AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

3–17–94
Vol. 59 No. 52

# federal register

Thursday
March 17, 1994

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

OFFICIAL BUSINESS
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SECOND CLASS NEWSPAPER

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

3–17–94
Vol. 59 No. 52
Pages 12523–12794

# federal register

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March 17, 1994

**Briefing on How To Use the Federal Register**
For information on briefing in Oakland, CA see announcement on the inside cover of this issue.

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

**WHAT:** Free public briefings (approximately 3 hours) to present:
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3. The important elements of typical Federal Register documents.
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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.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Parts 905 and 944

[Docket Nos. FV93-905-3-FIR and FV93-944-2-FIR]

### Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida and Imported Grapefruit; Relaxation of the Minimum Size Requirement for Red Seedless Grapefruit

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of two interim final rules that relaxed the minimum size requirement to 3 5/16 inches in diameter (size 56) for domestic shipments of Florida red seedless grapefruit and for red seedless grapefruit imported into the United States. This rule enables handlers in Florida and importers to continue to ship size 56 red seedless grapefruit for the entire 1993–94 season.

**EFFECTIVE DATE:** April 18, 1994.

**FOR FURTHER INFORMATION CONTACT:** Gary D. Rasmussen, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456; telephone: 202-720-5331; or William G. Pimental, Southeast Marketing Field Office, USDA/AMS, P.O. Box 2276, Winter Haven, Florida 33883; telephone: 813-299-4770.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement and Marketing Order No. 905 [7 CFR part 905] regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the order. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C 601-674], hereinafter referred to as the Act.

This rule is also issued under section 8e of the Act which provides that whenever specified commodities, including grapefruit, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities. Section 8e also provides that whenever two or more marketing orders regulate the same commodity produced in different areas of the United States, the Secretary shall determine which area the imported commodity is in most direct competition with and apply regulations based on that area to the imported commodity. The Secretary has determined that grapefruit imported into the United States are in most direct competition with grapefruit grown in Florida regulated under Marketing Order No. 905, and has found that the minimum grade and size requirements for imported grapefruit should be the same as those established for grapefruit under Marketing Order No. 905.

The Department is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

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

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

There are about 100 Florida citrus handlers subject to regulation under the marketing order covering oranges, grapefruit, tangerines, and tangelos grown in Florida, and about 11,000 producers of these citrus fruits in Florida. There are approximately 25 importers of grapefruit subject to the grapefruit import regulation. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. A minority of these handlers and a majority of the producers and importers may be classified as small entities.

This rule finalizes an interim final rule that relaxed the minimum size requirement for domestic shipments of Florida red seedless grapefruit to 3 5/16 inches in diameter (size 56) through November 6, 1994. This rule will enable handlers to continue to ship size 56 red seedless grapefruit for the entire 1993–94 season. The interim final rule was published in the November 12, 1993, **Federal Register** [58 FR 59931], and provided 30 days for interested persons to file comments. No comments were received.

Section 905.306 [7 CFR 905.306] specifies minimum grade and size requirements for different varieties of

fresh Florida grapefruit. Such requirements for domestic shipments are specified in § 905.306 in Table I of paragraph (a), and for export shipments in Table II of paragraph (b). Export requirements were not changed by the interim final rule for Florida grapefruit.

The Citrus Administrative Committee (committee) met September 28, 1993, and unanimously recommended that the minimum size requirement for domestic shipments of fresh red seedless grapefruit be relaxed. The committee meets prior to and during each season to review the handling regulations effective on a continuous basis for each citrus fruit regulated under the order. Committee meetings are open to the public, and interested persons may express their views at these meetings. The Department reviews committee recommendations and information, as well as information from other sources, and determines whether modification, suspension, or termination of the handling regulations would tend to effectuate the declared policy of the Act.

The committee reports that it expects that the fresh market demand will be sufficient to permit the shipment of size 56 red seedless grapefruit grown in Florida during the entire 1993–94 season. The committee also expects that the overall external quality of the fruit will be good. The committee also expects that more Florida red seedless grapefruit will be shipped fresh this season than last season.

This rule is designed to enable Florida grapefruit shippers to continue shipping size 56 red seedless grapefruit to the domestic market consistent with current and anticipated strong demand in those markets during the entire 1993–94 season, and to maximize shipments to fresh market channels. This rule is based on the committee's assessment of the maturity, flavor level, and size composition of this season's Florida red seedless grapefruit crop. The Florida seedless grapefruit shipping season normally begins in September and continues until the following July.

Minimum size requirements are designed to provide fresh markets with fruit of acceptable size and maturity, thereby maintaining consumer confidence in fresh Florida grapefruit. This helps create buyer confidence and contributes to stable marketing conditions. This is in the interest of producers, packers, and consumers, and is expected to increase returns to Florida grapefruit growers.

Under the order for Florida citrus, handlers may ship up to 15 standard packed cartons (12 bushels) of fruit per day, and gift packages which are individually addressed and not for resale, under exemption provisions. Fruit shipped for animal feed is also exempt under specific conditions. In addition, fruit shipped to commercial processors for conversion into canned or frozen products or into a beverage base are not subject to the handling requirements.

This rule also finalizes an interim final rule that relaxed the minimum size requirement for imported shipments of red seedless grapefruit. The interim final rule was published in the November 12, 1993, **Federal Register** [58 FR 59933], and provided 30 days for interested persons to file comments. No comments were received.

Section 8(e) of the Act requires that whenever grade, size, quality, or maturity requirements are in effect for grapefruit under a domestic marketing order, imported grapefruit must meet the same or comparable requirements. The interim final rule for Florida grapefruit relaxed the minimum size requirements for Florida red seedless grapefruit. Therefore a corresponding change was needed in the grapefruit import regulation.

Minimum grade and size requirements for grapefruit imported into the United States are currently in effect under § 944.106 [7 CFR 944.106], as reinstated on July 26, 1993 [58 FR 39428, July 23, 1993]. The interim final rule for imported grapefruit relaxed the minimum size requirements for imported red seedless grapefruit to 3 5/16 inches in diameter (size 56) for the period November 8, 1993, through November 6, 1994.

In accordance with section 8e of the Act, the USTR has concurred with the issuance of this final rule as it pertains to imported grapefruit.

This rule reflects the committee's and the Department's appraisal of the need to relax the minimum size requirement for red seedless grapefruit, as specified. The Department's view is that this rule will have a beneficial impact on producers, handlers, and importers since it will permit Florida grapefruit handlers to continue to make available those sizes of fruit needed to meet consumer needs consistent with this season's crop and market conditions.

Based on the above, the Administrator of the AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, the information and recommendations submitted by the committee, and other information, it is found that the finalization set forth below will tend to effectuate the declared policy of the Act.

**List of Subjects**

*7 CFR Part 905*

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

*7 CFR Part 944*

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth in the preamble, 7 CFR parts 905 and 944 are amended as follows:

1. The authority citation for 7 CFR part 905 and 944 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

## PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

2. Accordingly, the interim final rule amending the provisions of § 905.306, which was published in the November 12, 1993, **Federal Register** [58 FR 59931], is adopted as a final rule without change.

## PART 944—FRUITS; IMPORT REGULATIONS

3. Accordingly, the interim final rule amending the provisions of § 944.106, which was published in the November 12, 1993, **Federal Register** [58 FR 59933], is adopted as a final rule without change.

Dated: March 11, 1994.

**Robert C. Keeney,**

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6149 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–02–P

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## 7 CFR Part 927

**[Docket No. FV93–927–1FR; Amendment 1]**

## Increase in Expenses; Winter Pears Grown in Oregon, Washington, and California

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

**ACTION:** Final rule; amendment.

**SUMMARY:** This document amends a final rule to authorize an increase in expenses for the Winter Pear Control Committee (Committee) under Marketing Order No. 927 for the 1993–94 fiscal year. This final rule amendment will enable the Committee to incur increased expenses that are reasonable and necessary to administer the program. Funds to administer the program are derived from assessments on handlers.

**EFFECTIVE DATE:** July 1, 1993, through June 30, 1994.

**FOR FURTHER INFORMATION CONTACT:** Britthany Beadle, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, D.C. 20090–6456, telephone: (202) 720–5127; or Teresa L. Hutchinson, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1220 SW. Third Avenue, room 369, Portland, Oregon 97204, telephone: (503) 326–2724.

**SUPPLEMENTARY INFORMATION:** This final rule amendment is issued under Marketing Agreement and Order No. 927 (7 CFR part 927) regulating the handling of winter pears grown in Oregon and Washington. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The Department is issuing this rule in conformance with Executive Order 12866.

This final rule amendment has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, winter pears grown in Oregon, Washington, and California are subject to assessments. It is intended that the assessment rates specified herein will be applicable to all assessable pears handled during the 1993–94 fiscal year, which began July 1, 1993, through June 30, 1994. This final rule amendment will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

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

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

There are approximately 90 handlers of winter pears regulated under the marketing order each season and approximately 1,850 winter pear producers in Oregon, Washington, and California. Small agricultural producers have been defined by the Small Business Administration [13 CFR § 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of these handlers and producers may be classified as small entities.

The Oregon, Washington, and California winter pear marketing order, administered by the Department, requires that the assessment rates for a particular fiscal year apply to all assessable winter pears handled from the beginning of such year. Annual budgets of expenses are prepared by the Committee, the agency responsible for local administration of this marketing order, and submitted to the Department for approval. The members of the Committee are handlers and producers of Oregon, Washington, and California winter pears. They are familiar with the Committee's needs and with the costs for goods, services, and personnel in their local area, and are thus in a position to formulate appropriate budgets. The Committee's budget is formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rates recommended by the Committee are derived by dividing the anticipated expenses by expected shipments of pears. Because these rates are applied to actual shipments, they must be established at rates which will provide sufficient income to pay the Committee's expected expenses.

The Winter Pear Control Committee met on June 4, and June 24, 1993, and unanimously recommended total expenses of $6,933,615 for the 1993–94 fiscal year. In comparison, the 1992–93 fiscal year expense amount was $6,716,983, which is $216,632 less than the recommended amount for this fiscal year.

The Committee also unanimously recommended an assessment rate of $0.45 per standard box, or equivalent and a supplemental assessment rate of $0.04 per standard box, or equivalent for Anjou variety pears. In comparison, the 1992–93 pear assessment rate was $0.43 per standard box, or equivalent and $0.09 for the supplemental assessment rate on Anjou variety pears. This represents a $0.02 increase and $0.05 decrease, respectively, in the assessment rates recommended for this fiscal year because the current rates should generate sufficient income to cover the increased expenses.

Major expense categories for the 1993–94 fiscal year include $4,937,803 for advertising, $566,433 for contingency, $422,826 for Ethoxyquin data research, and $174,775 for salaries and benefits. Comparable 1992–93 budgeted expenses are $4,562,500, $490,578, $855,000, and $160,905, respectively.

The Committee's approved 1993–94 fiscal year expenses and assessment rates were adopted in a final rule and published in the **Federal Register** (58 FR 54926, October 25, 1993).

On December 1, 1993, the Committee conducted a mail ballot and on a vote of 13 in favor and 1 opposed, recommended to increase expenses to $7,931,925. This is a $998,310 increase in expenses from the previously approved 1993–94 budget. No changes in the approved assessment rates were recommended because the current rates should generate sufficient income to cover the increased expenses.

The increase is deemed necessary by the Committee because the crop estimate, which is now approximated at 15,250,000 standard boxes of winter pears was underestimated by nearly 2 million boxes. Due to the larger crop, additional funding in major categories is needed. This includes a total of $639,322 for contingency, $5,718,750 for paid advertising, $305,000 for winter pear improvement, $305,000 for SOPP, and $484,000 for Ethoxyquin data research which represent increases of $72,889, $780,947, $41,650; $41,650, and $61,174 respectively, from the previously approved budget.

This action will not impose additional costs on handlers because the previously established assessment rates are not being changed. Further, the increased expenses should benefit the industry by assisting in marketing a record-large crop. Therefore, the Administrator of the AMS has

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

After consideration of all relevant matter presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that this rule as hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is found that the specified expenses for the marketing order covered in this final rule amendment are reasonable and likely to be incurred and that such expenses and the specified assessment rates to cover such expenses will tend to effectuate the declared policy of the Act.

It is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice or to engage in further public procedure prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to conduct a more aggressive advertising and promotional program to market the largest crop in the industry's history; (2) the marketing season is well underway and further delays in authorizing this increase in expenditures would reduce the program's effectiveness; (3) handlers are aware of this action and need no additional time to comply because the assessment rates are not being changed; (4) no comments were received during the rulemaking proceeding to establish the assessment rates for the current fiscal year which remain unchanged by this action; and (5) no useful purpose would be served by delaying this action.

**List of Subjects in 7 CFR Part 927**

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 927 is amended as follows:

## PART 927—WINTER PEARS GROWN IN OREGON, WASHINGTON, AND CALIFORNIA

1. The authority citation for 7 CFR part 927 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 927.233 is revised to read as follows:

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

**§ 927.233 Expenses and assessment rates.**

Expenses of $7,931,925 by the Winter Pear Control Committee are authorized and an assessment of $0.45 per standard box, or equivalent, on assessable winter pears and a supplemental assessment of $0.04 per standard box, or equivalent, on assessable Anjou variety pears are established for the fiscal year ending June 30, 1994. Unexpended funds may be carried over as a reserve.

Dated: March 11, 1994.

**Robert C. Keeney,**

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6146 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–02–P

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**7 CFR Part 932**

**[Docket No. FV93–932–4 IFR]**

## Olives Grown in California; Expenses and Assessment Rate for 1994 Fiscal Year

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule authorizes expenditures and establishes an assessment rate for the California Olive Committee (Committee) under M.O. No. 932 for the 1994 fiscal year. Authorization of this budget enables the Committee to incur expenses that are reasonable and necessary to administer this program. Funds to administer this program are derived from assessments on handlers.

**DATES:** Effective beginning January 1, 1994, through December 31, 1994. Comments received by April 18, 1994 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this interim final rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456; Fax # (202) 720–5698. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Britthany Beadle, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone: (202) 720–5127; or Terry Vawter, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102 B, Fresno, California 93721, telephone: (209) 487–5901.

**SUPPLEMENTARY INFORMATION:** This interim final rule is issued under Marketing Agreement and Order No. 932 [7 CFR part 932], as amended, regulating the handling of olives grown in California. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, olives grown in California are subject to assessments. It is intended that the assessment rate specified herein will be applicable to all assessable olives handled during the 1994 fiscal year, beginning January 1, 1994, through December 31, 1994. This interim final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the

Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 5 handlers of olives regulated under the marketing order each season and approximately 1,350 olive producers in California. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. None of the handlers may be classified as small entities. The majority of the producers may be classified as small entities.

The marketing order, administered by the Department, requires that the assessment rate for a particular fiscal year apply to all assessable olives handled from the beginning of such year. Annual budgets of expenses are prepared by the Committee, the agency responsible for local administration of this marketing order, and submitted to the Department for approval. The members of the Committee are handlers and producers of California olives. They are familiar with the Committee's needs and with the costs for goods, services, and personnel in their local area, and are thus in a position to formulate appropriate budgets. The Committee's budget is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

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

The California Olive Committee met on December 14, 1993, and unanimously recommended a total expense amount of $3,748,290, for its 1994 budget. This is $928,530 more in expenses than the previous year. The increase is primarily due to additional funding for market development.

The Committee also unanimously recommended an assessment rate of $27.21 per ton for the 1994 fiscal year, which is $1.46 more in the assessment rate from the 1993 fiscal year. The assessment rate, when applied to anticipated shipments of 101,000 tons, would yield $2,748,210 in assessment income. This, along with approximately $1,000,000 from the Committee's authorized reserves will be adequate to cover estimated expenses.

Major expense categories for the 1994 fiscal year include $1,150,000 for the market expansion program, $990,860 for consumer affairs, and $173,730 for salaries. Funds in the reserve at the end of the fiscal year, estimated at $300,000 will be within the maximum permitted by the order of one fiscal year's expenses.

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

After consideration of all relevant matter presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that this rule as hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the fiscal year for the Committee began January 1, 1994, and the marketing order requires that the rate of assessment for the fiscal year apply to all assessable olives handled during the fiscal year;

(3) handlers are aware of this action which was recommended by the Committee at a public meeting; and (4) this interim final rule provides a 30-day comment period, and all comments timely received will be considered prior to finalization of this action.

**List of Subjects in 7 CFR Part 932**

Marketing agreements, Olives, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 932 is amended as follows:

## PART 932—OLIVES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 932 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

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

2. A new § 932.227 is added to read as follows:

**§ 932.227 Expenses and assessment rate.**

Expenses of $3,748,290 by the California Olive Committee are authorized and an assessment rate of $27.21 per ton of assessable olives is established for the fiscal year ending December 31, 1994. Unexpended funds may be carried over as a reserve.

Dated: March 11, 1994.

**Martha B. Ransom,**

*Acting Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6151 Filed 03–16–94; 8:45 am]

BILLING CODE 3410–02–P

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## 7 CFR Part 955

**[Docket No. FV94–955–1FR]**

## Vidalia Onions Grown in Georgia; Increased Expenses

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

**ACTION:** Final rule; amendment.

**SUMMARY:** This final rule increases the level of authorized expenses under Marketing Order No. 955 for the 1993–94 fiscal period. Authorization of these increased expenses is needed to cover marketing expenditures in excess of those authorized in the Vidalia Onion Committee's (Committee) 1993–94 budget.

**EFFECTIVE DATE:** September 16, 1993, through September 15, 1994.

**FOR FURTHER INFORMATION CONTACT:** Martha Sue Clark, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone 202–720–9918, or William G. Pimental, Southeast Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, P.O. Box 2276, Winter Haven, FL 33883–2276, telephone 813–299–4770.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 955 (7 CFR part 955), regulating the handling of Vidalia onions grown in Georgia. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The Department is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12788, Civil Justice Reform. This rule increases the level of authorized expenditures for the 1993–94 fiscal period which began September 16, 1993, and ends September 15, 1994. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

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

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

There are approximately 250 producers of Georgia Vidalia onions under this marketing order, and approximately 145 handlers. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of Vidalia onion producers and handlers may be classified as small entities.

