type (for example, Type I or Type II).

(bb) Fluid/water mix ratio.

(cc) Start time of final fluid application/beginning of holdover time.

(dd) Accomplishment of post-deicing/anti-icing check.

2. ATC Coordination.

3. Dispatch or flight following coordination.

4. Means for obtaining most current weather information.

(f) Use of holdover times for the cockpit crew. A pretakeoff check is an integral part of the use of holdover times.

(g) Procedures when holdover time is exceeded.

1. Pretakeoff contamination check.

2. Alternate means to determine whether or not surfaces are free of frost, ice or snow.

3. Re-deice and establish new holdover time.

(2) *Aircraft deicing/anti-icing procedures including checks to detect contaminated surfaces, and responsibilities*—(a) *Deicing* is a procedure by which frost, ice, or snow is removed from the aircraft in order to provide clean surfaces. The procedure can be accomplished by the use of fluids or mechanical means.

(b) *Anti-Icing* is a procedure by which the application of certain types of anti-icing fluids provides protection against the formation of frost or ice and accumulation of snow on treated surfaces of the aircraft for a limited period of time (holdover time).

(c) *Deicing/Anti-Icing* is a combination of the two procedures above. It can be performed in one or two steps.

1. One-step deicing/anti-icing is carried out with an anti-icing fluid. The fluid used to deice the aircraft remains on aircraft surfaces to provide limited anti-ice capability.

2. Two-step deicing/anti-icing consists of two distinct steps. The first step (deicing) is followed by the second step (anti-icing) as a separate fluid application. Anti-icing fluid is applied to protect the relevant surfaces, thus providing maximum possible anti-ice capability (holdover time).

(d) Safety requirements during fluid application.

(e) Deicing/anti-icing fluid application procedures.

(f) Remote deicing procedures. 1. Aircraft-specific considerations.

2. Location-specific procedures.

(g) *Contractor Deicing.* Many certificate holders will utilize contract services, such as aircraft servicing vendors, fixed base operators, or other air carriers to perform deicing/anti-icing. Operations training should include flightcrew supervisory responsibilities for certificate holders who engage in supplemental operations, who employ contractor deicing/anti-icing services, and who are unable to arrange for the training and qualification of the contractor personnel in advance of operations into airports where these contractor services are to be performed.

(h) *Deicing/Anti-Icing Checking Procedures and Responsibilities.* The training program should have aircraft-specific surface contamination checking guidelines to include the following:

1. *Types of Checks Required.* Each certificate holder should detail the types of checks required and the methods for accomplishing these checks. This will include procedural steps for the conduct of the check as well as the location, and personnel, deicing equipment, and lighting, if applicable, required to accomplish the check.

(aa) Flightcrew preflight inspection/cold weather preflight inspection procedures. This is the normal walk-around preflight inspection conducted by the flightcrew. This inspection should be used to note any aircraft surface contamination and direct any required deicing/anti-icing operations.

(bb) Aircraft deicing/anti-icing procedures include a check performed by qualified ground personnel after the deicing/anti-icing fluid application as an integral part of that process.

(cc) A pretakeoff check is performed prior to takeoff and within the holdover time. This is a check normally conducted from inside the cockpit. Identification of representative surfaces and continual assessment of environmental and other situational conditions should be included in the operator's program.

(dd) Pretakeoff contamination check. Check accomplished after the holdover time has been exceeded and within 5 minutes prior to takeoff. Each carrier will define the content of the pretakeoff contamination check. The check could be conducted from inside or outside the aircraft, depending upon such factors as atmospheric condition, lighting conditions, aircraft type and ability of the crew to see the relevant aircraft surfaces.

(ee) PIC responsibility. The PIC's responsibility is to make the decision on whether or not to make the takeoff based on operator developed guidance and procedures.

2. Identification of critical surfaces or representative surfaces to be checked/inspected during each type of check.

3. Techniques for recognizing contamination on the aircraft.

4. Communications procedures to include communications between ground personnel and the flightcrew, and communications with ATC and company station personnel to coordinate requirements for aircraft pretakeoff contamination check.