The budget of increased expenses for the 1993–94 fiscal period was prepared by the Vidalia Onion Committee, the agency responsible for local administration of the marketing order, and submitted to the Department for approval. The members of the Committee are producers and handlers of Vidalia onions. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The Committee met July 22, 1993, and unanimously recommended a 1993–94 budget of $262,950, which included $82,500 for marketing. An interim final rule implementing that recommendation was published in the **Federal Register** on September 7, 1993 (58 FR 47023) and finalized on December 6, 1993 (58 FR 64103).

The Committee subsequently met on February 17, 1994, and unanimously recommended an increase of $18,000 in its 1993–94 budget for the construction and purchase of a new trade show booth. The trade show booth is expected to cost $27,000 and will be used in conjunction with the Committee's Vidalia onion promotional efforts. The Committee recommended that $9,000 of current budget money be used and that the remaining $18,000 be taken from the authorized reserve, increasing marketing expenses from $82,500 to $100,500, and increasing the total budget from $262,950 to $280,950. The reserve, which currently totals $187,766, is within the maximum permitted by the order of three fiscal periods' expenses. There are adequate funds to cover this new expenditure, so no increase in the assessment rate was recommended.

Since no increase in the assessment rate is being recommended, no additional costs will be imposed on handlers. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice or to engage in further public procedure prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The fiscal period began on September 16, 1993, and the Committee needs to have approval to pay its expenses which are incurred on a continuous basis; (2) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting; and (3) no increase in the assessment rate is being recommended so no additional funds will need to be collected from handlers.

**List of Subjects in 7 CFR Part 955**

Marketing agreements, Onions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 955 is amended as follows:

## PART 955—VIDALIA ONIONS GROWN IN GEORGIA

1. The authority citation for 7 CFR part 955 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

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

**§ 955.20 [Amended]**

2. Section 955.206 is amended by revising "$262,950" to read "$280,950".

Dated: March 11, 1994.

**Robert C. Keeney,**

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6152 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–02–P

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## 7 CFR Part 989

**[FV94–989–1IFR]**

## Raisins Produced From Grapes Grown in California; Final Free and Reserve Percentages for the 1993–94 Crop Year for Natural (Sun-Dried) Seedless Raisins

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule invites comments on the establishment of final free and reserve percentages for 1993 crop Natural (sun-dried) Seedless raisins. The percentages are 74 percent free and 26 percent reserve. These percentages are intended to stabilize supplies and prices and to help counter the destabilizing effects of the burdensome oversupply situation facing

the raisin industry. This rule was unanimously recommended by the Raisin Administrative Committee (Committee), the body which locally administers the marketing order.

**DATES:** This interim final rule becomes effective March 17, 1994, and applies to all Natural (sun-dried) Seedless raisins acquired from the beginning of the 1993–94 crop year. Comments which are received by April 18, 1994 will be considered prior to any finalization of this interim final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this action. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2525–S, P.O. Box 96456, Washington, DC 20090–6456, or faxed to (202) 720–5698. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Richard Van Diest, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone: (209) 487–5901 or Richard Lower, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2020.

**SUPPLEMENTARY INFORMATION:** This interim final rule is issued under marketing agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, final free and reserve percentages may be established for raisins acquired by handlers during the crop year. This rule establishes final free and reserve percentages for Natural (sun-dried) Seedless raisins for the 1993–94 crop year, beginning August 1, 1993, through July 31, 1994. This interim final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his/her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

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

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

There are approximately 25 handlers of California raisins who are subject to regulation under the raisin marketing order, and approximately 5,000 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. A majority of producers and a minority of handlers of California raisins may be classified as small entities.

The order prescribes procedures for computing trade demands and preliminary and final percentages that establish the amount of raisins that can be marketed throughout the season. The regulations apply to all handlers of California raisins. Raisins in the free percentage category may be shipped immediately to any market, while reserve raisins must be held by handlers in a reserve pool for the account of the Committee, which is responsible for local administration of the order. Under the order, reserve raisins may be: Sold at a later date by the Committee to handlers for free use; used in diversion programs; exported to authorized countries; carried over as a hedge against a short crop the following year; or disposed of in other outlets noncompetitive with those for free tonnage raisins.

While this rule may restrict the amount of Natural (sun-dried) Seedless raisins that enter domestic markets, final free and reserve percentages are intended to lessen the impact of the oversupply situation facing the industry and promote stronger marketing conditions, thus stabilizing prices and supplies and improving grower returns. In addition to the quantity of raisins released under the preliminary percentages and the final percentages, the order specifies methods to make available additional raisins to handlers by requiring sales of reserve pool raisins for use as free tonnage raisins under "10 plus 10" offers, and authorizing sales of reserve raisins under certain conditions.

The Department's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" specifies that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal is met by the establishment of a final percentage which releases 100 percent of the computed trade demand and the additional release of reserve raisins to handlers under "10 plus 10" offers. The "10 plus 10" offers are two simultaneous offers of reserve pool raisins which are made available to handlers each season. For each such offer, a quantity of raisins equal to 10 percent of the prior year's shipments is made available for free use.

Pursuant to § 989.54(a) of the order, the Committee which is responsible for local administration of the order, met on August 16, 1993, to review shipment and inventory data, and other matters relating to the supplies of raisins of all varietal types. The Committee computed a trade demand for each varietal type for which a free tonnage percentage might be recommended. The trade demand is 90 percent of the prior year's shipments of free tonnage and reserve tonnage raisins sold for free use for each varietal type into all market outlets, adjusted by subtracting the carryin of each varietal type on August 1 of the current crop year and by adding to the trade demand the desirable carryout for each varietal type at the end of that crop year. As specified in § 989.154, the desirable

carryout for each varietal type shall be equal to the shipments of free tonnage raisins of the prior crop year during the months of August, September, and one half of October. If the prior year's shipments are limited because of crop conditions, the total shipments during that period of time during one of the three years preceding the prior crop year may be used. In accordance with these provisions, the Committee computed and announced a 1993–94 trade demand of 282,909 tons for Natural (sun-dried) Seedless raisins.

As required under § 989.54(b) of the order, the Committee met on October 5, 1993, and computed and announced a preliminary crop estimate and preliminary free and reserve percentages for Natural (sun-dried) Seedless raisins which released 85 percent of the trade demand since field prices had been established. The preliminary crop estimate and preliminary free and reserve percentages were as follows: 387,947 tons, and 62 percent free and 38 percent reserve. Also at that meeting, the Committee computed and announced preliminary crop estimates and preliminary free and reserve percentages for Dipped Seedless, Oleate and Related Seedless, Golden Seedless, Zante Currant, Sultana, Muscat, Monukka, and Other Seedless raisins. On November 15, 1993, the Committee decided that volume control percentages only were warranted for Natural (sun-dried) Seedless raisins, which would remain at 62 percent free and 38 percent reserve. It determined that the supplies of the other varietal types would be less than or close enough to the computed trade demands for each of these varietals or could be substituted to relieve anticipated shortages in some size ranges of Natural (sun-dried) Seedless raisins used for baking. In view of these factors, volume control percentages would not be necessary to maintain market stability.

Pursuant to § 989.54(c), the Committee may adopt interim free and reserve percentages. Interim percentages may release less than the computed trade demand for each varietal type. Interim percentages for Natural (sun-dried) Seedless raisins of 73.75 percent free and 26.25 percent reserve were computed and announced on January 13, 1994. That action released most, but not all the computed trade demand for Natural (sun-dried) Seedless raisins.

Under § 989.54(d) of the order, the Committee is required to recommend to the Secretary, no later than February 15 of each crop year, final free and reserve percentages which, when applied to the final production estimate of a varietal type, will tend to release the full trade demand for any varietal type.

The Committee's final estimate of 1993–94 production of Natural (sun-dried) Seedless raisins is 384,501 tons. Dividing the computed trade demand of 282,909 tons by the final estimate of production results in a final free percentage of 74 percent and a final reserve percentage of 26 percent.

Based on available information, the Administrator of the AMS has determined that the issuance of this interim final rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant information presented, including the Committee's recommendations and other information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that upon good cause it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The relevant provisions of this part require that the percentages designated herein for the 1993–94 crop year apply to all Natural (sun-dried) Seedless raisins acquired from the beginning of that crop year; (2) handlers are currently marketing 1993–94 crop raisins of the Natural (sun-dried) Seedless varietal type and this action should be taken promptly to achieve the intended purpose of making the full trade demand quantity computed by the Committee available to handlers; (3) handlers are aware of this action, which was recommended by the Committee at an open meeting, and need no additional time to comply with these percentages; and (4) this interim final rule provides a 30-day period for written comments and all comments received will be considered prior to finalization of this interim final rule.

**List of Subjects in 7 CFR Part 989**

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 989 is amended as follows:

## PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 989 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 989.246 is added to Subpart-Supplementary Regulations to read as follows:

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

**§ 989.246 Final free and reserve percentages for the 1993–94 crop year.**

The final percentages for standard Natural (sun-dried) Seedless raisins acquired by handlers during the crop year beginning on August 1, 1993, which shall be free tonnage and reserve tonnage, respectively, are designated as follows:

| | Free percentage | Reserve percentage |
|---|---|---|
| Natural (sun-dried) Seedless | 74 | 26 |

Dated: March 11, 1994.

**Martha B. Ransom,**

*Acting Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6147 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–02–P

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## Animal and Plant Health Inspection Service

## 9 CFR Parts 51 and 78

**[Docket No. 94–007–1]**

## Swine Brucellosis

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

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the brucellosis indemnity regulations to provide for payment at fair market value for whole herds of swine depopulated because of brucellosis. This action is necessary to eliminate in an expeditious manner all swine herds known to be affected with brucellosis. This action will also help ensure that swine brucellosis is eradicated in the United States within the next 5 years, thus saving the Federal government millions of dollars in program costs. This action will also help eliminate the human health risk associated with swine brucellosis. We are also amending the regulations concerning interstate movement of swine to require that all brucellosis-exposed swine from herds known to be affected with the disease be identified with an eartag before being moved interstate from the herd. This action will allow all handlers of swine to take precautions in handling swine potentially infected with brucellosis.

**DATES:** Interim rule effective March 17, 1994. Consideration will be given only to comments received on or before May 16, 1994.

**ADDRESSES:** Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 94–007–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Dr. Joseph F. Annelli, National Swine Epidemiologist, Swine Health Staff, Veterinary Services, APHIS, USDA, suite 204, Presidential Building, 6565 Belcrest Road, Hyattsville, MD 20782, (301) 436–7767.

**SUPPLEMENTARY INFORMATION:**

## Background

Brucellosis is a serious infectious disease of swine, cattle, bison, and other species, including humans, caused by bacteria of the genus *Brucella*. Brucellosis in swine is characterized by abortion, infertility, orchitis, posterior paralysis, and lameness. To help prevent the spread of the disease, and to further its eradication, the regulations in 9 CFR part 51 provide for payment of Federal indemnity to owners of certain animals destroyed because of brucellosis. The payment of indemnity is intended to provide owners with a financial incentive for promptly destroying animals infected with or exposed to brucellosis. Because the continued presence of brucellosis in a herd seriously threatens the health of animals in that herd and possibly other herds, the prompt destruction of brucellosis-affected swine is critical if brucellosis eradication efforts in the United States are to succeed.

Under the regulations in § 51.3(b)(2) prior to the effective date of this interim rule, indemnity payments for herd depopulation were made only for breeding swine destroyed because of brucellosis, and were based on a maximum "per head" rate of $150 per head for registered, inbred, or hybrid swine, and $65 per head for all other breeding swine. In this interim rule, we are amending the regulations to provide that in the case of whole herd depopulation of swine, indemnity payments shall be paid for all swine in the herd, not just for breeding swine, and at a fair market value determined by the Administrator of the Animal and Plant Health Inspection Service (APHIS), based on an appraisal conducted by an independent appraiser assigned by the Administrator, except that indemnity payments, plus any salvage, must not exceed the appraised value of each animal.

Because brucellosis is primarily transmitted through sexual contact, swine other than breeding swine have not been considered to be significantly at risk for transmitting brucellosis to other swine. Consequently, indemnity has not been paid for "feeder" or "finishing" pigs. Recently, however, the infection of 30 humans with brucellosis through the handling of swine other than breeding swine at a packing plant in North Carolina has indicated that such swine do pose a significant risk of transmitting brucellosis to swine and humans.

In response to the occurrence of brucellosis among workers at the packing plant, the State of North Carolina has ordered that the plant may obtain swine only from validated brucellosis-free States, or from validated brucellosis-free herds in States other than validated brucellosis-free States. Although, at this time, the infection of humans and the North Carolina order involve only one packing plant, if the problem were to broaden and occur at other packing plants in North Carolina, or to occur in additional States, additional individuals could suffer significant hardship from brucellosis infections, and packing plants and owners of herds other than validated brucellosis-free herds could experience severe economic disruption.

The United States Animal Health Association (USAHA), a nationwide association of State veterinarians and industry members, recently passed a resolution requesting that the Department establish the goal of the complete eradication of swine brucellosis in the United States by the end of 1996. This resolution was supported by the National Pork Producers Council (NPPC) and the American Meat Institute (AMI). Additionally, the USAHA passed a second resolution, supported by NPPC and AMI, requesting that the Department move to depopulate immediately all herds of swine known to be affected with brucellosis by paying fair market value for all swine in the affected herds. (Under § 51.1, a herd known to be affected is defined as any herd in which any animal has been classified as a brucellosis reactor and which has not been released from quarantine.)

We compared the probable outcome of following the USAHA resolutions with that of continuing the existing eradication program, and concluded that eradication of swine brucellosis can be accomplished more quickly, with significantly less expense, by beginning now to pay fair market value for whole herd depopulation.

This change in the indemnity regulations is warranted now due to the success of the existing swine brucellosis eradication program. During the life of the program, the prevalence of swine brucellosis has been reduced from 15 percent of the nation's swine herds to 0.014 percent. Currently, only 34 herds nationwide are known to be affected with brucellosis. Because the number of herds known to be affected is small, paying fair market value for whole herd depopulation is feasible.

When undertaking whole herd depopulation, herd owners, where it is possible, will be required either to dispose of the swine through means other than slaughter (e.g., through burial, incineration, rendering, etc.) on the premises where the animals are held or penned at the time the indemnity is approved, or to move their swine for disposal to another location when movement to the location is approved, in advance, by an APHIS representative. Paying fair market value for whole herd depopulation, as provided for in this interim rule, will enable herd owners to dispose of swine through means other than slaughter (e.g., through burial, incineration, rendering, etc.). (The flat rates provided for under the existing regulations assume that the herd owner will also receive salvage value at slaughter.) Disposing of swine through such alternate means will help eliminate the danger of spreading brucellosis to swine, as well as help protect packing plant workers from the danger posed by brucellosis-infected swine.

Prior to the effective date of this interim rule, § 51.6 of the regulations required that swine for which indemnity was paid under the regulations be slaughtered at a slaughtering establishment. In order to allow for alternative means of destruction, we are amending § 51.6(c) in this interim rule to provide that in the case of indemnity paid for whole herd depopulation, swine may be destroyed on the premises where the animals are held or penned at the time the indemnity is approved, or may be moved for destruction to another location when movement to the location is approved in advance by an APHIS

representative. We are also providing that in cases where the swine are destroyed other than at a slaughtering establishment, the carcasses of the swine shall be disposed of by burial, incineration, or other disposal means authorized by applicable State law, and are requiring that destruction and disposition of animals destroyed other than at a slaughtering establishment be performed in the presence of an APHIS representative.

As noted above, in paying fair market value for whole herd indemnity, every effort will be made to dispose of swine by means other than slaughter. In some cases, however, when a packing plant is willing to handle swine from herds known to be affected, when it has been notified of the arrival of the swine, and when appropriate precautions are taken to protect the plant's workers, slaughter may be a feasible means of disposing of the animals. As noted above, in such cases, the indemnity paid, plus any salvage, must not exceed the appraised value of the swine.

Although, under the provisions of this interim rule, average indemnity costs for the Federal government will increase from $1,760 per herd to $9,030 per herd, the total cost for indemnity is expected to increase only slightly over the life of the program, and total program costs are expected to decrease substantially. According to APHIS projections, the eradication program as provided for prior to this interim rule would have required over 30 more years to accomplish total eradication, with projected costs of almost $600,000 for indemnity and $18 million for surveillance. In contrast, because the provisions of this interim rule will allow for the quick depopulation of herds known to be affected with brucellosis, and therefore increase program effectiveness, total eradication is expected to be accomplished in 5 years, with projected costs of $850,000 for indemnity and $10.5 million for surveillance. Thus, the total cost of eradication will be reduced from $18.6 million to $11.35 million, and the time necessary to achieve eradication shortened by more than 25 years.

**Identification of Exposed Swine From Herds Affected With Brucellosis**

The regulations in 9 CFR part 78 govern, among other things, the interstate movement of swine affected with brucellosis. Under these regulations, the interstate movement of brucellosis reactor swine and exposed swine is subject to certain restrictions. Among the restrictions on the movement of reactor swine is the requirement that such swine be individually identified by attaching to the left ear a metal tag bearing a serial number and the inscription, "U.S. Reactor," or a metal tag bearing a serial number designated by the State animal health official for identifying brucellosis reactors.

Although part 78 does require that exposed swine moved interstate be accompanied by a permit, it does not require that exposed swine from a herd known to be affected with brucellosis be identified with a metal eartag. However, because some swine originating in a herd known to be affected are likely to be the offspring of infected sows, and because the swine in the herd may be in extended contact with infected swine, they are at increased risk of being infected with brucellosis. Because of this increased risk, we consider it necessary to provide that such swine can be readily identified prior to slaughter. In order to better monitor the movement of exposed swine to ensure that they are destroyed and are not diverted into herds not affected with brucellosis, we are amending § 78.32 to require that exposed swine from a herd known to be affected with brucellosis may be moved interstate from the herd only if identified in the same manner as reactor swine. This identification will facilitate the monitoring of such swine until they are slaughtered, thus protecting against the spread of brucellosis by such animals. An additional benefit of such identification is that it will alert packing plants to the arrival of reactor swine, allowing them to take appropriate handling precautions.