(3) *Aircraft surface contamination and critical area identification, and how contamination adversely affects aircraft performance and flight characteristics.*—(a) *Aircraft Ground Icing Conditions.* Certificate holders should ensure that a description of the following conditions is incorporated in the procedures for implementing ground deicing/anti-icing operational procedures. Also, certificate holders should ensure that those persons who have responsibilities under the deicing/anti-icing program for determining whether or not ground deicing/anti-icing procedures should be in effect, understand that under at least the following conditions, frost, ice, or snow

may reasonably be expected to adhere to the aircraft.

1. *In-flight Ice Accumulation.* Certificate holders should have procedures which ensure that the flightcrews of arriving flights report occurrences of in-flight icing to the person responsible for executing the certificate holder's deicing/anti-icing program at each airport where the certificate holder conducts its operations. This is a problem when flights are scheduled for short turnaround times—for example, for 30 minutes or less, and when ambient temperatures on the ground are at or below freezing.

2. *Freezing Precipitation.* Snow, sleet, freezing rain, drizzle, or hail which adheres to aircraft surfaces.

3. *Frost.* (including hoarfrost) is a crystallized deposit, formed from water vapor on surfaces which are at or below 0 °C (32 °F).

4. *Freezing Fog.* Clouds of supercooled water droplets that form a deposit of ice on objects in cold weather conditions.

5. *Snow.* Precipitation in the form of small ice crystals or flakes which may accumulate on or adhere to aircraft surfaces.

6. *Freezing Rain.* Water condensed from atmospheric vapor falling to earth in supercooled drops, forming ice on objects.

7. *Rain or High Humidity (on Cold-Soaked Wing).* Water forming ice or frost on the wing surface when the temperature of the aircraft wing surface is at or below 0 °C (32 °F). Certain aircraft, such as McDonnell Douglas Models DC–9–80 series and MD–88 series airplanes, are currently susceptible to the formation of frost or ice on their wings' upper surfaces when cold-soaked fuel is in the main wing fuel tanks, and the aircraft are exposed to conditions of high humidity, rain, drizzle, or fog at ambient temperatures well above freezing.

8. *Underwing Frost.* Takeoff with frost under the wing in the area of the fuel tanks (caused by cold-soaked fuel) within limits established by the aircraft manufacturer, accepted by FAA aircraft certification offices and stated in aircraft maintenance and flight manuals, may be permitted.

(b) *Critical Aircraft Surfaces.* Certificate holders should identify for each type of aircraft used in their operations, the critical surfaces which should be checked on flight-crewmember-conducted, preflight, external-aircraft icing checks and pretakeoff checks or pretakeoff contamination checks. Information from the aircraft manufacturer (or from this AC, if the subject information is not available from the aircraft manufacturer) should be used to determine the critical surfaces for each aircraft type.

(c) *Representative Aircraft Surfaces.* Certificate holders should identify for each type of aircraft used in their operations, the representative aircraft surfaces which should be checked on flight-crewmember-conducted pretakeoff checks. Information from the aircraft manufacturer, or information developed from carrier operating experience, should be used to determine representative surfaces. In the absence of such information, information from this AC can be used to determine representative aircraft surfaces.

(d) *Effects of Frost, Ice, Snow, and Slush on Aircraft Performance, Stability, and Control.* The certificate holder should obtain this information from the manufacturer of each type of aircraft it uses in its operations and should ensure that its flight crewmembers, aircraft dispatchers, and management personnel understand these effects. Accident data and NASA studies have confirmed some aircraft manufacturer data that the effects of wing contamination may be significantly more pronounced for hard-leading-edge (hard-wing) airplanes than for slatted-leading-edge (slatted-wing) airplanes. According to McDonnell Douglas, the presence of even minute amounts of ice or other contaminates (equivalent to medium grit sandpaper) on the leading edges or upper surfaces of the wings of a DC–9–10 series airplane results in significant loss of wing lift, which causes the airplane to stall at lower-than-normal angles of attack during takeoff. The discussion of these effects should include, but is not limited to, the following subjects:

1. Increased drag/weight.
2. Tendency for rapid pitch-up during rotation or wing roll off.
3. Loss of lift.
4. Stall occurs at lower-than-normal angle of attack.
5. Buffet or stall occurs before activation of stall warning.
6. Decreased effectiveness of flight controls.