**Immediate Action**

The Administrator of the Animal and Plant Health Inspection Service has determined that there is good cause for publishing this interim rule without prior opportunity for public comment. Immediate action is necessary to eliminate a public health risk, avert a potentially serious economic impact on swine marketing, reduce government expenses, and significantly shorten the time necessary for the eradication of swine brucellosis.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make it effective upon publication in the **Federal Register**. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**. It will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

**Executive Order 12866 and Regulatory Flexibility Act**

The Department has reviewed this rule under Executive Order 12866. The rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget.

This interim rule provides for indemnity payment for whole herd depopulation of swine herds known to be affected with brucellosis. Prior to the effective date of this interim rule, indemnity for herd depopulation was paid only for breeding swine infected with or exposed to the disease, and was based on a maximum "per head" rate of $150 per head for registered, inbred, or hybrid swine, and $65 per head for all other breeding swine.

At present 34 swine herds in the United States are known to be affected with brucellosis. This number represents 0.014 percent of the 235,840 swine herds in this country. Of the 34 herds, 18 are in Florida and 12 are in Texas. Louisiana, Mississippi, South Carolina, and Oklahoma have 1 each. The 34 herds known to be affected are all independently owned, and all of the farmers are considered "small entities" (annual gross receipts of $0.5 million or less, according to Small Business Administration size standards).

APHIS cannot require that farmers depopulate their herds, so it is impossible to determine exactly how many owners will accept indemnity for whole herd depopulation. Because several herds are in the final stages of brucellosis "cleanup," these farmers may not choose to depopulate their entire herds.

At the time of this writing, current market values for the different classes of swine are: [1] Sows, $160; boars, $150; gilts, $160; feeder pigs, $100; and suckling pigs, $20.

If owners choose to depopulate their entire herds, under the regulations they could start new operations with a more productive swine herd after a standard minimum of 30 days of "downtime" for elimination of the *Brucella* bacteria from the premises through cleaning and disinfecting. Noninfected sows tend to produce more piglets than do infected sows.

This interim rule also requires that all exposed swine in a herd known to be affected with brucellosis must be

[1] These values do not include potential salvage values received at the time of slaughter.

identified with a metal eartag before being moved interstate from the herd known to be affected. We estimate that the cost of applying eartags to exposed swine in the average herd known to be affected will be less than $50.

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

**Executive Order 12372**

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

**Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) the information collection or recordkeeping requirements included in this interim rule will be submitted for approval to the Office of Management and Budget. Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please send a copy of your comments to: (1) Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, and (2) Clearance Officer OIRM, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250.

**List of Subjects**

*9 CFR Part 51*

Animal diseases, Cattle, Hogs, Indemnity payments, Reporting and recordkeeping requirements.

*9 CFR Part 78*

Animal diseases, Bison, Cattle, Hogs, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR parts 51 and 78 are amended as follows:

## PART 51—ANIMALS DESTROYED BECAUSE OF BRUCELLOSIS

1. The authority citation for part 51 continues to read as follows:

**Authority:** 21 U.S.C. 111–113, 114, 114a, 114a–1, 120, 121, 125, 134b; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 51.3, paragraph (b)(2), the first sentence is amended by adding the words "or whose whole herd" immediately after the word "swine", revising the second sentence, and adding a new sentence after the second sentence to read as follows:

* * * * *

**§ 51.3 Payment to owners for animals destroyed.**

* * * * *

(b) * * *

(2) * * *

The indemnity shall not exceed $150 per head for registered, inbred, or hybrid breeding swine, and $65 per head for all other breeding swine, except that in the case of whole herd depopulation, indemnity payments shall be paid on all swine in the herd at fair market value, as determined by the Administrator, based on an appraisal conducted by an independent appraiser assigned by the Administrator. In cases where indemnity is paid for whole herd depopulation, indemnity payments, plus any salvage, must not exceed the appraised value of each animal. * * *

3. In § 51.6, paragraph (c) is revised to read as follows:

**§ 51.6 Destruction of animals; time limit for destruction of animals.**

* * * * *

(c) *Swine.* The claimant shall be responsible for insuring that swine subject to this part shall be sold under permit to a slaughtering establishment where State or Federal Meat inspection is available, or to a market approved by the State Animal Health Official, or to a market approved by the Administrator, for sale to such slaughtering establishment;[5] except that in the case of indemnity for whole herd depopulation, as provided for in § 51.3, swine shall be destroyed, if possible, on the premises where the animals are held or penned at the time the indemnity is approved, or may be moved for destruction to another location when movement to the location is approved in advance by an APHIS representative. In cases where the swine are destroyed other than at a slaughtering establishment, the carcasses of the swine shall be disposed of by burial, incineration, or other disposal means authorized by applicable State law. The destruction and disposition of animals destroyed in accordance with this section other than at a slaughtering establishment shall be performed in the presence of an APHIS representative.

* * * * *

[5] Markets are approved by the Administrator in accordance with § 76.18 of this chapter.

## PART 78—BRUCELLOSIS

4. The authority citation for part 78 continues to read as follows:

**Authority:** 21 U.S.C. 111–114a-1, 114g, 115, 117, 120, 121, 123–126, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

5. Section 78.32 is revised to read as follows:

**§ 78.32 Brucellosis exposed swine.**

(a) Brucellosis exposed swine may be moved interstate only if accompanied by a permit and only for immediate slaughter as follows:

(1) Directly to a recognized slaughtering establishment; or

(2) Directly to a stockyard posted under the Packers and Stockyards Act, as amended (7 U.S.C. 181 *et seq.*), or directly to a market agency or dealer registered under the Packers and Stockyards Act, for sale to a recognized slaughtering establishment.

(b) Brucellosis exposed swine from a herd known to be affected with brucellosis may be moved interstate from the herd known to be affected only if such swine are individually identified by attaching to the left ear a metal tag bearing a serial number and the inscription, "U.S. Reactor," or a metal tag bearing a serial number designated by the State animal health official for identifying brucellosis reactors.

(Approved by the Office of Management and Budget under control number 0579–0047)

Done in Washington, DC, this 11th day of March 1994.

**Patricia Jensen,**

*Acting Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 94–6180 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–34–P

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**9 CFR Part 94**

**[Docket No. 93–127–2]**

## Change in Disease Status of the Republic of Korea Because of Rinderpest and Foot-and-Mouth Disease

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

**ACTION:** Final rule.

**SUMMARY:** We are declaring the Republic of Korea free of rinderpest and foot-and-mouth disease. There have been no outbreaks of foot-and-mouth disease in the Republic of Korea since 1934, and we have determined that rinderpest has never existed there. We are also adding the Republic of Korea to a list of countries that, although declared free of rinderpest and foot-and-mouth disease, are subject to special restrictions on the importation of their meat and other animal products into the United States. This revision will remove the prohibition on the importation into the United States, from the Republic of Korea, of live ruminants and fresh, chilled, and frozen meat from ruminants, and will relieve restrictions on the importation, from the Republic of Korea, of milk and milk products from ruminants.

The Republic of Korea is not declared to be free of hog cholera and swine vesicular disease. Therefore, the importation from the Republic of Korea of swine and fresh, chilled, and frozen meat from swine will continue to be restricted because of these diseases.

We are also adding the Republic of Korea to the list of countries whose importation into the United States of llamas and alpacas is restricted.

**EFFECTIVE DATE:** April 1, 1994.

**FOR FURTHER INFORMATION CONTACT:** Dr. John Cougill, Staff Veterinarian, Import-Export Products Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, room 759, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–7834.

**SUPPLEMENTARY INFORMATION:**

## Background

The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation into the United States of specified animals and animal products in order to prevent the introduction into the United States of various diseases, including rinderpest, foot-and-mouth disease (FMD), bovine spongiform encephalopathy, African swine fever, hog cholera, and swine vesicular disease. These are dangerous and destructive communicable diseases of ruminants and swine.

Section 94.1(a)(1) of the regulations provides that rinderpest or FMD exists in all countries of the world except those listed in § 94.1(a)(2), which are declared to be free of these diseases.

On November 30, 1993, we published in the **Federal Register** (58 FR 63122–63123, Docket No. 93–127–1) a proposal to add the Republic of Korea [1] to the list in § 94.1(a)(2) of countries declared to be free of rinderpest and FMD.

We also proposed to add the Republic of Korea to the list in § 94.11(a) of countries declared free of rinderpest and FMD that are subject to special restrictions on the importation of their meat and other animal products into the United States.

Additionally, we proposed to add the Republic of Korea to the list in § 94.1(d)(1) of countries in which rinderpest or FMD has been known to exist and that were declared free of rinderpest and FMD on or after September 28, 1990. All countries declared free of rinderpest and FMD on or after September 28, 1990, must be added to this list. The importation or entry of llamas and alpacas into the United States from countries on this list is prohibited, unless the llamas or alpacas are imported through the Harry S Truman Animal Import Center in accordance with 9 CFR 92.435.

We solicited comments concerning our proposal for a 60-day comment period ending January 31, 1994. We did not receive any comments. The facts presented in the proposed rule still provide the basis for this final rule.

Therefore, based on the rationale set forth in the proposed rule, we are adopting the provisions of the proposal as a final rule.

**EFFECTIVE DATE:** This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. This rule removes the prohibition on the importation into the United States, from the Republic of Korea, of ruminants and fresh, chilled, and frozen meat from ruminants and relieves restrictions on the importation, from the Republic of Korea, of milk and milk products from ruminants. We have determined that approximately 2 weeks are needed to ensure that Animal and Plant Health Inspection Service personnel at ports of entry receive official notice of this change in the regulations. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be made effective 15 days after publication in the **Federal Register**.

## Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

This rule adds the Republic of Korea to the list in part 94 of countries declared to be free of rinderpest and foot-and-mouth disease. This action relieves restrictions imposed on the importation of live ruminants and fresh, chilled, and frozen meat of ruminants from the Republic of Korea into the United States. This action does not relieve restrictions on the importation of live swine and fresh, chilled, and frozen meat of swine because the Republic of Korea is still considered to be affected with hog cholera and swine vesicular disease.

Based on available information, the Department does not anticipate a major increase in exports of fresh, chilled, or frozen meat of ruminants from the Republic of Korea into the United States as a result of this rule. In 1992, the United States did not import any live ruminants or swine from the Republic of Korea. Additionally, only 2 metric tons of meat and meat products were shipped from the Republic of Korea to the United States. This accounted for less than one-tenth of one percent of total 1992 meat imports. The Republic of Korea is currently an importer of beef and lamb and does not produce enough ruminant meat to be self-sufficient. Therefore, any effect on domestic prices or supplies will be insignificant. Increases in imports of live ruminants from the Republic of Korea are also unlikely because there is no demand in the United States for live ruminants from the Republic of Korea and because of high transportation costs.

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

## Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

## Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule have been approved by the Office of Management and Budget (OMB), and there are no new requirements. The assigned OMB control number is 0579–0015.

[1] The Republic of Korea was incorrectly referred to in the proposed rule as South Korea.

**List of Subjects in 9 CFR Part 94**

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, 9 CFR part 94 is amended as follows:

## PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), VELOGENIC VISCEROTROPIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 continues to read as follows:

**Authority:** 7 U.S.C. 147a, 150ee, 161, 162, and 450; 19 U.S.C. 1306; 21 U.S.C. 111, 114a, 134a, 134b, 134c, 134f, 136, and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331, 4332; 7 CFR 2.17, 2.51, and 371.2(d).

**§ 94.1 [Amended]**

2. In § 94.1, paragraph (a)(2) is amended by adding "Republic of Korea," immediately after "Poland,".

3. In § 94.1, paragraph (d)(1) is amended by adding "Republic of Korea," immediately after "Poland,".

**§ 94.11 [Amended]**

4. In § 94.11, the first sentence in paragraph (a) is amended by adding "Republic of Korea," immediately after "Republic of Ireland,".

Done in Washington, DC, this 11th day of March 1994.

**Patricia Jensen,**

*Acting Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 94–6182 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–34–P

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**9 CFR Part 94**

**[Docket No. 93–102–2]**

## Importation of Pork and Pork Products From Countries Where Swine Vesicular Disease Is Known To Exist

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations concerning importation of certain cured and dried pork and pork products from countries where swine vesicular disease is known to exist, to allow the bones to be removed in the country where the pork or pork products are processed. Prior to the effective date of this final rule, the regulations required that bones be removed in the country where the swine are raised and slaughtered. This action will give processors an option as to where bones are removed, while continuing to prevent the introduction of swine vesicular disease into the United States.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Dr. John Cougill, Staff Veterinarian, Import-Export Products Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, room 759, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–7834.

**SUPPLEMENTARY INFORMATION:**

**Background**

Regulations in 9 CFR part 94 regulate, among other things, the importation of certain animals, meat, and animal products into the United States. These regulations are designed to prevent the introduction into the United States of certain diseases of livestock and poultry. Section 94.12 restricts the importation of pork and pork products into the United States from countries where swine vesicular disease (SVD) is known to exist. In order to prevent the introduction of this disease into the United States, only pork and pork products that meet conditions detailed in the regulations are eligible for entry into the United States.

Prior to the effective date of this final rule, the regulations allowed swine to be raised and slaughtered in an SVD-free country and the meat shipped to an SVD-infected country for curing and drying. However, if the resulting cured and dried pork or pork products were to be imported into the United States, all bones had to be removed in the country of origin, that is, the country where the swine were raised and slaughtered. The bones could not be removed in the country where the pork or pork products were cured and dried. (See § 94.12(b)(1)(iv)(A).)

On November 15, 1993, we published in the **Federal Register** (58 FR 60146–60147, Docket No. 93–102–1) a proposal to amend § 94.12(b)(1)(iv)(A) of the regulations to allow the option of removing the bones in the country where the pork and pork products are cured and dried.

We solicited comments concerning our proposal for a 60-day comment period ending January 14, 1994. We received one comment by that date. It was from a veterinary medical association, and was in favor of the proposed changes.

Therefore, based on the rationale set forth in the proposed rule, we are adopting the provisions of the proposal as a final rule.

**Effective Date**

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**.

Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

**Executive Order 12866 and Regulatory Flexibility Act**

This final rule has been reviewed under Executive Order 12866.

At present, Germany is the only country where SVD is considered to exist that exports these cured and dried pork and pork products to the United States. During 1989, approximately 17,987 kilograms of cured and dried pork and pork products were exported from Germany to the United States. The value of these imports totaled $113,000.

Three facilities in Germany currently process cured and dried pork and pork products for the United States market. The regulatory amendments made final in this document will allow these processing facilities to purchase pork from SVD-free countries with the bones in, and remove the bones at the processing facilities in Germany. The amendments will not have any impact on the domestic pork industry, which is valued in excess of $4 billion.

We have been unable to identify any domestic entities that will be affected by the rule. We therefore estimate that the rule will have a negligible impact on the domestic market for cured and dried pork and pork products.

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

**Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule have been approved by the Office of Management and Budget (OMB), and there are no new requirements. The assigned OMB control number is 0579–0015.

**List of Subjects in 9 CFR Part 94**

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, 9 CFR part 94 is amended to read as follows:

## PART 94–RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), VELOGENIC VISCEROTROPIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 continues to read as follows:

**Authority:** 7 U.S.C. 147a, 150ee, 161, 162, and 450; 19 U.S.C. 1306; 21 U.S.C. 111, 114a, 134a, 134b, 134c, 134f, 136, and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331, 4332; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 94.12, paragraph (b)(1)(iv)(A) is revised to read as follows:

**§ 94.12 Pork and pork products from countries where swine vesicular disease exists.**

* * * * *

(b) * * *

(1) * * *

(iv) * * *

(A) All bones have been completely removed, either in the country of origin or in the country where the pork or pork products are processed; and

* * * * *

Done in Washington, DC, this 11th day of March 1994.

**Patricia Jensen,**

*Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 94–6184 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–34–P

**Food Safety and Inspection Service**

**9 CFR Parts 317 and 318**

**[Docket No. 89–022F]**

**RIN 0583–AB15**

## Ascorbic Acid, Erythorbic Acid, Citric Acid, Sodium Ascorbate, and Sodium Citrate on Beef, Lamb, and Pork Cuts

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is amending the Federal meat inspection regulations to permit the application of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate, singly or in combination, to the surface of fresh beef cuts or fresh lamb cuts to delay discoloration of such cuts. Use of these substances will result in the preservation of a fresh color and appearance throughout the product's microbiological shelf life. This action is in response to petitions submitted by Wilson Foods Corporation. In addition, FSIS is amending the regulations to clarify the permitted use and levels of such substances on fresh pork cuts, and revise the purpose of these substances from "to maintain color" to "to delay discoloration" for clarification. Preserving the fresh color and appearance of beef and lamb cuts increases the marketability of such products; therefore, losses to manufacturers due to color deterioration will be reduced. In addition, FSIS is removing and reserving 9 CFR 317.8(b)(37), which requires qualifying statements on fresh pork cuts.

**EFFECTIVE DATE:** April 18, 1994.

**FOR FURTHER INFORMATION CONTACT:** Charles R. Edwards, Director, Product Assessment Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 254–2565.

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866**

This final rule has been reviewed under Executive Order 12866.

**Executive Order 12778**

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. States and local jurisdictions are preempted under the Federal Meat Inspection Act (FMIA) from imposing any marking, labeling, packing, or ingredient requirement on federally inspected meat products that are in addition to, or different than, those imposed under FMIA. States and local jurisdictions may, however, exercise concurrent jurisdictions over meat products that are outside official establishments for the purpose of preventing the distribution of meat products that are misbranded or adulterated under the FMIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States. Under the FMIA, States that maintain meat inspection programs must impose requirements that are at least equal to those required under the FMIA. The States may, however, impose more stringent requirements on such State inspected products and establishments.