(4) *Types, purpose, characteristics, and capabilities of deicing and anti-icing fluids.* Deicing and anti-icing fluids with differing characteristics and capabilities exist; they may undergo improvements, and new types of fluids may be developed. Certificate holders should ensure that their flight crewmembers, aircraft dispatchers, and management personnel generally understand the purpose and capabilities of the fluids used in the deicing/anti-icing program; and that their flight crewmembers are generally knowledgeable of the characteristics of each type of fluid. Certificate holders should refer to the following SAE publications for additional information on specific deicing and anti-icing methods and procedures and on fluid characteristics and capabilities: AMS 1424, "Deicing/Anti-Icing Fluid, Aircraft, Newtonian—SAE Type I"; AMS 1428, "Fluid, Aircraft Deicing/Anti-Icing, Non-Newtonian, Pseudo-Plastic, SAE Type II"; and ARP 4737, "Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft"; and the following ISO documents: ISO 11075, "Aerospace—Aircraft de-icing/Anti-icing newtonian fluids ISO type I"; ISO 11076, "Aerospace—Aircraft de-icing/anti-icing methods with fluids"; ISO 11077, "Aerospace—de-icing/anti-icing self propelled vehicles—Functional requirements"; ISO 11078, "Aerospace—Aircraft de-icing/anti-icing non-newtonian fluids ISO type II." Certificate holders should ensure that at least the following subjects are discussed:

(a) Deicing fluids:

1. Heated water.
2. Newtonian fluid (SAE/ISO Type I) (see Caution).
3. Mixtures of water and SAE/ISO Type I fluid.
4. Mixtures of water and SAE/ISO Type II fluid.

Note: Deicing fluid should be applied heated to assure maximum efficiency.

(b) Anti-icing fluids:

1. Newtonian fluid (SAE/ISO Type I) (see Caution).
2. Mixtures of water and SAE/ISO Type I fluid.
3. Non-Newtonian fluid (SAE/ISO Type II).
4. Mixtures of water and SAE/ISO Type II fluid.

Note: SAE/ISO Type II anti-icing fluid is normally applied cold on clean aircraft surfaces, but may be applied heated. Cold SAE/ISO Type II fluid normally provides longer anti-icing protection. SAE/ISO Type I anti-icing fluid should be applied heated.

Caution: SAE/ISO Type I fluids supplied as concentrates for dilution with water prior to use should not be used undiluted. This is due to adverse aerodynamic effects of propylene glycol based fluids and the freeze point characteristics of ethylene glycol-based fluid.

(c) *Fluid Characteristics.*

1. *Type I Fluids.*

(aa) Unthickened.

(bb) Limited holdover time.

(cc) Applied to form thin liquid film on wing.

2. *Type II Fluids.*

(aa) Thickened.

(bb) Longer holdover times in comparison to those of Type I fluids.

(cc) Application results in a thick liquid film (a gel-like consistency) on wing.

(dd) Wind flow over the wing (shear) causes the fluid to progressively flow off the wing during takeoff.

3. *Deicing/Anti-Icing Fluids Handling/Performance Implications.* The type fluid used and how completely the fluid flows off the wing during takeoff determines the effects of the following handling/performance factors. The aircraft manufacturer may also provide performance information regarding the use of the different deicing/anti-icing fluids.

(aa) Increased rotation speeds/increased field length.

(bb) Increased control (elevator) pressures on takeoff.

(cc) Increased stall speeds/reduced stall margins.

(dd) Lift loss at climbout/increased pitch attitude.

(ee) Increased drag during acceleration/increased field length.

(ff) Increased drag during climb.

(gg) For Type II fluids, fluid build-up on the runway takeoff end may significantly reduce runway coefficient of friction.

c. Maintenance and Ground Personnel Training

At least the following subjects for ground personnel (for example, maintenance mechanic, ramp agent, contractors) should be discussed.

(1) *Effects of frost, ice, snow, and slush on aircraft surfaces.* This discussion is intended to provide ground personnel with an understanding of the critical effect the presence of ice and snow on flight surfaces can have, and should include, but is not limited to, the following:

(a) Loss of Lift.

(b) Increased drag/weight.

(c) Decreased control.

(d) Aircraft-specific areas.

1. Engine foreign object damage (FOD) potential.

2. Pam-air intakes.

3. Instrument pickup points.

4. Leading edge device (LED) aircraft (slots, slats and flaps) and non-LED aircraft.

(2) *Fluid characteristics and capabilities.* Deicing/anti-icing fluids with differing properties exist and may continue to be developed. To the extent that they are being utilized by an air carrier, they should be addressed in training programs:

(a) General fluid descriptions.

(b) Composition and appearance.

(c) Health precautions/environmental considerations.

(d) Differences between Type I and Type II deicing/anti-icing fluids.

(e) Purpose for each type.

(f) Capabilities.

(g) Shearing characteristics in storage and handling.

(h) Fluid application methods.

(3) *Holdover times.* A discussion of holdover times should include the following:

(a) Source of holdover time data.

(b) Precipitation category.

1. Precipitation intensity.

2. Duration of precipitation.

3. Relationship of precipitation change to holdover time.

(c) Relationship of holdover time to particular fluid concentrations for Type I and Type II fluids.

(d) Identification of when holdover time begins and ends.

(e) Communication procedures between ground personnel and flightcrew to determine the start of holdover times.

(4) *Equipment.* An understanding of the capabilities of the deicing equipment and the qualifications for operation are necessary. The equipment portion of the training program should include the following:

(a) Description of various equipment types.

(b) Operation of the equipment.

(5) *Preflight check.* (a) In the pre-departure sequence, ground deicing may be initiated at one or more of the following times:

1. On overnight aircraft, if appropriate.

2. At the gate, following checking by the cockpit crew and a request for deicing.

3. After a normal preflight by ground personnel or the flightcrew and after the crew is on board the aircraft.

(b) In each case, the preflight and the decision on whether or not to deice/anti-ice should be based on appropriate consideration of the circumstances and should include the following:

1. Weather conducive to ice formation or snow accumulation.

2. Aircraft critical areas (general and aircraft-specific).

Note: For aircraft-specific items, refer to the aircraft operating manual.

(6) *Deicing/anti-icing procedures.* Ground personnel should be knowledgeable of deicing and anti-icing application procedures:

(a) One-step deice and two-step deice/anti-ice process.

(b) Communications from the ground crew to the cockpit crew should provide the following information:

1. Fluid type.

2. Fluid/water mix ratio.

3. Start time of final deice/anti-ice application.

4. Post-application check accomplished.

(c) Safety requirements and emergency procedures.

(d) Deicing/anti-icing prior to aircrew arrival.

(e) Normal aircrew deicing procedures.

(f) Remote deicing procedures.

1. Aircraft-specific considerations.

2. Location-specific procedures.

3. Safety precautions.

(g) Post-application check. An integral part of a ground personnel training program is the check following deicing to determine that all critical surfaces have had snow, ice or frost removed.

(7) *Pretakeoff contamination check.* This check is accomplished when the holdover time has been exceeded and within 5 minutes of takeoff. Each carrier will define the content of the pretakeoff contamination check. The check could be conducted from inside the aircraft by the flightcrew or from outside the aircraft by qualified ground personnel. Training for ground personnel should include the following:

(a) When the check is required.

(b) The necessary resources, personnel, devices and standards to properly accomplish the check.

(c) Where the check will take place.

(8) *Contractor deicing.* Many certificate holders will utilize parties other than themselves to perform deicing. The second party with whom they reach an agreement to provide deicing services could be another carrier, a fixed-base operator or some other service provider at an airport. Training for deicing services from other than the carrier should include the following:

(a) An approved contract training program and application of standards that meet the carrier's own training and application criteria.

(b) Train-the-trainer program (the carrier trains the contract deicing personnel or designated trainer).

(c) Alternate airport procedures where contract service agreements are not present.

(d) Guidance that the cockpit crew will hold contractor to their own airline standards.

(9) *Ground Personnel Qualification/Quality Assurance.* Air carrier ground deicing programs must have a set standard to judge a person's qualification as a ground deicing person and a quality assurance program to

monitor and maintain a high level of competence.

(a) The program should be tailored to the individual airline with each air carrier maintaining its own quality assurance responsibility.