No retroactive effect will be given to this rule. There are no applicable administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

**Effect on Small Entities**

The Administrator, FSIS, has made a determination that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule allows the application of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate, singly or in combination, to the surface of fresh beef cuts or fresh lamb cuts to delay discoloration. This final rule will impose no new requirements on small entities. Current regulations already allow these substances to be applied to the surface of fresh pork cuts. Currently, approximately 20 percent to 25 percent of meat packaging companies are producing red meat cuts. FSIS estimates that less than 3 percent of these companies will be affected by this final rule. Also, the Agency estimates the cost of applying these substances to the surface of fresh beef cuts or fresh lamb cuts is between $.03 and $.04 per pound. However, if production of fresh beef cuts or fresh lamb cuts treated in this manner increases and a sustained market develops for these products, the cost will decrease.

The meat industry will benefit from this final action because the preservation of the fresh color and appearance of beef cuts and lamb cuts for a longer period of time should increase the marketability of these products, thereby reducing the losses to manufacturers due to color deterioration of beef cuts and lamb cuts. Manufacturers, both large and small, opting to use such substances will be required to revise the ingredients statement on product labels to show the presence of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and/

or sodium citrate. However, the use of these substances will be voluntary, and any costs associated with new label applications will be covered under existing approved paperwork requirements of FSIS's prior label approval system.

Manufacturers choosing to apply ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate, singly or in combination, to fresh beef cuts and fresh lamb cuts will be required to develop and maintain an approved partial quality control (PQC) program, and would thus incur expenses associated with maintaining the PQC program. Decisions by individual manufacturers on whether to use such substances on the surface of fresh beef and fresh lamb cuts will be based on their conclusions that the benefits will outweigh the costs of maintaining the required PQC program. Current regulations already require manufacturers of fresh pork cuts using those substances to develop and maintain an approved PQC program.

**Paperwork Requirements**

Manufacturers opting to apply ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, or sodium citrate to fresh beef and lamb cuts will be required to develop and maintain a partial quality control (PQC) program. FSIS will receive, evaluate, and either approve or disapprove requests for such PQC programs. The PQC program will be placed on file in the establishment, and be available to any duly authorized representative of the Secretary. The information collection requirements contained in this final rule have been approved by the Office of Management and Budget under approval number 0583–0087.

**Background**

*Wilson Foods Petitions*

On December 13, 1988, and October 24, 1991, Wilson Foods Corporation, Oklahoma City, Oklahoma, submitted petitions, along with supporting technical data, to FSIS to permit the application of ascorbic acid, erythorbic acid, sodium ascorbate, citric acid and sodium citrate, singly or in combination, to fresh beef cuts and fresh lamb cuts to delay discoloration of the meat cuts.[1] The intended effect of ascorbic acid, erythorbic acid, and sodium ascorbate is to serve as antioxidants; the intended effect of citric acid and sodium citrate is to serve as sequestrants. The petitioner's data demonstrate that the required amount to accomplish the intended effects, singly or in combination, would be at levels not to exceed 500 ppm or 1.8 milligrams (mg) per square inch of the product's surface of ascorbic acid, erythorbic acid, or sodium ascorbate, and/or not to exceed 250 ppm or 0.9 mg per square inch of the product's surface of citric acid or sodium citrate. The data submitted by the petitioner were the results of experiments on products which were packaged in a modified atmosphere of carbon dioxide, oxygen, and nitrogen. It is the Agency's understanding that the benefits provided by the addition of these substances occur regardless of packaging conditions. However, this rulemaking concerns the addition of substances, rather than packaging gases, which are not a part of this rule.

The petitioner's data further demonstrate that such treatments result in delaying undesirable discoloration of the product for a period of time that does not exceed the product's microbiological shelf life. Fresh beef cuts and fresh lamb cuts treated with the substances mentioned above and stored at refrigerator temperature will remain wholesome for up to 21 days. Loss of the "fresh" color and marketability of beef cuts and lamb cuts occurs before the product becomes microbiologically unsafe. Some consumers are reluctant to purchase fresh beef or lamb cuts because of the change to a darker color of the product before spoilage.

*Current Regulations*

Section 318.7(c)(4) of the Federal meat inspection regulations (9 CFR 318.7(c)(4)) allows the use of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate on fresh pork cuts to maintain color at levels not to exceed either 500 ppm or 1.8 mg/sq inch of surface of ascorbic acid, erythorbic acid or sodium ascorbate, singly or in combination, and/or not to exceed either 250 ppm or 0.9 mg/sq inch of surface of citric acid or sodium citrate, singly or in combination. In addition, 9 CFR 318.7(c)(4) requires the use of such substances under an approved PQC program under 9 CFR 318.4(d) and (e). Section 317.8(b)(37) of the Federal meat inspection regulations (9 CFR 317.8(b)(37)) requires that when ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate, singly or in combination, are added to fresh pork cuts, there shall appear on the label of that product, in letters of the same style and type and not less than one-fourth the size of letters in the product name, contiguous to the name of the product, a statement identifying the specific approved substance(s) by its common name and the purpose for which it is added such as "Sprayed with a solution of water, ascorbic acid and citric acid to maintain color."

The Food and Drug Administration (FDA) lists ascorbic acid in 21 CFR 182.3013, erythorbic acid in 21 CFR 182.3041, and sodium ascorbate in 21 CFR 182.3731 as generally recognized as safe (GRAS) when used in accordance with good manufacturing practices for use as preservatives. FDA lists citric acid in 21 CFR 182.6033 and sodium citrate in 21 CFR 182.6751 as GRAS when used in accordance with good manufacturing practices for use as sequestrants.

*Proposed Rule*

On October 4, 1993, FSIS published a proposed rule in the **Federal Register** (58 FR 51581) to permit the application of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate, singly or in combination, to the surface of fresh beef cuts or fresh lamb cuts to delay discoloration of such meat cuts. The proposed rule would allow these substances to be used, singly or in combination, at levels of not more than 500 ppm or 1.8 milligrams per square inch of product surface area for ascorbic acid, erythorbic acid or sodium ascorbate, and/or not more than 250 ppm or 0.9 milligrams per square inch of surface area for citric acid or sodium citrate to achieve the intended technical effects.

FSIS also proposed that processors who apply these substances to cuts of fresh beef and lamb be required to follow an approved PQC program as set forth in 9 CFR 318.4(d). Neither processing of such products nor distribution of such products in commerce would be permitted until such PQC programs are approved and utilized according to the requirements set forth in 9 CFR 318.4(e). All such PQC programs would cover certain critical control points, including: (1) The condition of the meat before treatment (it must be fresh or previously frozen and maintained in a wholesome condition, evidenced by time and temperature records from the point of slaughter), (2) solution formulation control, (3) single application control, (4) finished product ingredient analysis monitoring, and (5) integrity of the packaging during storage, transportation, and distribution. This would ensure that these substances applied to the surface of the meat cuts to delay discoloration would not be applied in excessive amounts; therefore,

[1] Copies of the petitions and supporting technical data are available for review in the FSIS Hearing Clerk's office.

the discoloration of the cuts would occur before the onset of microbiological spoilage.

Cuts of fresh pork treated with ascorbic acid, erythorbic acid, sodium ascorbate, sodium citrate, and citric acid are currently required by 9 CFR 317.8(b)(37) to be labeled with a statement identifying these substances by their common and usual name and the purpose for which they are used; e.g., "Sprayed with a solution of water, ascorbic acid and citric acid to maintain color." This statement is required to be shown on the label in a prominent manner, contiguous to the product name, in letters of the same style and type and not less than one-fourth the size of the largest letter in the product name. After reassessing its overall policy regarding prominent labeling, FSIS set forth in the proposed rule that 9 CFR 317.8(b)(37) requiring qualifying statements on fresh pork cuts would be removed and reserved.

In addition, on November 4, 1992, the Agency published in the **Federal Register** a proposed rule (57 FR 52596) to eliminate those prominent disclosure requirements for product name qualifiers where the inclusion of a substance does not significantly alter the basic identity of the finished product or where the prominently disclosed information can be found in the ingredients statement. Such rule, in part, would eliminate product name qualifiers on fresh pork cuts treated with ascorbic acid, erythorbic acid, sodium ascorbate, sodium citrate, and citric acid. FSIS is considering the publication of a final rule on prominent labeling which would become effective in the near future. FSIS believes that such action would not deprive consumers of informative labeling because all substances used in the preparation of a product are required to be listed in the ingredients statement (9 CFR 317.2(f)(1)). However, as indicated in the proposed rule on ascorbic acid and other substances, FSIS is removing and reserving 9 CFR 318.7(b)(37). Therefore, as of the effective date of this final rule, qualifying statements, which identify the presence of ascorbic acid, erythorbic acid, sodium ascorbate, sodium citrate, and citric acid on fresh port cuts, are no longer required on the labeling of fresh pork cuts which contain such substances.

FSIS also stated in the preamble to the proposed rule that 9 CFR 317.8(b)(6) prohibits the word "fresh" on labels to designate product which has been salted for preservation. Therefore, FSIS would not allow the word "fresh" to be used on the labels of products treated with ascorbic acid, erythorbic acid, sodium ascorbate, sodium citrate, and citric acid.

FSIS proposed to amend the table of approved substances in 9 CFR 318.7 by revising the current entry for the Class of substance titled "Miscellaneous," under the Substance column for "Ascorbic, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate" to include such use on fresh beef and lamb cuts, along with the existing use on fresh pork cuts. In addition, FSIS proposed that the entry be revised to clarify the permitted use and levels of such substances on fresh pork cuts. The Agency also proposed to revise the purpose of these substances from "to maintain color" to "to delay discoloration" for clarification.

### Discussion of Comments

FSIS received three comments in response to the proposed rule. The comments were submitted by a consultant and two food manufacturers. The commenters fully supported the proposed rule.

After review of the comments and other information, the Administrator has determined that the application of ascorbic acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate to the surface of fresh beef and lamb cuts, as permitted in the rule, will not render the products in which they are used adulterated or misbranded or otherwise not in compliance with the Federal Meat Inspection Act. The Administrator has further determined that these substances will be functional and suitable for the products and will be permitted for use on the surface of fresh beef and lamb cuts as the lowest level necessary to accomplish the stated technical effect.

### List of Subjects

*9 CFR Part 317*

Meat inspection, Food labeling.

*9 CFR Part 318*

Meat inspection, Food additives.

### Final Rule

For reasons discussed in the preamble, FSIS is amending 9 CFR parts 317 and 318 of the Federal meat inspection regulations as follows:

## PART 317—LABELING, MARKING DEVICES, AND CONTAINERS

1. The authority citation for part 317 continues to read as follows:

**Authority:** 21 U.S.C. 601–695; 7 CFR 2.17, 2.55.

2. Section 317.8 is amended by removing and reserving paragraph (b)(37).

## PART 318—ENTRY OFFICIAL ESTABLISHMENTS; REINSPECTION AND PREPARATION OF PRODUCTS

3. The authority citation for part 318 continues to read as follows:

**Authority:** 7 U.S.C. 450, 1901–1906; 21 U.S.C. 601–695; 7 CFR 2.17, 2.55.

4. In the table in § 318.7(c)(4) under the Class of substance "Miscellaneous," the entry under the Substance "Ascorbic Acid, erythorbic acid, citric acid, sodium ascorbate, and sodium citrate" is revised to read as follows:

**§ 318.7 Approval of substances for use in the preparation of products.**

* * * * *

(c) * * *

(4) * * *

| Class of substance | Substance | Purpose | Product | Amount |
|---|---|---|---|---|
| * | * | * | * | * |
| Miscellaneous | Ascorbic acid, erythorbic acid, citric acid, sodium ascorbate and sodium citrate, singly or in combination, under an approved partial quality control (PQC) program (9 CFR 318.4 (d) & (e)). | To delay discoloration. | Fresh beef cuts, fresh lamb cuts, and fresh pork cuts. | Not to exceed, singly or in combination, 500 ppm or 1.8 mg/sq inch of product surface of ascorbic acid (in accordance with 21 CFR 182.3013), erythorbic acid (in accordance with 21 CFR 182.3041), or sodium ascorbate (in accordance with 21 CFR 182.3731); and/or not to exceed, singly or in combination, 250 ppm or 0.9 mg/sq inch of product surface of citric acid (in accordance with 21 CFR 182.6033), or sodium citrate (in accordance with 21 CFR 182.6751). |

| Class of substance | Substance | Purpose | Product | Amount |
|---|---|---|---|---|
| * | * | * | * | * |

Done at Washington, DC, on: March 11, 1994.

**Patricia Jensen,**

*Acting Assistant Secretary, Marketing & Inspection Services.*

[FR Doc. 94–6242 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–DM–M

## NUCLEAR REGULATORY COMMISSION

## 10 CFR Part 171

RIN 3150–AE83

## Restoration of the Generic Exemption From Annual Fees for Nonprofit Educational Institutions

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** On September 29, 1993 (58 FR 50859), the Nuclear Regulatory Commission ("NRC" or "Commission") published a proposed rule granting a petition for rulemaking submitted by a number of colleges and universities possessing NRC licenses. The petition requested that the NRC reinstate the exemption from annual fees previously given nonprofit educational licensees. The proposed rule requested public comment solely on that issue. The exemption had been eliminated in a final rule published in the **Federal Register** on July 20, 1993. After careful consideration, the Commission has decided to reinstate the annual fee exemption for nonprofit educational institutions.

**EFFECTIVE DATE:** April 18, 1994.

**FOR FURTHER INFORMATION CONTACT:** L. Michael Rafky, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone 301–504–1974.

**SUPPLEMENTARY INFORMATION:**

I. Background.
II. Responses to comments.
III. Final action—changes included in final rule.
IV. Section-by-section analysis.
V Environmental impact: categorical exclusion.
VI. Paperwork reduction act statement.
VII. Regulatory analysis.
VIII. Regulatory flexibility certification.
IX. Backfit analysis.

### I. Background

Soon after publishing its final rule establishing the NRC's FY 1993 fee schedules (58 FR 38666; July 20, 1993), which included for the first time annual fees for previously exempt nonprofit educational institutions [1], the Commission received a petition for reconsideration of that rule. The petition, filed by a number of colleges and universities affected by the policy change, requested that the NRC reconsider its decision to charge annual fees to such institutions. The petition asserted that the externalized benefits and public good resulting from use of university research reactors in various fields of education would be lost if these fees were imposed upon college and university licensees. (See Petition for Reconsideration of Final Rule (July 30, 1993) (appended to the Proposed Rule for the Restoration of the Annual Fee Exemption to Nonprofit Educational Institutions, 58 FR 50859; September 29, 1993.)) The petition pointed to research in such fields as nuclear safety, medicine, archaeology, food science and textiles, education of the public in nuclear matters, and to various benefits of education.

The petition relied upon a letter from economist Alfred Kahn to counsel for Cornell University, a petition signatory. The Kahn letter referred to "pure knowledge," especially nonproprietary university research made accessible to the public free of charge, as "the archetypical 'public good,' in economic terms, the essential characteristic of which is that, once produced, it can be made available more and more widely at zero economic cost."

While considering whether to grant the petition for reconsideration, or in the alternative to grant some nonprofit educational institutions individual "public interest" exemptions from the new annual fees, the NRC sent staff members to a number of colleges and universities to learn more about the use of nuclear materials in educational programs and the benefits that resulted from those materials' use. The Commission concluded, on the basis of these visits and the arguments made in the petition for reconsideration, that it should propose to retract the new annual fees ($62,100 per research reactor license; lesser amounts for each materials license). Accordingly, on September 29, 1993 (58 FR 50859), the Commission published in the **Federal Register** a notice granting the petition and proposing to restore the annual fee exemption for nonprofit educational institutions.

The Commission received over 200 comments on the proposed rule, with the vast majority in favor of restoring the annual fee exemption. (This number includes comments on the educational exemption provided to the Commission in response to its Congressionally-mandated study of overall agency fee policy, see 58 FR 21116; April 14, 1993). After careful review of the comments, and after studying the views of a professional economist engaged to assist in analyzing the comments (see note 2 infra), the Commission has decided to make final its proposed reinstatement of the exemption from annual fees for nonprofit educational institutions.

As the Commission made clear in the proposed rule, it will not charge other licensees retroactively for the monetary shortfall produced by the Commission's change in policy on the educational exemption. Therefore, for FY 1993 no licensees will be charged additional fees to compensate for the restored exemption. In addition, because the educational exemption is being restored for FYs 1991–92, there will be no refunds to power reactor licensees who paid increased annual fees in those years due to the exemption of nonprofit educational institutions (a point also detailed in the proposed rule).

### II. Responses to Comments

Although the comment period expired on October 29, 1993, the NRC reviewed all comments received prior to November 13, 1993. The Commission received over 200 comments in response to the proposed rule. Copies of all comment letters received are available for inspection in the NRC Public Document Room ("PDR"), 2120 L Street, NW. (Lower Level), Washington, DC 20555.

1. *Comment.* Most commenters were educational institutions, who argued that their educational and research activities with licensed nuclear materials will have to be severely curtailed or halted altogether if the

[1] The NRC's elimination of the exemption was prompted in part by a court decision questioning the exemption's lawfulness. *Allied-Signal* v. *NRC*, 988 F.2d 146 (DC Cir. 1993).

annual fee exemption is not restored. They claimed that the annual fees would, in many cases, entirely subsume the budget for operation of the research reactor or use of nuclear material. Many commenters also stated that there was no possibility of obtaining more money for their operating budgets, and that the inevitable result of annual fees would therefore be an across-the-board reduction in nuclear-related studies.

*Response.* The Commission is aware of the effect annual fees could have on nonprofit educational institutions, not only from their comments but also from its own site visits. The Commission believes that much of the work done by these institutions with nuclear materials, in both nuclear and non-nuclear fields of study, is extremely valuable and should not be impeded or halted due to the new annual fees. Further, for reasons discussed later, subsidies for such activities are both necessary and desirable.

2. *Comment.* A number of comments received from nonprofit educational institutions stated that their work produced externalized benefits to society, in the words used in the DC Circuit's Allied-Signal decision, "not captured in tuition or other market prices." Among the benefits cited were research in fields such as nuclear safety, neutron activation analysis, neutron radiography, archaeology, art history and biology. Much of this research, some commenters claimed, was basic research done to advance science, not for profit or commercial use (although such an outcome might occur). One commenter noted that it does not accept research grants and contracts without making them public, and publishes virtually all its findings. The commenters asserted that this research, if halted due to new fees, would not likely be duplicated or replaced by the private sector.

*Response.* The Commission agrees with commenters that much of the work done with nuclear materials in academia, if halted, would simply not be continued in the private sector. In particular, the Commission was impressed by the arguments made regarding basic research. The Commission believes that such research, done in the spirit of academic inquiry, is an integral part of the programs run by educational institutions with NRC licenses.

The Commission agrees with commenters' arguments that educational institutions' commitment to basic research is largely unique, as it is not driven by the need to develop commercial uses. While there is undoubtedly much basic research performed outside educational institutions, the Commission does not believe that it is an adequate substitute for academic research.

In the Commission's view, a major benefit resulting from educational institutions' use of nuclear reactors and materials is the production of new knowledge through research, which the Commission would term a "public good," as defined in economic theory.[2] Two characteristics of a public good like pure knowledge are its nondepletability and nonexcludability. That is, one person's acquisition of knowledge does not reduce the amount available to others; further, it is not efficient—and often is impossible, as a practical matter—to prevent others from acquiring it. These characteristics make it difficult to recoup the costs of producing pure knowledge. Because the value of a public good may be very great, but the costs of producing it impossible to recapture, it may be necessary to subsidize that good's production for production to occur at all. In the Commission's view, that is true of the pure knowledge produced by nonprofit educational institutions, and the Commission has therefore decided to exempt them from fees.

Restoring the educational exemption will have additional beneficial consequences. Colleges and universities not only produce research results and pure knowledge (what we have termed "public goods"), but also other benefits of great value to both the nuclear community and society as a whole. For instance, many of the students trained on research reactors will likely become the next generation of nuclear reactor operators and engineers. The knowledge they gain from their education in these fields will allow them to operate reactors and other nuclear facilities safely and effectively. Knowledge attained through education will also be of value to those companies or Government agencies, including the armed forces, who hire these students to perform nuclear-related work, which often cannot be done without extensive education in the area.

3. *Comment.* A number of commenters argued, for a variety of reasons, that the educational exemption should not be restored. Some commenters stated that each licensee should pay its fair share. Others believed that for-profit entities benefit the public as well and should not be penalized because they generate profits. Certain nonprofit commenters and medical licensees argued that if the exemption were retained, it should be expanded to include nonprofit institutions and medical licensees that are not now exempted from fees. A few commenters stated that in certain fields of study, schools and university hospitals compete with private research laboratories and nonprofit hospitals, respectively, and thus would receive an unfair subsidy from an annual fee exemption. One commenter went on to argue that such a subsidy amounted to an unlawful promotion of atomic energy by the NRC. Another commenter requested that the proposed rule be changed to exempt it from the annual fee, noting that it was the only Federally-owned research reactor not so exempted, due to the level of its power output.

A number of other commenters supported restoration of the educational exemption, but believed it should be funded in a different manner. The two alternatives most popular with commenters were funding the exemption out of general revenues, which would mean removing it from the fee base, or funding it via a surcharge on all licensees, not just power reactor licensees. Those commenters favoring removal of the educational exemption from the fee base acknowledged that such an outcome would require Congressional legislation.

*Response.* After deliberating over whether the educational exemption should be restored, the Commission believes the wisest policy decision is to exempt nonprofit educational licensees once again. Since the Commission published its final rule in July 1993 abolishing the educational exemption, it has devoted an extraordinary amount of time and attention to the question of whether to reverse that decision. It has reviewed hundreds of letters on the issue, fielded numerous phone comments and inquiries, and sent staff members to study the issue by visiting college and university licensees. In the Commission's view, the evidence taken as a whole leans strongly in favor of restoring that exemption, for the reasons described above: that many educational licensees would be forced to halt their research and educational activities due to lack of funds if NRC fee subsidies were withdrawn; that those activities would often not be continued in the private sector, resulting in a serious loss of basic research in numerous areas of study; and that the public good inherent

[2] The Commission's analysis of this concept was aided by a memorandum prepared by an NRC consultant on the issues of external benefits and public goods. The memorandum has been placed in the NRC PDR and may be examined by any interested member of the public. See Memorandum to NRC Staff from Stephen J.K. Walters, Professor of Economics, Loyola College (Md.), dated January 4, 1994.

in the production of knowledge made available to all is worthy of Government support. Such support would not therefore constitute an unlawful subsidy or promotion of atomic energy.

The Commission has received anecdotal information from some commenters indicating that certain nonprofit research institutions (which do not fall within the definition of nonprofit educational institution as provided in 10 CFR 171.5) and Federally-owned research reactors should receive the same treatment as educational institutions.[3] However, the Commission does not believe it has sufficient information on which to base a generic exemption for such research institutions and reactors. Because the proposed rule did not suggest that the educational exemption be expanded in this way, the Commission received a smaller number of comments than are needed to make an informed decision on this issue. For that reason, the current policy of charging such entities annual and user fees remains in effect. Those nonprofit research institutions and Federally-owned research reactors who believe that they qualify for an exemption from the annual fee based on the public good concept are, of course, free to request one from the Commission. See 10 CFR 171.11. Depending on the outcome of any such requests, the Commission may need to revisit the question of whether to make nonprofit research institutions generically exempt from fees in a future rulemaking.

The Commission also believes that medical licensees should continue to pay annual fees. This is consistent with past Commission practice. Contrary to some commenters' assertions, the Commission's fee policy does not result in a competitive advantage for university medical licensees over nonprofit hospitals. Both are charged fees for licenses authorizing medical treatment using licensed nuclear material.[4] The Commission does not believe that medical licensees are analogous to nonprofit educational institutions. Their function is not pure research and education, but primarily to provide services to paying customers.

While the Commission does not dispute that medicine provides significant benefits to patients, such treatment is both depletable and excludable. The benefits of medicine are therefore a private rather than a public good. By contrast, an educational institution generally disseminates the results of its basic research to all who want it, even going beyond the confines of the university itself, without receiving compensation from any of those benefitting from that knowledge. The key to nonprofit educational licensees' singular treatment is not merely that they provide valuable social benefits; rather, it is the existence of certain market failure considerations (discussed above) that apply to producers of pure knowledge through basic research, but not to medical practitioners. The distinction between educational and medical licensees is addressed at greater length in the Commission's **Federal Register** notice discussing the petition filed by the American College of Nuclear Physicians and the Society of Nuclear Medicine seeking a fee exemption for medical licensees (published in the Proposed Rule Section of this issue of the **Federal Register**).

The Commission does not plan to adopt the suggestion of some commenters that most or all other licensees should contribute something toward the costs of exempting nonprofit educational licensees. The agency, in any event, is not recouping these costs for FY 1993, as it is legally precluded from retroactively collecting those costs from licensees. The Commission in its Energy Policy Act-mandated review of fee policy has concluded that the costs of exempting nonprofit educational institutions should be excluded from the fee base through legislation modifying OBRA–90. In its study, the Commission concluded that if legislation to accomplish this is not enacted, these costs should continue to be recovered through fees assessed to power reactor licensees.

4. *Comment.* A number of commenters have argued that the Atomic Energy Act of 1954, as amended ("AEA"), mandates NRC support of education, and that accordingly the NRC must restore the educational exemption to conform to that mandate. In this regard, some commenters made the point that their facilities were originally funded or provided to them by the AEC or other Federal agencies.

*Response.* The Commission acknowledges its longstanding policy of supporting education, and believes that such support has been vital to the success of nuclear and nuclear-related education. That notwithstanding, the Commission does not view its education policy, or the exhortatory language of the AEA, as mandating that colleges and universities be exempt from NRC fees. The Commission has decided to restore the fee exemption as a policy matter, not a matter of legal compulsion.

5. *Comment.* Many educational institutions commented that it made little sense to charge them annual fees when much of their nuclear-education funding was derived from Federal agencies such as the Department of Energy and the National Science Foundation. Another commenter argued that State agencies were nonprofit in nature and should be exempted in the same manner as colleges and universities.

*Response.* The Commission for reasons discussed above decided to reinstate the exemption for nonprofit educational institutions. The fact that a number of these institutions received funding from Federal agencies was not a factor in the final decision. The Commission's decision was based primarily on who received the benefits of the services rendered, rather than who funded the underlying activities.

The Commission also notes that it charges fees to other governmental licensees, including both Federal and State agencies. (Virtually no Federal agencies are charged user fees under part 170 due to a prohibition against such fees in the Independent Offices Appropriation Act, see 31 U.S.C. 9701.) It finds no basis for changing its historical policy with respect to these entities in this rulemaking. This issue is addressed in the Commission's Report to Congress on fee policy, cited earlier in this rulemaking.

6. *Comment.* Some educational commenters stated that they should fall under the category of small entities, and asked whether the definition of "small entity" could be broadened to include a greater number of institutions than currently fall within the definition.

*Response.* The Commission intends to re-examine the size standards it uses to define small entities within the context of compliance with the Regulatory Flexibility Act. The Commission will conduct this review within the context of the proposed revisions of small business size standards proposed by the Small Business Administration ("SBA") (58 FR 46573; September 2, 1993). The Commission will not complete its review until the SBA promulgates a final rule containing the revised size standards. Until these activities are

[3] Most Federally-owned research reactors were exempted from fees by Congress in earlier legislation. See section 6101(c)(4) of OBRA–90, 42 U.S.C. 2214(c), as amended by the Energy Policy Act of 1992. However, the reactor in question operates at a power level greater than that specified in the legislation for exempt facilities, and therefore does not meet the definition of a "research reactor" for purposes of the statutory exemption.

[4] Similarly, materials licenses held by nonprofit educational institutions which authorize remunerated services or services performed under a Government contract are also subject to fees. See 10 CFR 170.11(a)(4) and 171.11(a)(1) (1993).

completed, it would be premature to address this comment.

## III. Final Action—Changes Included in Final Rule

The Commission has made only one change to its FY 1993 final rule establishing annual and user fee schedules for that fiscal year. As it proposed, the Commission has amended § 171.11 to exempt nonprofit educational institutions from annual fees. The new exemption provision is identical to that contained in the FY 1991 and 1992 final fee rules. Because the final fee schedule for FY 1993 has already been issued, the Commission will not be charging any other licensees for the fees that would have been paid for FY 1993 by the newly exempt group of licensees. For that reason, no new fee schedule is being published at this time. A revised NRC fee schedule incorporating these changes and billing other licensees for the FY 1994 exemption's costs will be included in the FY 1994 proposed fee rule.

Because the Commission has decided in this final rule to reinstate the annual fee exemption for nonprofit educational institutions, the NRC will cancel the FY 1993 annual fee invoices for those licensed activities exempt under this final rule. Accordingly, refunds will be made to those licensees who paid the FY 1993 annual fees and are now exempt under this final rule. Additionally, no further action will be taken on nonprofit educational institutions' exemption requests, which had been held in abeyance pending this final rule.

Some nonprofit educational institutions filed applications requesting termination, downgraded, possession-only or combined licenses to avoid the FY 1993 annual fee. If those applications are still pending, the licensees should notify the NRC within 30 calendar days from the effective date of this rule if they wish to rescind their applications due to the exemption's reinstatement. Absent such notification, the NRC will process the applications as filed. There are instances where the NRC has already completed final action on some of the applications in question. The affected nonprofit educational institutions are advised that if they wish to reinstate their previous license authority, they must file an application to do so with the NRC. Such applications for reinstatement of previous license authority are exempted from fees under 10 CFR 170.11(a)(4) as appropriate.

## IV. Section-by-Section Analysis

*Section 171.11 Exemptions*

Paragraph (a) of this section is amended by adding nonprofit educational institutions, as defined in § 171.5, to the list of those entities exempted from annual fees by the Commission. A discussion of this change in fee policy is found in Sections I and II of this final rule.

## V. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental assessment nor an environmental impact statement has been prepared for the final regulation.

## VI. Paperwork Reduction Act Statement

This final rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

## VII. Regulatory Analysis

With respect to 10 CFR part 171, on November 5, 1990 the Congress passed Public Law No. 101–508, the Omnibus Budget Reconciliation Act of 1990 (OBRA–90). OBRA–90, as amended, requires that for FYs 1991 through 1998 approximately 100 percent of the NRC's budget authority be recovered through the assessment of fees. To accomplish this statutory requirement, on July 20, 1993 (58 FR 38666), the NRC, in accordance with § 171.13, published in the **Federal Register** the final amount of the FY 1993 annual fees for operating reactor licensees, fuel cycle licensees, materials licensees, and holders of Certificates of Compliance, registrations of sealed source and devices and QA program approvals, and Government agencies. Consistent with OBRA–90 and its Conference Committee Report, the Commission has ensured that—

(1) The annual fees are based on the Commission's FY 1993 budget of $540 million less the amounts collected from part 170 fees and the funds directly appropriated from the Nuclear Waste Fund to cover the NRC's high level waste program;

(2) The annual fees, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and

(3) Annual fees are assessed to those licensees which the Commission, in its discretion, determines can fairly, equitably and practicably contribute to their payment.

Therefore, when developing the annual fees for operating power reactors, the NRC continues to consider the various reactor vendors, the types of containment, and the location of those reactors. The annual fees for fuel cycle licensees, materials licensees, and holders of certificates, registrations and approvals and for licenses issued to Government agencies take into account the type of facility or approval and the classes of the licensees.

10 CFR part 171, which established annual fees for operating power reactors effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in *Florida Power and Light Company* v. *United States*, 846 F.2d 765 (DC Cir. 1988), *cert denied*, 490 U.S. 1045 (1989).

10 CFR part 171, which established fees based on the FY 1989 budget, was also legally challenged. As a result of the Supreme Court decision in *Skinner* v. *Mid-American Pipeline Co.*, 109 S.Ct. 1726 (1989), and the denial of certiorari in *Florida Power and Light*, all of the lawsuits were withdrawn.

The NRC's FY 1991 annual fee rule was largely upheld recently by the DC Circuit Court of Appeals in *Allied-Signal* v. *NRC*, 988 F.2d 146 (DC Cir. 1993).

## VIII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that this final rule as adopted does not have a significant economic impact on a substantial number of small entities.

## IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and that a backfit analysis is not required for this final rule. The backfit analysis is not required because these amendments do not require the modification of or additions to systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility or the procedures or organization required to design, construct or operate a facility.

## List of Subjects in 10 CFR Part 171

Annual charges, Byproduct material, Holders of certificates, registrations, and approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 552 and 553, the NRC hereby adopts the following amendments to 10 CFR part 171.

## PART 171—ANNUAL FEES FOR REACTOR OPERATING LICENSES, AND FUEL CYCLE LICENSES AND MATERIALS LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC

1. The authority citation for part 171 is revised to read as follows:

**Authority:** Sec. 7601, Pub. L. 99–272, 100 Stat. 146, as amended by sec. 5601, Pub. L. 100–203, 101 Stat. 1330, as amended by sec. 3201, Pub. L. 101–239, 103 Stat. 2106 as amended by sec. 6101, Pub. L. 101–508, 104 Stat. 1388 (42 U.S.C. 2213); sec. 301, Pub. L. 92–314, 86 Stat. 222 (42 U.S.C. 2201(w)); sec. 201, 88 Stat. 1242 as amended (42 U.S.C. 5841); sec. 2903, Pub. L. 102–486, 106 Stat. 3125 (42 U.S.C. 2214 note).

2. In § 171.11, paragraph (a) is revised to read as follows:

**§ 171.11 Exemptions.**

(a) An annual fee is not required for:

(1) A construction permit or license applied for by, or issued to, a nonprofit educational institution for a production or utilization facility, other than a power reactor, or for the possession and use of byproduct material, source material, or special nuclear material. This exemption does not apply to those byproduct, source, or special nuclear material licenses which authorize:

(i) Human use;

(ii) Remunerated services to other persons;

(iii) Distribution of byproduct material, source material, or special nuclear material or products containing byproduct material, source material, or special nuclear material; or

(iv) Activities performed under a Government contract.

(2) Federally-owned research reactors used primarily for educational training and academic research purposes. For purposes of this exemption, the term research reactor means a nuclear reactor that—

(i) Is licensed by the Nuclear Regulatory Commission under section 104 c. of the Atomic Energy Act of 1954 (42 U.S.C. 2134(c)) for operation at a thermal power level of 10 megawatts or less; and

(ii) If so licensed for operation at a thermal power level of more than 1 megawatt, does not contain—

(A) A circulating loop through the core in which the licensee conducts fuel experiments;

(B) A liquid fuel loading; or

(C) An experimental facility in the core in excess of 16 square inches in cross-section.

* * * * *

Dated at Rockville, MD this 11th day of March, 1994.

For the Nuclear Regulatory Commission.

**Samuel J. Chilk,**

*Secretary of the Commission.*

[FR Doc. 94–6233 Filed 3–16–94; 8:45 am]

BILLING CODE 7590–01–P

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## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 200

**[Release No. 34–33573A]**

### Regional Office Reorganization; Correction

**ACTION:** Correction to final rule amendments.

**SUMMARY:** This document contains corrections to final rule amendments which were published February 9, 1994 [59 FR 5942]. The amendments pertain to the organization and operation of the Commission's regional offices.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** James Clarkson, Director, Regional Office Operations, (202) 272–3090; Anne Sullivan, Office of General Counsel, (202) 272–7525.

**SUPPLEMENTARY INFORMATION:** The regulations which are the subject of these corrections are contained in 17 CFR 200 and were amended by release effective February 9, 1994.

### Need for Correction

As published, certain addresses contained in the final rule amendments are incorrect or incomplete.

### Correction of Publication

Accordingly, the publication on February 9, 1994 of the final rule amendments in Commission Release No. 34–33573 which were the subject of FR Doc. No. 94–2826 is corrected as follows:

**§ 200.11 [Corrected]**

1. On page 5943, in the first column, in Section 200.11(b), line twelve, remove the words "Sixth Floor," as they appear after "73 Tremont Street".

2. On page 5943, in the first column, in Section 200.11(b), line 28, add "Minnesota," between "Michigan," and "Missouri,".

3. On page 5943, in the first column, in Section 200.11(b), beginning in line 30, revise the phrase "Administrator, Northwestern Atrium Center," to read "Director,".