(b) The program should have a tracking system that ensures that all required training has been satisfactorily completed and recorded for all ground personnel in the deicing process. Also, a name list of qualified deicing personnel should be made available to all managers responsible for deicing at their location.

(c) An ongoing review plan is needed to evaluate the effectiveness of the training received by the deicing personnel, and there must be an adequate number of people trained each year to foster the success of the program. Recurrent training will be a step in that process.

11. Outside-the-Aircraft Check in Lieu of an Approved Ground Deicing/Anti-Icing Program

A certificate holder may continue to operate without an approved ground deicing/anti-icing program if it has procedures and properly trained personnel for the conduct of an outside-the-aircraft check in accordance with FAR sections 121.629(d), 121.135(b)(2), 121.415(g), 121.105, and 121.123. The authorization for the conduct of this check in lieu of an approved program will be contained in the certificate holder's operations specifications (OpSpecs). As stated in FAR 121.629(d), this check is accomplished when conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft. Under FAR 121.629(d) the check is required to be completed within 5 minutes prior to beginning takeoff and is accomplished from outside the aircraft. Certificate holders' manuals and training programs should detail procedures for the conduct of this check.

Appendix A

Note: This appendix contains holdover timetable data extracted from "SAE Aerospace Recommended Practice"; ARP 4737, "Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft"; and ISO 11076, "Aerospace—Aircraft de-icing/anti-icing methods with fluids." These excerpts are included to provide the holdover times that are acceptable for use in developing a carrier's holdover timetables. The certificate holder should consult the referenced SAE and ISO documents for complete information for development of timetables and procedures for their use.

BILLING CODE 4910-13-M

Table 1. Guideline for Holdover Times Anticipated by SAE Type II and ISO Type II Fluid Mixtures as a Function of Weather Conditions and OAT.

CAUTION! THIS TABLE IS FOR USE IN DEPARTURE PLANNING ONLY.
IT SHOULD BE USED IN CONJUNCTION WITH PRE-TAKEOFF CHECK PROCEDURES.

OAT °C	OAT °F	Type II Fluid Concentration Neat-Fluid /Water [% by Volume]	Approximate Holdover Times Anticipated Under Various Weather Conditions (hours: minutes) FROST	FREEZING FOG	SNOW	FREEZING RAIN	RAIN ON COLD SOAKED WING
0 and above	32 and above	100/0	12:00	1:15-3:00	0:25-1:00	0:08-0:20	0:24-1:00
		75/25	6:00	0:50-2:00	0:20-0:45	0:04-0:10	0:18-0:45
		50/50	4:00	0:35-1:30	0:15-0:30	0:02-0:05	0:12-0:30
below 0 to -7	below 32 to 19	100/0	8:00	0:35-1:30	0:20-0:45	0:08-0:20	CAUTION! clear ice may require touch for confirmation
		75/25	5:00	0:25-1:00	0:15-0:30	0:04-0:10	
		50/50	3:00	0:20-0:45	0:05-0:15	0:01-0:03	
below -7 to -14	below 19 to 7	100/0	8:00	0:35-1:30	0:20-0:45	List of Symbols °C = Celsius °F = Fahrenheit Vol = Volume OAT = Outside Air Temp.	
		75/25	5:00	0:25-1:00	0:15-0:30		
below -14 to -25	below 7 to -13	100/0	8:00	0:35-1:30	0:20-0:45		
below -25	below -13	100/0 if 7°C(13°F) Buffer is maintained	A buffer of at least 7°C(13°F) must be maintained for Type II used for anti-icing at OAT below -25°C(-13°F). Consider use of Type I fluids where SAE or ISO Type II cannot be used.				

THIS TABLE DOES NOT APPLY TO OTHER THAN SAE OR ISO TYPE II FPD FLUIDS.

THE RESPONSIBILITY FOR THE APPLICATION OF THESE DATA REMAINS WITH THE USER.

Table 2. Guideline for Holdover Times Anticipated by SAE Type I, and ISO Type I Fluid Mixtures as a Function of Weather Conditions and OAT.

CAUTION! THIS TABLE IS FOR USE IN DEPARTURE PLANNING ONLY. IT SHOULD BE USED IN CONJUNCTION WITH PRE-TAKEOFF CHECK PROCEDURES.