4. On page 5943, in the first column, in Section 200.11(b), line 30, the zip code "60611" is corrected to read "60661".

5. On page 5943, in the first column, in Section 200.11(b), line 37, remove the word "Administrator" and add, in its place, the word "Director".

6. On page 5943, in the second column, in Section 200.11(b), line eleven, add the words "Suite 1100," before the words "San Francisco,".

**§ 200.80 [Corrected]**

7. On page 5944, in the third column, in Section 200.80(c)(1)(iii), line one, add the number "3475" before the words "Lenox Road,".

8. On page 5944, in the third column, in Section 200.80(c)(1)(iii), lines four and five, remove the words "Northwestern Atrium Center,".

9. On page 5944, in the third column, in Section 200.80(c)(1)(iii), line six, the zip code "60611" is corrected to read "60661".

10. On page 5944, in the third column, in Section 200.80(c)(1)(iii), line 23, add the words "Suite 1100," before the words "San Francisco,".

**§ 200.303 [Corrected]**

11. On page 5945, in the first column, in Section 200.303(a)(2), line 15, add the number "3475" before the words "Lenox Road,".

12. On page 5945, in the first column, in Section 200.303(a)(2), beginning on line 18, remove the words "Northwestern Atrium Center,".

13. On page 5945, in the first column, in Section 200.303(a)(2), line 20, the zip code "60611" is corrected to read "60661".

14. On page 5945, in the first column, in Section 200.303(a)(2), line 37, insert the words "Suite 1100," before the words "San Francisco,".

Dated: March 11, 1994.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–6176 Filed 3–16–94; 8:45 am]

BILLING CODE 8010–01–M

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Social Security Administration**

**20 CFR Part 416**

**[Regulations No. 16]**

**RIN 0960–AD85.**

## Supplemental Security Income for the Aged, Blind, and Disabled; Replacement of Lost, Damaged, or Stolen Excluded Resources (Hurricane Andrew)

**AGENCY:** Social Security Administration, HHS.

**ACTION:** Interim final rules with request for comments.

**SUMMARY:** Some supplemental security income (SSI) recipients who were victims of Hurricane Andrew in south Florida have not been able to replace or repair their damaged homes due to circumstances beyond their control. This means that some SSI recipients will have resources (insurance money) in amounts that will disqualify them for SSI benefits if held for periods exceeding the maximum 18-month period provided in regulations at § 416.1232. Since Hurricane Andrew occurred in August 1992, some SSI recipients could become ineligible as early as March 1994. We are codifying in regulations, interim final rules which provide additional time for victims of Hurricane Andrew to make arrangements to effect repair or replacement of excluded property without interruption of their SSI benefits.

**DATES:** Effective Date: This rule is effective March 17, 1994.

### Comments

To be sure that your comments are considered, we must receive them no later than May 16, 1994.

**ADDRESSES:** Comments should be submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, MD 21235, or delivered to 3–B–1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8 a.m. and 4:30 p.m. on regular business days. Alternately, you may submit comments by telefax to (410) 966–0869.

**FOR FURTHER INFORMATION CONTACT:** Henry D. Lerner, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1762.

**SUPPLEMENTARY INFORMATION:** In August 1992, Hurricane Andrew devastated south Florida causing damage estimated in excess of $18 billion. According to published reports, of the 47,000 homes destroyed, 32,000 are still uninhabitable. Only 10 percent of 140,000 damaged homes have been rebuilt or repaired because the number of contractors available to rebuild homes is steadily decreasing.

We estimate that approximately 450 SSI recipients, who were victims of Hurricane Andrew, have received payments from private insurance companies for the repair or replacement of their property, but because of the extent of the devastation, they have not yet been able to repair or replace their homes and property.

The regulations at § 416.1205(c) provide that SSI recipients can have no more than $2,000 in countable resources and SSI couples can have no more than $3,000. The regulations at § 416.1237 provide that assistance received under the Disaster Relief and Emergency Assistance Act or other assistance provided under a Federal statute because of a catastrophe which is declared to be a major disaster by the President of the United States or comparable assistance received from a State or local government, or from a disaster assistance organization, is excluded permanently under § 416.1210 in determining countable resources.

The regulations at § 416.1232 complement the disaster assistance exclusion by providing that cash or in-kind items for the repair or replacement of lost, stolen, or damaged excluded resources are not treated as resources for 9 months, plus one extension for a reasonable period up to an additional 9 months for good cause if circumstances do not permit repair or replacement within the initial 9-month period and the individual intends to use the funds for repair or replacement.

Excluded resources generally include the individual's home, household goods and personal effects, and the automobile, as are described in §§ 416.1212, 416.1216 and 416.1218 respectively.

Private insurance payments do not qualify as disaster assistance and, therefore, cannot be permanently excluded. For some of these SSI recipients, the maximum period of 18 months during which monies to repair or replace excluded resources are not treated as resources is about to expire. Because of the vast devastation caused by Hurricane Andrew, these individuals have not been able to rebuild or repair their homes. We estimate that, as early as March 1994, some of these individuals will begin to lose SSI eligibility.

We propose interim final regulations to amend § 416.1232(b) for victims of Hurricane Andrew only, to extend the maximum 18-month period during which cash or in-kind replacement received from any source for purposes of repairing or replacing an excluded resource is not treated as a resource:

- For an additional 12 months as long as the individual intends to repair or replace the property and good cause still exists for not yet having done so.

Existing regulations for the exclusion of monies to repair or replace an excluded resource have been adequate to cover past situations, including other disasters. However, the damage caused by Hurricane Andrew was so extensive and destroyed so much of the existing infrastructure (e.g., governmental and public services and utilities, construction and repair industry and equipment, etc.) that the current maximum 18-month period, in this context, is not adequate. Many SSI recipients hurt by Hurricane Andrew who have received insurance settlements have not been able to rebuild or repair their homes or even contract for those services. Through this regulatory change, we are providing additional time for victims of this extraordinary disaster to make arrangements to effect repair or replacement without interruption in their SSI benefits.

During the extension period, we will make periodic contacts with each individual to determine whether the individual still intends to repair or replace the property and, if so, whether good cause for not yet having done so still exists. We will obtain evidence to make these determinations.

### Regulatory Procedures

We are publishing these new SSI resource counting rules as interim final rules with a request for comments instead of as proposed rules. The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its notice and comment procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. After due consideration, we have determined that, under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice of proposed rulemaking on

these regulations because such procedures would be contrary to the public interest. The process of notice and comment rulemaking generally requires many months before culminating in a final rule. If SSI recipients who are victims of Hurricane Andrew do not receive the beneficial effect of this rule by March 1994, some will lose their SSI eligibility. Since it is in the public interest that these individuals continue to receive SSI benefits while they make arrangements to repair or replace their excluded resources that have been damaged or destroyed by Hurricane Andrew, we believe that the public interest warrants immediate promulgation of these rules. Accordingly, promulgation of these rules pursuant to notice and comment rulemaking would be contrary to the public interest and thus may be dispensed with pursuant to 5 U.S.C. 553(b)(B). However, we are asking the public to comment on these interim final rules and will determine if these regulations need revision on consideration of any comments received.

*Executive Order 12866*

These interim final regulations do not meet the criteria for a significant regulatory action under section 3(f) of E.O. 12866 and, thus, are not subject to Office of Management and Budget (OMB) review under E.O. 12866.

*Paperwork Reduction Act of 1980*

These interim final regulations do not contain reporting requirements. However, they extend the initial regulation that did. Inadvertently, we did not publish a narrative for that regulation concerning the need for clearance by the Office of Management and Budget (OMB). We would normally seek approval of the reporting requirements contained in the initial regulation (under the Paperwork Reduction Act) from OMB. We are not doing so in this situation because we already have their clearance to collect this kind of information using the SSA-795 (Statement of Claimant or Other Person), OMB Control Number 0960-0045.

We expect that approximately 450 SSI recipients will be involved, and that it will take them an estimated five minutes each to provide this information. The annual burden for this reporting requirement is estimated at 37.5 hours. The respondents are SSI recipients who have excess countable resources as a result of the damage caused by Hurricane Andrew.

*Regulatory Flexibility Act*

We certify that these interim final regulations will not have a significant economic impact on a substantial number of small entities because they affect eligibility for or the amount of SSI payments of individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program No. 93.807, Supplementary Security Income)

**List of Subjects in 20 CFR Part 416**

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplementary Security Income.

Dated: February 16, 1994.

**Shirley Chater,**

*Commissioner of Social Security.*

Approved: March 10, 1994.

**Donna E. Shalala,**

*Secretary of Health and Human Services.*

Part 416 of chapter III of title 20 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for subpart L of part 416 continues to read as follows:

**Authority:** Secs. 1102, 1602, 1611, 1612, 1613, 1614(f), 1621 and 1631 of the Social Security Act; 42 U.S.C. 1302, 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, and 1383; sec. 211 of Pub. L. 93-66, 87 Stat. 154.

2. Section 416.1232 is amended by revising paragraph (b) to read as follows:

**§ 416.1232 Replacement of lost, damaged, or stolen excluded resources.**

* * * * *

(b) The initial 9-month time period will be extended for a reasonable period up to an additional 9 months where we find the individual had good cause for not replacing or repairing the resource. An individual will be found to have good cause when circumstances beyond his or her control prevented the repair or replacement or the contracting for the repair or replacement of the resource. If good cause is found for an individual, any unused cash (and interest) is counted as a resource beginning with the month after the good cause extension period expires. *Exception: For victims of Hurricane Andrew only,* the extension period for good cause may be extended for up to an additional 12 months beyond the 9-month extension when we find that the individual had good cause for not replacing or repairing an excluded resource within the 9-month extension.

* * * * *

[FR Doc. 94-6158 Filed 3-16-94; 8:45 am]

BILLING CODE 4190-29-P

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## Food and Drug Administration

## 21 CFR Part 442

**[Docket No. 93N-0431]**

## Antibiotic Drugs; Cefmetazole and Cefmetazole Sodium Injection

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new bulk form of cefmetazole and for its use in a new dosage form of cefmetazole sodium, cefmetazole sodium injection. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

**DATES:** Effective April 18, 1994; written comments, notice of participation, and requests for a hearing by April 18, 1994; data, information, and analyses to justify a hearing by May 16, 1994.

**ADDRESSES:** Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Peter A. Dionne, Center for Drug Evaluation and Research (HFD-520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-0335.

**SUPPLEMENTARY INFORMATION:** FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of (1) a new bulk form of cefmetazole, and (2) for its use in a new dosage form of cefmetazole sodium, cefmetazole sodium injection. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in 21 CFR part 442 to provide for the inclusion of accepted standards for this product.

**Environmental Impact**

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a

type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

**Submitting Comments and Filing Objections**

This final rule announces standards that FDA has accepted in a request for approval of an antibiotic drug. Because this final rule is not controversial and because, when effective, it provides notice of accepted standards, FDA finds that notice and comment procedure is unnecessary and not in the public interest. This final rule, therefore, is effective April 18, 1994. However, interested persons may, on or before April 18, 1994, submit written comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before April 18, 1994, a written notice of participation and request for a hearing, and (2) on or before May 16, 1994, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for a hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for a hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this document and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for a hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

**List of Subjects in 21 CFR Part 442**

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 442 is amended as follows:

## PART 442—CEPHA ANTIBIOTIC DRUGS

1. The authority citation for 21 CFR part 442 continues to read as follows:

**Authority:** Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

2. Section 442.69 is added to subpart A to read as follows:

**§ 442.69 Cefmetazole.**

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cefmetazole is (6*R*,7*S*)-7-[2-[(cyanomethyl)thio]acetamido]-7-methoxy-3-[[(1-methyl-1*H*-tetrazol-5-yl)thio]methyl]-8-oxo-5-thia-1-azabicyclo[4.2.0]oct-2-ene-2-carboxylic acid. It is so purified and dried that:

(i) Its potency is not less than 970 micrograms of cefmetazole activity per milligram.

(ii) Its moisture content is not more than 0.5 percent.

(iii) It gives a positive identity test for cefmetazole.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on the batch for potency, moisture, and identity.

(ii) Samples, if required by the Director, Center for Drug Evaluation and Research: 10 packages each containing approximately 500 milligrams.

(b) *Tests and methods of assay*—(1) *Potency.* Proceed as directed in § 442.70a(b)(1).

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *Identity.* Proceed as directed in § 436.211 of this chapter using a mineral oil mull prepared as described in paragraph (b)(2) of that section.

3. New § 442.270 is added to subpart C to read as follows:

**§ 442.270 Cefmetazole injectable dosage forms.**

4. New § 442.270b is added to subpart C to read as follows:

**§ 442.270b Cefmetazole sodium injection.**

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cefmetazole sodium injection is a frozen, aqueous, iso-osmotic solution of cefmetazole and sodium citrate. It contains one or more suitable and harmless buffer substances and a tonicity adjusting agent. Each milliliter contains cefmetazole sodium equivalent to 20 milligrams or 40 milligrams of cefmetazole per milliliter. Its cefmetazole content is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of cefmetazole that it is represented to contain. It is sterile. It contains not more than 0.2 endotoxin units per milligram. Its pH is not less than 4.2 and not more than 6.2. It passes the identity test. The cefmetazole used conforms to the standards prescribed by § 442.69(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(A) The cefmetazole used in making the batch for potency, moisture, and identity.

(B) The batch for potency, sterility, bacterial endotoxins, pH, and identity.

(ii) Samples, if required by the Director, Center for Drug Evaluation and Research:

(A) The cefmetazole used in making the batch: 10 packages, each containing approximately 500 milligrams.

(B) The batch:

(*1*) For all tests except sterility: A minimum of 12 immediate containers.

(*2*) For sterility testing: 20 immediate containers, collected at regular intervals throughout each filling operation.

(b) *Tests and methods of assay.* Thaw the sample as directed in the labeling. The sample solution used for testing must be at room temperature.

(1) *Cefmetazole potency.* Proceed as directed in § 442.70a(b)(1), except prepare the sample solution and calculate the cefmetazole content as follows:

(i) *Preparation of sample solution.* Using a suitable hypodermic needle and syringe, remove an accurately measured portion from each container

immediately after thawing and reaching room temperature and dilute with mobile phase to obtain a solution containing 500 micrograms of cefmetazole per milliliter (estimated). Prepare the sample solution just prior to its introduction into the chromatograph.

(ii) *Calculation.* Calculate the milligrams of cefmetazole per milliliter of sample as follows:

$$\text{Milligrams of cefmetazole per milliliter} = \frac{A_U \times P_S \times d}{A_S \times 1{,}000}$$

where:

$A_U$ = Area of the cefmetazole peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

$A_S$ = Area of the cefmetazole peak in the chromatogram of the cefmetazole working standard;

$P_S$ = Cefmetazole activity in the cefmetazole working standard solution in micrograms per milliliter; and

$d$ = Dilution factor of the sample.

(2) *Sterility.* Proceed as directed in § 436.20 of this chapter, using the method described in paragraph (e)(1) of that section.

(3) *Bacterial endotoxins.* Proceed as directed in the United States Pharmacopeia bacterial endotoxins test.

(4) *pH.* Proceed as directed in § 436.202 of this chapter, using the undiluted solution.

(5) *Identity.* The high-performance liquid chromatogram of the sample determined as directed in paragraph (b)(1) of this section compares qualitatively to that of the cefmetazole working standard.

Dated: March 9, 1994.

**Raymond E. Hamilton,**

*Acting Director, Office of Compliance, Center for Drug Evaulation and Research.*

[FR Doc. 94–6224 Filed 3–16–94; 8:45 am]

BILLING CODE 4160–01–F

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## 21 CFR Part 558

## New Animal Drugs for Use in Animal Feeds; Salinomycin

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Hoechst-Roussel Agri-Vet Co. The ANADA provides for making a Type A medicated article containing salinomycin used to make a Type C medicated broiler feed for the prevention of coccidiosis in broiler chickens.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Melanie R. Berson, Center for Veterinary Medicine (HFV–135), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1643.

**SUPPLEMENTARY INFORMATION:** Hoechst-Roussel Agri-Vet Co., P.O. Box 2500, Somerville, NJ 08876–1258, filed ANADA 200–075 which provides for making a 30 grams (g) per pound salinomycin Type A medicated article used to make a Type C medicated broiler feed containing 40 to 60 g of salinomycin per ton. The feed is used for the prevention of coccidiosis caused by *Eimeria acervulina, E. brunetti, E. maxima, E. mivati, E. necatrix,* and *E. tenella* in broiler chickens.

ANADA 200–075 for Hoechst-Roussel's salinomycin Type A article is as a generic copy of Agri-Bio Corp.'s Bio-Cox (salinomycin Type A article) in a new animal drug application (NADA 128–686). The ANADA is approved as of February 23, 1994, and the regulations are amended in 21 CFR 558.550(a) to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of part 20 (21 CFR part 20) and § 514.11(e)(2)(ii) (21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

### List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

## PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** Secs. 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b, 371).

2. Section 558.550 is amended by revising paragraph (a) to read as follows:

**§ 558.550 Salinomycin.**

(a) *Approvals.* Type A medicated article with 30 grams of activity per pound from salinomycin sodium biomass: To 012799 in § 510.600(c) of this chapter for use as in paragraph (b)(1)(i) of this section; to 042835 in § 510.600(c) of this chapter for use as in paragraph (b) of this section.

* * * * *

Dated: March 10, 1994.

**Richard H. Teske,**

*Acting Director, Center for Veterinary Medicine.*

[FR Doc. 94–6225 Filed 3–16–94; 8:45 am]

BILLING CODE 4160–01–F

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## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 1

[T.D. 8533]

RIN 1545–AS58

## Accuracy-Related Penalty

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Temporary regulations.

**SUMMARY:** This document contains temporary regulations relating to the accuracy-related penalty under chapter 1 of the Internal Revenue Code. These regulations affect all persons that file returns of income tax and provide guidance necessary to comply with these changes. These regulations are necessary to effect changes to the accuracy-related penalty made by the Omnibus Budget Reconciliation Act of 1993.

**EFFECTIVE DATE:** March 14, 1994.

**FOR FURTHER INFORMATION CONTACT:** David L. Meyer, 202–622–6232 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

These temporary regulations set forth certain changes made to the accuracy-related penalty in section 6662 of the Internal Revenue Code (Code) by section 13251 of the Omnibus Budget

Reconciliation Act of 1993 (OBRA 1993). These changes eliminated the disclosure exception for the negligence penalty (section 6662(b)(1) of the Code) and raised the disclosure standard for purposes of the penalties for disregarding rules or regulations (section 6662(b)(1) of the Code) and a substantial understatement of income tax (section 6662(b)(2) of the Code) from "not frivolous" to "reasonable basis." See section 13251 of OBRA 1993 and H. Rep. No. 213, 103rd Cong., 1st Sess. 669 (1993) (the Conference Report).

The legislative history to OBRA 1993 indicates that this "reasonable basis" standard is a relatively high standard of tax reporting that is significantly higher than the "not frivolous" disclosure standard previously applicable to taxpayers under section 6662 of the Code and currently applicable to preparers under section 6694 of the Code. See Conference Report, at p.669. A position is not frivolous if it is not "patently improper." See § 1.6694–2(c)(2) of the Income Tax Regulations and current § 1.6662–3(b)(3). The legislative history to OBRA 1993 also provides that the reasonable basis standard is not satisfied by a position that is merely arguable or merely a colorable claim. See Conference Report, at p.669.

In addition to adopting the new reasonable basis standard as the standard that a disclosed return position must satisfy to avoid the disregard and substantial understatement penalties, Congress adopted the new reasonable basis standard as the standard that a return position must satisfy to avoid the negligence penalty. See Conference Report at p.669.

Treasury requests comments on how the new reasonable basis standard should be defined for purposes of the negligence, disregard, and substantial understatement penalties.

**Explanation of Changes**

Section 1.6662–3(a) of the regulations generally provides that if any portion of an underpayment, as defined in section 6664(a) of the Code and § 1.6664–2, of any income tax imposed under subtitle A of the Code that is required to be shown on a return is attributable to negligence or disregard of rules or regulations, there is added to the tax an amount equal to 20 percent of such portion. Section 1.6662–3(b)(1) defines "negligence" to include any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return. Currently, § 1.6662–3(c) generally provides that no penalty under section 6662(b)(1) may be imposed on any portion of any underpayment that is attributable to negligence or a position contrary to a rule or regulation if the position is adequately disclosed and is not frivolous, if the requirements of that section are met.

Section 1.6662–4(a) of the regulations generally provides that if any portion of an underpayment of any income tax imposed under subtitle A of the Code that is required to be shown on a return is attributable to a substantial understatement of such income tax, there is added to the tax an amount equal to 20 percent of such portion. Section 1.6662–4(a) further provides that, except in the case of any item attributable to a tax shelter, an understatement is reduced by the portion of the understatement that is attributable to positions for which there was substantial authority or adequate disclosure. Currently, under § 1.6662–4(e)(2), this adequate disclosure exception will not apply if the position on the return is frivolous.

As a result of OBRA 1993, the minimum standard that a disclosed return position must satisfy to avoid either the penalty for disregarding rules or regulations or for a substantial understatement of income tax has been raised from "not frivolous" to "reasonable basis." In addition, there is no longer a disclosure exception for the negligence penalty and, to avoid that penalty, the return position generally must satisfy the new reasonable basis standard.

These rules generally apply to returns that are due (without regard to extensions for filing) after December 31, 1993. However, the rules relating to changes to the penalties for negligence or disregard of rules or regulations will not apply to returns, including qualified amended returns, filed on or before March 14, 1994.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

**Drafting Information**

The principal author of these regulations is David L. Meyer, Office of Assistant Chief Counsel, Income Tax and Accounting, Internal Revenue Service. However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

**Par. 2.** Section 1.6662–0 is amended by revising the introductory language and adding an entry for § 1.6662–7T to read as follows:

**§ 1.6662–0 Table of contents.**

This section lists the captions that appear in §§ 1.6662–1 through 1.6662–7T.

* * * * *

*§ 1.6662–7T Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty (temporary).*

(a) In general.
(1) Scope.
(2) Effective date.
(b) No disclosure exception for negligence penalty.
(c) Disclosure standard for other penalties is reasonable basis.
(d) Definition of reasonable basis.
(1) In general. [Reserved].
(2) Relationship to other standards.

**Par. 3.** Section 1.6662–7T is added to read as follows:

**§ 1.6662–7T Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty (temporary).**

(a) *In general*—(1) *Scope.* The Omnibus Budget Reconciliation Act of 1993 made certain changes to the accuracy-related penalty in section 6662. This section provides rules reflecting those changes.

(2) *Effective date.* This section applies to returns that are due (without regard to extensions of time for filing) after December 31, 1993. However, the provisions of these regulations relating to the penalties for negligence or disregard of rules or regulations will not apply to returns (including qualified

amended returns) that are filed on or before March 14, 1994.

(b) *No disclosure exception for negligence penalty.* The penalty for negligence in section 6662(b)(1) may not be avoided by disclosure of a return position.

(c) *Disclosure standard for other penalties is reasonable basis.* The penalties for disregarding rules or regulations in section 6662(b)(1) and for a substantial understatement of income tax in section 6662(b)(2) may be avoided by adequate disclosure of a return position only if the position has at least a reasonable basis. See §§ 1.6662–3(c) and 1.6662–4(e) and (f) for other applicable disclosure rules.

(d) *Definition of reasonable basis*—(1) *In general.* [Reserved].

(2) *Relationship to other standards.* The reasonable basis standard is significantly higher than the not frivolous standard applicable to preparers under section 6694 and defined in § 1.6694–2(c)(2).

**Margaret Milner Richardson,**

*Commissioner of Internal Revenue.*

Approved:

**Leslie Samuels,**

*Assistant Secretary of the Treasury.*

[FR Doc. 94–6236 Filed 3–14–94; 12:20 pm]

BILLING CODE 4830–01–U

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## 26 CFR Part 48

[T.D. 8496]

RIN 1545–AS13

## Diesel Fuel Excise Tax; Registration Requirements Relating to Gasoline and Diesel Fuel Excise Tax; Correction

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Correction to temporary regulations.

**SUMMARY:** This document contains a correction to temporary regulations relating to the tax on diesel fuel and registration requirements for the gasoline and diesel fuel excise taxes. This document was published in the **Federal Register** on Tuesday, November 30, 1993, (58 FR 63069).

**EFFECTIVE DATE:** January 1, 1994.

**FOR FURTHER INFORMATION CONTACT:** Frank Boland, (202) 622–3130, (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

### Background

The temporary regulations provide rules under sections 6011(a), 4081, 4082, 4101(a) and (b), 4101(d), and 6427(n) of the Internal Revenue Code.

### Need for Correction

As published, T.D. 8496 contains an error which may prove to be misleading and is in need of clarification.

### Correction of Publication

Accordingly, the publication of the temporary regulations (T.D. 8496), which was the subject of FR Doc. 93–28647 is corrected as follows:

On page 63076, column 1, § 48.4101–3T (d)(3), line 1, the language "(3) A throughputter, as defined" is corrected to read "(3) A throughputter, as defined in".

**Cynthia E. Grigsby,**

*Chief, Regulations Unit, Assistant Chief Counsel (Corporate).*

[FR Doc. 94–6238 Filed 3–16–94; 8:45 am]

BILLING CODE 4830–01–P

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## DEPARTMENT OF TRANSPORTATION

## Coast Guard

## 33 CFR Part 1

[CGD 92–066]

RIN 2115–AE32

## Recreational Vessel Fees

**AGENCY:** Coast Guard, DOT.

**ACTION:** Technical amendment.

**SUMMARY:** This document contains corrections to regulations published on February 17, 1993 (58 FR 8884). That Interim Final Rule changed the length categories of recreational vessels subject to the recreational vessel fee (RVF) for calendar years 1993 and 1994, as required by Section 501 of the High Seas Driftnet Fisheries Enforcement Act of 1992.

**EFFECTIVE DATE:** October 1, 1992.

**ADDRESSES:** Unless otherwise indicated, documents referenced in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G–LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

**FOR FURTHER INFORMATION CONTACT:** Mr. Carlton Perry, Auxiliary, Boating, and Consumer Affairs Division, (202) 267–0979. A copy of this technical amendment may be obtained by calling the Coast Guard's toll-free Boating Safety Hotline, 1–800–368–5647. In Washington, DC, call 267–0780.

**SUPPLEMENTARY INFORMATION:**

### Background

The Interim Final Rule, as published in the **Federal Register** (58 FR 8884; February 17, 1993), provided amendatory language revising the categories of vessels, by length, that were subject to the Recreational Vessel Fee for calendar years 1993 and 1994. However, the Interim Final Rule also contained incorrect amendatory language revising section 1.30–1 which caused the text of former paragraph (c) and the introductory text of paragraph (d) of that section to be mistakenly deleted. Since the purpose of the rulemaking was only to implement Section 501 of the High Seas Driftnet Fisheries Enforcement Act of 1992, Public Law 102–587, the amendatory language should have redesignated paragraphs (c) and (d) of § 1.30–1 as paragraphs (d) and (e), respectively, rather than causing them to be deleted. This document revises 33 CFR 1.30–1 to redesignate and restore the deleted text as it formerly appeared in the CFR.

### Need for Correction

As published, the Interim Final Rule omitted information on applicability of the fees to vessels operated on navigable waters of the United States.

### List of Subjects in 33 CFR Part 1

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Penalties, Fees.

## Subpart 1.30—Recreational Vessel Fees

Accordingly, 33 CFR supart 1.30 is corrected by making the following correcting amendments.

1. The authority citation for subpart 1.30 continues to read as follows:

**Authority:** 46 U.S.C. 2110; 49 CFR 1.46.

2. Section 1.30–1 is revised to read as follows:

**§ 1.30–1 Applicability.**

(a) This subpart establishes annual fees for recreational vessels, effective for calendar years 1993 and 1994.

(b) The fees established under this subpart for calendar year 1993 do not apply to recreational vessels 21 feet in length and under, public vessels, and vessels deemed public vessels under 14 U.S.C. 827.

(c) The fees established under this subpart for calendar year 1994 do not apply to recreational vessels under 37 feet in length, public vessels, and vessels deemed public vessels under 14 U.S.C. 827.

(d) The fees established under this subpart apply to recreational vessels operated on:

(1) Territorial Seas of the United States;

(2) Internal navigable waters of the United States subject to tidal influence;

(3) Internal navigable waters of the United States, not subject to tidal influence, from which, during most of the boating season, a 16 foot long powered vessel with a displacement-type hull can navigate to waters subject to tidal influence; and

(4) Waters listed in paragraph (e) of this section.

(e) The fees established under this subpart also apply to the following waters.

(1) Colorado River, between Headgate Rock Dam and Davis Dam, including Lake Havasu and the Parker Strip (AZ, CA);

(2) Lake of the Woods (MN);

(3) Lake Roosevelt (WA); and

(4) Lake Tahoe (CA, NV).

Dated: March 2, 1994.

**R.C. Houle,**

*Acting Chief, Office of Navigation Safety and Waterway Services.*

[FR Doc. 94–6269 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–14–M

## LEGAL SERVICES CORPORATION

### 45 CFR Part 1611

### Eligibility: Income Level for Individuals Eligible for Assistance

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Legal Services Corporation ("Corporation") is required by law to establish maximum income levels for individuals eligible for legal assistance. This document updates the specified income levels to reflect the annual amendments to the Federal Poverty Guidelines as issued by the Department of Health and Human Services.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Victor M. Fortuno, General Counsel, Legal Services Corporation, 750 First Street NE., Washington, DC 20002–4250; 202–336–8810.

**SUPPLEMENTARY INFORMATION:** Section 1007(a)(2) of the Legal Services Corporation Act ("Act"), 42 U.S.C. 2996f(a)(2), requires the Corporation to establish maximum income levels for individuals eligible for legal assistance, and the Act provides that other specified factors shall be taken into account along with income. Section 1611.3(b) of the Corporation's regulations establishes a maximum income level equivalent to one hundred and twenty-five percent (125%) of the official Federal Poverty Income Guidelines.

Responsibility for revision of the official Federal Poverty Income Guidelines was shifted in 1982 from the Community Services Administration to the Department of Health and Human Services. The revised figures for 1994 set out below are equivalent to 125% of the current official Poverty Guidelines as set out at 58 FR 6277 (Feb. 10, 1994).

**List of Subjects in 45 CFR Part 1611**

Legal services.

### PART 1611—ELIGIBILITY

1. The authority citation for part 1611 continues to read as follows:

**Authority:** Secs. 1006(b)(1), 1007(a)(1) Legal Services Corporation Act of 1974, 42 U.S.C. 2996e(b)(1), 2996f(a)(1), 2996f(a)(2).

2. Appendix A of part 1611 is revised to read as follows:

APPENDIX A OF PART 1611—LEGAL SERVICES CORPORATION 1994 POVERTY GUIDELINES*

| Size of family unit | All states but Alaska and Hawaii [1] | Alaska [2] | Hawaii [3] |
|---|---|---|---|
| 1 | $9,200 | $11,500 | $10,588 |
| 2 | 12,300 | 15,375 | 14,150 |
| 3 | 15,400 | 19,250 | 17,713 |
| 4 | 18,500 | 23,125 | 21,275 |
| 5 | 21,600 | 27,000 | 24,838 |
| 6 | 24,700 | 30,875 | 28,400 |
| 7 | 27,800 | 34,750 | 31,963 |
| 8 | 30,900 | 38,625 | 35,525 |

*The figures in this table represent 125% of the poverty guidelines by family size as determined by the Department of Health and Human Services.

[1] For family units with more than eight members, add $3,100 for each additional member in a family.

[2] For family units with more than eight members, add $3,875 for each additional member in a family.

[3] For family units with more than eight members, add $3,563 for each additional member in a family.

Dated: March 8, 1994.

**Victor M. Fortuno,**

*General Counsel.*

[FR Doc. 94–6223 Filed 3–16–94; 8:45 am]

BILLING CODE 7050–01–M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MM Docket No. 92–313; RM–8140]**

### Radio Broadcasting Services; Central, New Mexico

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Mel-Mike Enterprises, Inc., substitutes Channel 237C1 for Channel 237C2 at Central, Mew Mexico, and modifies the license of Station KNUW to specify operation on the higher class channel. See 58 FR 5322, January 21, 1993. Channel 237C1 can be allotted to Central in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) northwest, at coordinates North Latitude 32–52–15 and West Longitude 108–18–57, to accommodate petitioner's desired transmitter site and avoid short-spacings to Stations KKRK, Channel 237A, Douglas, Arizona, and KLAQ, Channel 238C, El Paso, Texas. Mexican concurrence has been received since Central is located within 320 kilometers (199 miles) of the U.S.-Mexican border. With this action, this proceeding is terminated.

**EFFECTIVE DATE:** April 28, 1994.

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

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 92–313, adopted March 7, 1994, and released March 14, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street NW., suite 140, Washington, DC 20037.

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

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

### PART 73—[AMENDED]

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

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

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under New Mexico, is amended by removing Channel 237C2 and adding Channel 237C1 at Central.

Federal Communications Commission.

**Victoria M. McCauley,**

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

[FR Doc. 94–6227 Filed 3–16–94; 8:45 am]

BILLING CODE 6712–01–M

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 672

**[Docket No. 931199–4042; I.D. 031194A]**

### Groundfish of the Gulf of Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Modification of a closure.

**SUMMARY:** NMFS is rescinding the closure to directed fishing for Atka mackerel in the Western Regulatory Area of the Gulf of Alaska (GOA) to allow a 48-hour directed fishery. This action is necessary to fully utilize the total allowable catch (TAC) of Atka mackerel in that area.

**EFFECTIVE DATE:** From 12 noon, Alaska local time (A.l.t.), March 14, 1994, through 12 noon, A.l.t., March 16, 1994, the closure to directed fishing for Atka mackerel in the Western Regulatory Area of the GOA is rescinded; and effective 12 noon A.l.t. March 16, 1994, through 12 midnight, A.l.t. December 31, 1994, directed fishing for Atka mackerel in the Western Regulatory Area of the GOA is closed.

**FOR FURTHER INFORMATION CONTACT:** Andrew N. Smoker, Fishery Biologist, Fisheries Management Division, NMFS, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** The groundfish fishery in the GOA Exclusive Economic Zone is managed by the Secretary of Commerce according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 672.

In accordance with § 672.20(c)(1)(ii)(B), the annual TAC for Atka mackerel in the Western Regulatory Area of the GOA, was established by the final 1994 groundfish specifications (59 FR 7647, February 16, 1994), as 2,500 metric tons (mt). The final 1994 groundfish specifications also closed the directed fishery for Atka mackerel in the Western Regulatory Area of the GOA under § 672.20(c)(2).

The Regional Director, Alaska Region, NMFS, in accordance with § 672.20(c)(2)(ii), has determined that the TAC of Atka mackerel in the Western Regulatory Area of the GOA is sufficient to allow a 48-hour directed fishery. Therefore, NMFS is rescinding the closure to directed fishing for Atka mackerel in the Western Regulatory Area of the GOA as of 12 noon A.l.t., March 14, 1994.

In accordance with § 672.20(c)(2)(ii), the Regional Director has established a directed fishing allowance of 2,300 mt, with the remaining 200 mt to be taken as incidental catch in directed fishing for other species in the area. The Regional Director has determined that the directed fishing allowance will be attained by a 48-hour directed fishery for Atka mackerel. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Western Regulatory Area of the GOA, effective from 12 noon, A.l.t., March 16, 1994, until 12 midnight, A.l.t., December 31, 1994.

#### Classification

This action is taken under § 672.20.

#### List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: March 11, 1994.

**David S. Crestin,**

*Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 94–6229 Filed 3–14–94; 2:54 pm]

BILLING CODE 3510–22–P

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### 50 CFR Part 672

**[Docket No. 931199–4042; I.D. 031494A]**

### Groundfish of the Gulf of Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Closure.

**SUMMARY:** NMFS is closing the directed fishery for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the allocation of Pacific cod for the inshore component in this area.