Freezing Point of Type I fluid mixture used must be at least 10°C(18°F) below OAT.

Outside Air Temperature		Approximate Holdover Times Anticipated Under Various Weather Conditions (hours:minutes)				
°C	°F	FROST	FREEZING FOG	SNOW	FREEZING RAIN	RAIN ON COLD SOAKED WING
0 & above	32 & above	0:18-0:45	0:12-0:30	0:06-0:15	0:02-0:05	0:06-0:15
below 0 to -7	below 32 to 19	0:18-0:45	0:06-0:15	0:06-0:15	0:01-0:03	CAUTION! Clear ice may require touch for confirmation
below -7	below 19	0:12-0:30	0:06-0:15	0:06-0:15		

THIS TABLE DOES NOT APPLY TO OTHER THAN SAE OR ISO TYPE I FPD FLUIDS.

THE RESPONSIBILITY FOR THE APPLICATION OF THESE DATA REMAINS WITH THE USER.

[FR Doc. 92-23656 Filed 9-25-92; 11:13 am]
BILLING CODE 4910-13-C

federal register

Tuesday
September 29, 1992

Part VII

Department of Energy

Monitored Retrievable Storage (MRS) Facility, License Application Annotated Outline; Transmittal to NRC; Notice

DEPARTMENT OF ENERGY

Transmittal of Monitored Retrievable Storage (MRS) Facility Annotated Outline for the Preparation of a License Application, Revision 1, to U.S. Nuclear Regulatory Commission (NRC)

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: The Department of Energy (DOE) transmitted the Monitored Retrievable Storage (MRS) Facility Annotated Outline for the Preparation of a License Application, Revision 1, dated August 31, 1992, to the NRC for information and guidance on September 10, 1992. The annotated outline process is the basis for developing a license application before the NRC, if any, for the MRS program. The annotated outline process is iterative, with revisions to be developed in consultation with the NRC.

FOR FURTHER INFORMATION CONTACT: For further information and to obtain a copy of the annotated outline, contact Priscilla Bunton, RW-331, Office of Civilian Radioactive Waste Management, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8365.

Issued in Washington, DC on September 21, 1992.

John W. Bartlett,

Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 92-23371 Filed 9-24-92; 8:45 am]

BILLING CODE 6450-01-M

federal register

Tuesday
September 29, 1992

Part VIII

The President

Proclamation 6478—Child Health Day, 1992

Proclamation 6479—Leif Erikson Day, 1992

Proclamation 6480—Fire Prevention Week, 1992

Proclamation 6481—White Cane Safety Day, 1992

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Presidential Documents

Title 3—

The President

Proclamation 6478 of September 26, 1992

Child Health Day, 1992

By the President of the United States of America

A Proclamation

On Child Health Day, we pause as a Nation to assess our children's state of health and to reaffirm our commitment to providing every young American with the best possible start in life, beginning with high quality prenatal care throughout pregnancy for expectant mothers and extending through each child's formative years.

When we examine history, one area of child health that has been marked by remarkable improvement is that of communicable childhood diseases. Over the years scientists and physicians have developed the means to protect children from diseases that, in the past, killed or disabled thousands of boys and girls. Through the practice of childhood immunization, the United States helped to lead the way in eliminating smallpox worldwide by 1980. Heartened by such progress, we aimed to rid the United States of another contagious and potentially devastating disease, measles, by 1990. Unfortunately, however, we remain short of that goal.

Despite the existence of effective childhood vaccines for measles and eight other contagious diseases, more than 50,000 cases of measles were reported in the United States from 1989 to 1991. Out of these cases, 160 persons died.

Such a tragic toll is all the more intolerable because it is preventable. Through a series of vaccinations beginning as early as birth, children can be protected against not only measles but also mumps, rubella, polio, diphtheria, pertussis (whooping cough), tetanus, hepatitis B, and *Haemophilus influenzae* Type B. While as many as 5 in 10 infants and toddlers are receiving all of their recommended childhood immunizations on time, thousands of other children remain at risk of contracting life-threatening or disabling illnesses.

To encourage parents to fulfill their responsibility to have their children immunized and to expand access to vaccinations, the Department of Health and Human Services is moving forward with a concerted immunization initiative. Building on several local pilot programs that were developed in 1991, this initiative will increase the number of vaccinated preschoolers through education programs aimed at parents, through the integration of services, and through the enlistment of teachers, local health clinics, and other concerned individuals and organizations.

All of us who care about children—especially parents and grandparents but also educators, public officials, and health care providers—must renew our commitment to ensuring that every American preschooler is protected through age-appropriate immunizations. Doing so is vital to the well-being of our children and to the future of our Nation.

The Congress, by joint resolution approved May 18, 1928, as amended (36 U.S.C. 143), has called for the designation of the first Monday in October as "Child Health Day" and has requested the President to issue a proclamation in observance of this day.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim Monday, October 5, 1992, as Child Health Day. I urge all Americans to join me in renewing our commitment to protecting the lives of this Nation's youngest citizens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of September, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.

George Bush

[FR Doc. 92-23839
Filed 9-28-92; 11:38 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 6479 of September 26, 1992

Leif Erikson Day, 1992

By the President of the United States of America

A Proclamation

When we Americans commemorate the voyages of Leif Erikson, the daring Norse navigator who explored the North American coast some 1,000 years ago, we celebrate the enduring spirit of discovery—a spirit that is leading us to ever new frontiers in learning and commerce. As we remember "Leif the Lucky," the brave son of Iceland and grandson of Norway, we also celebrate the close, cordial ties that exist between the United States and the Nordic countries. Those ties have been strengthened and enriched over the years by the outstanding contributions of Nordic-Americans, who take special interest in this annual observance of Leif Erikson Day.

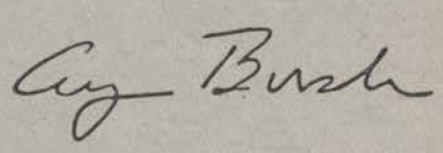
Last year descendants of early Norse explorers reenacted the voyages of Leif Erikson by sailing replicas of Viking ships from Norway to Iceland, Greenland, and North America. The success of this tribute to "1,000 Years of Discovery" rekindled feelings of friendship on both sides of the Atlantic and reaffirmed our admiration for all those who continue to chart new realms of knowledge and human endeavor—from pioneers in science and technology to the courageous peoples who, for the first time in decades or perhaps for the first time ever, are beginning to reap the rewards of democracy and free enterprise.

At a time when relations between Europe and America are being renewed and strengthened in light of the new, post-Cold War era, the Nordic countries have an important role to play in fostering continued transatlantic cooperation, including an open trading system and mutual support of democratic reform. Likewise, Americans who trace their roots to the Nordic countries—Denmark, Finland, Iceland, Norway, and Sweden—provide a living link between continents, much as their ancestors did nearly a millennium ago.

In recognition of the legendary achievements of Leif Erikson and in honor of our Nordic-American heritage, the Congress, by joint resolution approved on September 2, 1964 (78 Stat. 849, 36 U.S.C. 169c), designated October 9 of each year as "Leif Erikson Day" and requested the President to issue a proclamation in observance of this day.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim October 9, 1992, as Leif Erikson Day. I invite all Americans to observe this day with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of September, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.



[FR Doc. 92-23840
Filed 9-28-92; 11:39 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 6480 of September 26, 1992

Fire Prevention Week, 1992

By the President of the United States of America

A Proclamation

Despite all that we have learned about fire prevention and safety, residential fires remain our Nation's number one fire problem. Fires in the home account for four out of every five fire-related deaths, three out of every four fire-related injuries, and almost half of all fire-related property losses.

The vast majority of fire-related deaths occur in homes that do not have a working smoke detector. Because the early warning provided by such a device can dramatically increase one's chances of surviving a fire, it is imperative that homeowners not only install but also maintain smoke detectors in recommended areas of the home. During the past quarter-century, home fire protection has improved dramatically with the installation of at least one smoke detector in most homes. Yet, more Americans must avail themselves of this lifesaving technology, and those in homes with smoke detectors must be sure to test and service them regularly.

To convey that message nationwide, the United States Fire Administration and the National Fire Protection Association have dedicated this year's Fire Prevention Week activities to the theme, "Test Your Detector—It's Sound Advice!" I urge Americans to pay heed to fire safety throughout the year and especially during this first week of October. Homeowners should walk through their homes and be certain that there are enough smoke detectors—one on each level, including the basement, and one outside each sleeping area. Smoke detectors should be tested often to ensure that they are working properly, and batteries should be replaced at least once a year.

As we observe Fire Prevention Week, let us also recognize the members of the public and private organizations that are working toward our shared goal of fire safety, including the American Burn Association, the Congressional Fire Services Institute, the Fire Marshals Association of North America, the International Association of Arson Investigators, the International Association of Black Professional Fire Fighters, the International Association of Fire Chiefs, the International Association of Fire Fighters, the International Association of Fire Service Instructors, the National Association of State Fire Marshals, and the National Volunteer Fire Council.

Most important, let us offer special thanks to our Nation's volunteer and career fire fighters. These brave men and women put their lives on the line every day in order to protect the lives and property of their fellow citizens. Last year alone, 105 fire fighters made the ultimate sacrifice in the line of duty. Our Nation will honor them on Sunday, October 11, 1992, during the National Fallen Fire Fighters Memorial Service at the National Fire Academy in Emmitsburg, Maryland. All Americans are invited to join in praying for these heroic individuals and their bereaved families and friends.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week of October 4 through October 10, 1992, as Fire Prevention Week. I urge all Americans to participate in fire prevention activities in their homes, schools, and places of work—this week and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of September, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.

George Bush

[FR Doc. 92-23842
Filed 9-28-92; 11:53 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 6481 of September 27, 1992

White Cane Safety Day, 1992

By the President of the United States of America

A Proclamation

The white cane is a simple yet very useful device that enables persons with visual impairments to enjoy greater mobility and independence in their daily lives. This tool also has great symbolic value, for it is a tangible reminder of the courage, determination, and achievements of persons with disabilities.

As we recognize the accomplishments of Americans who use the white cane, it is fitting that we also recognize the importance of promoting their safety. For Americans who are not blind or visually impaired, this means taking responsibility as careful, courteous drivers and pedestrians.

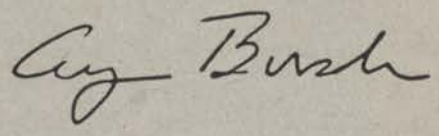
Americans who use the white cane deserve not only the respect and courtesy of others but also the right to equal opportunity. The Americans with Disabilities Act (ADA) that I signed 2 years ago affirmed the rights of persons with disabilities and strengthened our Nation's commitment to eliminating the physical and attitudinal barriers that, in the past, prevented these individuals from participating fully in the mainstream of American life. Today the United States is providing a model for the world as we work toward full and harmonious implementation of the ADA.

In order to ensure that every American is prepared for the opportunities that life offers, we are also working through the AMERICA 2000 program to promote lifelong learning and achievement. The many Americans who have obtained training in use of the white cane have demonstrated their appreciation of the value of learning far beyond the traditional classroom, and their efforts should challenge and inspire others.

Recognizing the importance of the white cane to Americans with visual impairments, the Congress, in 1964, by Public Law 88–628, designated October 15 of each year as "White Cane Safety Day" and requested the President to issue annually a proclamation in observance of this day.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim October 15, 1992, as White Cane Safety Day. I encourage all Americans to observe this day with appropriate programs and activities in recognition of the interests and achievements of persons who use the white cane.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of September, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.



[FR Doc. 92–23843
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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202-523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470).

H.R. 5620/P.L. 102-368

Dire Emergency Supplemental Appropriations Act, 1992, Including Disaster Assistance To Meet the Present Emergencies Arising From the Consequences of Hurricane Andrew, Typhoon Omar, Hurricane Iniki, and Other Natural Disasters, and Additional Assistance to Distressed Communities. (Sept. 23, 1992; 106 Stat. 1117; 46 pages) Price: $1.50

H.J. Res. 413/P.L. 102-369

To designate September 13, 1992, as "Commodore John Barry Day". (Sept. 24, 1992; 106 Stat. 1163; 2 pages) Price: $1.00

S.J. Res. 303/P.L. 102-370

To designate October 1992 as "National Breast Cancer Awareness Month". (Sept. 24, 1992; 106 Stat. 1165; 2 pages) Price: $1.00

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