**EFFECTIVE DATE:** 12 noon, Alaska local time (A.l.t.), March 16, 1994, through 12 midnight, A.l.t., December 31, 1994.

**FOR FURTHER INFORMATION CONTACT:** Andrew N. Smoker, Resource Management Specialist, Fisheries Management Division, NMFS, (907) 586–7228.

**SUPPLEMENTARY INFORMATION:** The groundfish fishery in the GOA exclusive economic zone is managed by the Secretary of Commerce according to the Fishery Management Plan for Groundfish of the GOA (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 672.

In accordance with § 672.20(c)(1)(ii), the allocation of Pacific cod for the inshore component in the Central Regulatory Area, GOA, was established by the final 1994 groundfish specifications (59 FR 7647, February 16, 1994), as 28,125 metric tons (mt).

The Director of the Alaska Region, NMFS (Regional Director), has determined, in accordance with § 672.20(c)(2)(ii), that the allocation of Pacific cod total allowable catch for the inshore component in the Central Regulatory Area, GOA, soon will be reached. The Regional Director established a directed fishing allowance of 23,625 mt, with consideration that 4,500 mt will be taken as incidental catch in directed fishing for other species in the Central Regulatory Area. The Regional Director has determined that the directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by operators of vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area, effective from 12 noon, A.l.t., March 16, 1994, through 12 midnight, A.l.t., December 31, 1994.

Directed fishing standards for applicable gear types may be found in the regulations at § 672.20(g).

#### Classification

This action is taken under 50 CFR 672.20.

#### List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: March 14, 1994.

**Richard H. Schaefer,**

*Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 94–6262 Filed 3–14–94; 2:54 pm]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 59, No. 52
Thursday, March 17, 1994

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

### Animal and Plant Health Inspection Service

### 7 CFR Part 301

[Docket No. 93–153–1]

### Citrus Canker Regulations; Quarantined Areas and Survey Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the citrus canker regulations by removing the areas in Highlands and Manatee Counties, FL, from the list of quarantined areas and by removing the area in Hillsborough County, FL, from the list of survey areas. No evidence of citrus canker has been found in these areas for at least 2 years. This action appears necessary to relieve regulatory restrictions which are no longer necessary.

DATES: Consideration will be given only to comments received on or before April 18, 1994.

ADDRESSES: Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 93–153–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Poe, Operations Officer, Domestic and Emergency Operations, Plant Protection and Quarantine, APHIS, USDA, room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–6365.

SUPPLEMENTARY INFORMATION:

#### Background

Citrus canker is a plant disease caused by strains of the bacterium *Xanthomonas campestris* pv. *citri*. The disease is known to affect plants and plant parts, including fresh fruit, of citrus and citrus relatives (Family Rutaceae). It can cause defoliation and other serious damage to the leaves and twigs of susceptible plants. It may also make the fruit of infected plants unmarketable by causing lesions on the fruit. Infected fruit may also drop from trees before reaching maturity. The Asiatic strains of *Xanthomonas campestris* pv. *citri* (A strains) are aggressive strains.

In the United States, Florida is the only State where citrus canker has been present in recent years. Regulations to prevent the interstate spread of citrus canker from Florida are contained in 7 CFR 301.75–1 through 301.75–14, "Subpart—Citrus Canker" (referred to below as "the regulations").

The regulations designate certain areas in Florida as quarantined areas and impose restrictions on the interstate movement of regulated articles from and through quarantined areas. The regulations also designate survey areas, which surround the quarantined areas. Survey areas undergo close monitoring by Animal and Plant Health Inspection Service (APHIS) and State inspectors.

The regulations currently designate certain areas in Highlands and Manatee Counties as quarantined for citrus canker. An area in Hillsborough County is also currently designated in the regulations as a survey area.

The quarantined area in Highlands County was established in response to the detection of citrus canker caused by the A strains in a commercial grove in October 1990. The area in Manatee County has been quarantined since June 1986 because of the detection of citrus canker caused by the A strains. All the quarantined areas and all the survey areas have been surveyed for citrus canker on a regular basis since the initial detections. No evidence of citrus canker has been observed in the Highlands County quarantined area since June 19, 1991. No citrus canker has been found in the Manatee County quarantined area since January 19, 1992, and no evidence of citrus canker has been observed in the Hillsborough County survey area at any time. APHIS believes, therefore, that it is safe to conclude that citrus canker is not present in any of these areas, and that it is no longer necessary to require any special requirements to be met within these areas or to limit the interstate movement from or through these areas of regulated articles.

Based on these facts, we are proposing to remove the areas in Highlands and Manatee Counties from the list of quarantined areas (§ 301.75–4(a)) and to remove the area in Hillsborough County from the list of survey areas (§ 301.75–4(d)(1)). The removal of these areas will remove all quarantined areas and survey areas for citrus canker in the United States.

#### Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

If this proposed rule is adopted, all areas in Highlands and Manatee Counties would be released from their classification as quarantined areas, and the area in Hillsborough County would be released from its classification as a survey area. If the proposed rule is adopted, citrus plants, plant parts, citrus fruit, and other regulated articles from currently quarantined areas would be allowed to be moved interstate to other areas in the United States, including commercial citrus-producing areas, and regulated articles would be allowed to be moved interstate through quarantined areas. Requirements which apply to survey areas would also be removed.

We have determined that 237 individuals and businesses would be economically affected by the proposed changes. These individuals and businesses include: Lawn care companies (82), grove owners (74 persons who own 2,177 acres), retail nursery outlets (21), fruit processors (15), fruit harvesting contractors (12), fruit shippers (12), fresh fruit packing houses (11), nurseries (9), and seed extractors (1). APHIS believes that virtually all of these individuals and businesses are small entities.

These individuals and businesses are all currently required to comply with the regulations. This results in inconvenience and in some cases

expenses that are not encountered by similar individuals and businesses in other parts of the United States.

It should be noted that the costs of compliance are, in many cases, minimal, and that the individuals and businesses affected by the regulations represent less than one percent of all similar individuals and businesses in Florida.

One of the largest groups of affected individuals and business is grove owners. We estimate that this rule change would save each affected grove owner approximately $25 per acre, per year, by removing requirements for cleaning and disinfecting vehicles, equipment, and personnel leaving their groves. These costs represent a small percentage of the owners' overall production costs.

In addition, this proposed rule would allow grove owners to expand the areas into which their fruit could be moved interstate, in that they would be allowed to move fruit interstate to commercial citrus-producing areas. We anticipate that any impact from this rule change would be negligible, as approximately 90 percent of all of Florida's citrus production is for the juice market, and only about 10 percent is for the fresh fruit market.

In addition to grove owners in the quarantined areas, truckers, packing and processing plants, and lawn services within the currently quarantined areas would no longer be subject to inspection and would no longer need to carry out activities now required by the regulations. This would result in financial savings to these entities. This also means that groves producing regulated fruit for interstate movement, regulated trees, and regulated plants in the current survey area would no longer be subject to regular inspections for citrus canker. This change would reduce the burden on APHIS and State agencies, which currently provide inspectors to perform regular inspections in the survey area.

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

**Executive Order 12372**

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

**Executive Order 12778**

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 7 CFR Part 301**

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly 7 CFR part 301 would be amended as follows:

## PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 would continue to read as follows:

**Authority:** 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 301.75–4, paragraphs (a) and (d)(1) would be revised to read as follows:

**§ 301.75–4 Quarantined areas.**

(a) The following States or portions of States are designated as quarantined areas: Citrus canker is not known to exist in the United States.

* * * * *

(d) * * *

(1) *Survey area.* In the following area, inspections are conducted as required by paragraphs (d)(1)(i), (d)(1)(ii), and (d)(1)(iii) of this section: Citrus canker is not known to exist in the United States.

* * * * *

Done in Washington, DC, this 11th day of March 1994.

**Patricia Jensen,**

*Acting Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 94–6181 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–34–P

**Agricultural Marketing Service**

**7 CFR Part 955**

**[Docket No. FV93–955–3PR]**

## Vidalia Onions Grown in Georgia; Interest Charges on Delinquent Assessments

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

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** This rule proposes to revise the administrative rules and regulations established under the Federal marketing order for Vidalia onions grown in Georgia. This proposal would allow the Vidalia Onion Committee (Committee) to impose interest charges on handler assessments that are paid late. This proposal would encourage handlers to pay assessments in a timely manner. This proposal is based on a unanimous recommendation of the Committee, which is responsible for local administration of the order.

**DATES:** Comments which are received by April 1, 1994 will be considered prior to any finalization of this proposed rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent in triplicate to the Docket Clerk, Marketing Order Administrative Branch, F&V, AMS, USDA, Room 2523–S, P.O. Box 96456, Washington, DC 20090–6456, FAX number (202) 720–5698. Comments should reference this docket number, the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Shoshana Avrishon, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2536–S., P.O. Box 96456, Washington, DC 20090–6456; telephone (202) 720–3610, or FAX (202) 720–5698; or William G. Pimental, Marketing Specialist, Southeast Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883–2276; (813) 299–4770, or FAX (813) 299–5169.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement and Order No. 955 (7 CFR part 955) regulating the handling of Vidalia onions grown in Georgia. The marketing agreement and order are authorized by the Agricultural Marketing Agreement Act of 1937, as

amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The U.S. Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This proposal is not intended to have retroactive effect. This proposal will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

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

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

There are approximately 145 handlers of Vidalia onions that are subject to regulation under the marketing order and approximately 250 producers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than $3,500,000, and small agricultural producers have been defined as those having annual receipts of less than $500,000. The majority of the Vidalia onion handlers and producers may be classified as small entities.

This rule proposes adding a new § 955.142 to Subpart— Administrative Rules and Regulations and is based on a unanimous recommendation of the Committee and other available information.

Section 955.42(f), of the marketing order provides authority for the Committee to impose a late payment or an interest charge or both, on any handlers who fail to pay assessments in a timely manner.

On November 18, 1993, the Committee met to discuss, among other things, the difficulty it has experienced in collecting assessments from some handlers. It reported that during the past season approximately 20 handlers paid assessments late. When this occurred, handlers who paid their assessments on time were placed in an unfair situation compared to those handlers who failed to do so. The delinquent handlers were able to use the money which was due the Committee for other financial obligations and thus eliminate interest charges on money that they might otherwise have had to borrow to pay those other financial obligations. This money could also have been invested to earn interest for the delinquent handlers.

At the meeting, the Committee determined that it was important to encourage all handlers to pay their assessments promptly, thereby eliminating these inequities and avoiding additional and unnecessary collection costs. The Committee recommended the following proposal. If a handler does not pay all of the handler's assessments 30 days after the date of billing, the unpaid portion of the account would be considered delinquent and subject to interest charges at the rate of one percent per month. Handlers would be charged interest charges on unpaid assessments and interest charges on any unpaid interest charges until the late obligation is paid in full. The Committee assesses handlers on a monthly basis.

The Committee believes that the proposed interest charge is high enough to discourage handlers from delaying assessment payments. Thus, this proposal is expected to encourage all handlers to pay their assessments in a timely manner, and facilitate the collection of funds to pay expenses necessary for the maintenance and functioning of the Committee.

Based on the above, the Administrator of the AMS has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

A period of fifteen days is provided for all interested persons to submit written comments. The Committee would like the proposal to be effective as soon as possible so that efforts to encourage timely payments can be implemented early in 1994. All comments timely received will be considered before issuing a final decision on this proposal.

**List of Subjects in 7 CFR Part 955**

Marketing agreements, Onions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 955 is proposed to be amended as follows:

## PART 955—VIDALIA ONIONS GROWN IN GEORGIA

1. The authority citation for 7 CFR part 955 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 955.142 is proposed to be added to read as follows:

**§ 955.142 Delinquent assessments.**

Each handler shall pay interest of one percent per month on any unpaid assessments levied pursuant to section 955.42 and any accrued unpaid interest beginning 30 days after date of billing, until the delinquent handler's assessment plus applicable interest has been paid in full.

Dated: March 11, 1994.

**Martha B. Ransom,**

*Acting Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 94–6150 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–02–P

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## NUCLEAR REGULATORY COMMISSION

## 10 CFR Parts 170 and 171

**[Docket No. PRM–170–3]**

## American College of Nuclear Physicians and the Society of Nuclear Medicine; Denial of Petition for Rulemaking

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; denial.

**SUMMARY:** The Nuclear Regulatory Commission ("NRC" or "Commission") received a petition for rulemaking submitted by the American College of Nuclear Physicians ("ACNP") and the Society of Nuclear Medicine ("SNM") ("petitioners"). The petitioners requested that the Commission amend

its regulations governing the user and annual fees charged to their members due to increases in those fees. Among the specific requests contained in the petition were to establish a generic exemption for medical licensees who provide services in nonprofit institutions and to allow NRC licensees a greater voice in the development of new regulations by the NRC. After careful consideration, the Commission has decided not to adopt the proposals made in the petition.

**ADDRESSES:** Copies of the petition for rulemaking, the public comments received, and the NRC's letter to the petitioner are available for public inspection or copying in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC 20555.

**FOR FURTHER INFORMATION CONTACT:** L. Michael Rafky, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone 301–504–1974.

**SUPPLEMENTARY INFORMATION:**

I. Background.
II. Responses to comments.

## I. Background

On February 18, 1992, the NRC received a petition for rulemaking submitted by petitioners ACNP and SNM. The petitioners requested that the NRC amend 10 CFR parts 170 and 171 which govern the annual and user fees imposed on most NRC materials licensees by the Commission since the advent of 100 percent fee recovery in FY 1991. The petitioners requested these amendments because of the substantial adverse impacts experienced by their members following increases in the NRC's user and annual fees.

On May 12, 1992 (57 FR 20211), the NRC published a notice in the **Federal Register** announcing receipt of the petition. In that notice, the NRC stated that it would consider the issues raised by petitioners within the context of the review and evaluation of the fee program for FY 1993 conducted as part of the NRC's continued implementation of Public Law 101–508, the Omnibus Budget Reconciliation Act of 1990, as amended (OBRA–90). On October 13, 1992 (57 FR 46818), the NRC published a notice requesting public comment on the issues raised in the petition.

The NRC received nearly 100 comments in response to this request, with the vast majority in favor of granting the petition. After careful consideration of the comments, the Commission has decided to deny the petition for rulemaking, for reasons stated below.

## II. Responses to Comments

1. *Comment.* The majority of commenters simply restated their support for some or all of the requested changes in NRC policy detailed in the petition. In their petition, ACNP and SNM stated that NRC fee increases under the 100 percent recovery regime were adversely affecting their members' practice of nuclear medicine, in the process harming the societal benefits which stem from that field of medicine. The petitioners claimed that they could not recoup the costs of NRC fees because Medicare reimbursement levels are inadequate and because competing nuclear medicine alternatives are not regulated (or charged fees) by the NRC. Petitioners then compared their treatment under the NRC's fee rules to that of nonprofit educational institutions, power reactors and small entities, all of whom petitioners claimed receive special treatment by the NRC, and argued that for exemption purposes medical licensees should not be lumped together with all other materials licensees.

For these reasons, ACNP and SNM requested that the Commission take the following policy actions:

(1) Grant a generic exemption for medical services provided in nonprofit institutions, such as hospitals, similar to that granted to nonprofit educational institutions;

(2) Provide individualized exemption criteria for medical licensees, by means of a "simple template for structuring exemption requests;"

(3) Adopt a sliding scale of minimum fees that grants nuclear physicians more relief than the current small entity classification (which grants relief to physicians in private practice with less than $1,000,000 in gross receipts); and

(4) Give NRC licensees a greater voice in the NRC's decisionmaking process for developing new regulatory programs.

In that regard, petitioners suggested that the criteria contained in the NRC's backfit rule be applied to the development of all new regulatory programs. That is, if a regulation is not necessary for the adequate protection of the public health and safety, the NRC would be required to show that the rule would substantially increase safety and that its benefits outweigh its costs.

*Response.* The Commission does not believe that the analogy between colleges and universities and medical services provided in a nonprofit institution is a valid one. The Commission recently decided to reinstate a longstanding (but temporarily withdrawn) fee exemption for nonprofit educational institutions. The key to educational institutions' singular treatment, however, is not their nonprofit status, nor the fact that they provide valuable social benefits; rather, it is the existence of certain structural market failures in educational institutions' production of new knowledge. In other words, colleges and universities produce new knowledge primarily through basic research, and disseminate it (essentially for free) to all who want it, without receiving compensation from those benefitting. In economic terms, this new knowledge is often termed a "public good." [1]

Two defining characteristics of a public good are its nondepletability and nonexcludability. That is, one person's acquisition of knowledge does not reduce the amount available to others; further, it is not efficient—and often is impossible, as a practical matter—to prevent others from acquiring it at a zero price. These characteristics make it difficult to recoup the costs of producing new knowledge. Because the value of a public good may be very great, but the costs of producing it impossible to recapture, public subsidies may be necessary for production to occur at all. The Commission has decided to exempt nonprofit educational institutions from annual fees to advance continued production of new knowledge.

By contrast, medical practitioners have the capability of obtaining compensation for the benefits they provide. Unlike new knowledge, medical services are both depletable and excludable. The benefits of medicine, while unquestionably significant, are therefore a private rather than a public good, in economic terms. The Commission believes, in sum, that the market failure considerations that apply to educational institutions' attempts to produce new knowledge simply do not apply to medical practitioners. There is no structural barrier to the recovery of costs incurred in producing the benefits of medicine. The situation of the medical practitioners is not fundamentally different from that of the for-profit licensees whose claims for exemption on grounds of inability to pass through costs the Commission has rejected in the past. (See 58 FR 38666–68; July 20, 1993.)

[1] The Commission's analysis of this aspect of the petition is based in part on a memorandum prepared by an NRC consultant on the topic of externalized benefits and public goods. This memorandum has been placed in the NRC Public Document Room for examination by any interested persons. See Memorandum to NRC Staff from Stephen J.K. Walters, Professor of Economics, Loyola College (Md.), dated January 4, 1994.

In this regard, the Commission notes petitioners' claim that Medicare may not account for NRC fees when reimbursing physicians and hospitals. The Commission is also aware of pricing pressures caused by competing nuclear medicine modalities not regulated (or charged fees) by the NRC. However, as the Commission explained in its FY 1993 fee rule, it is impracticable for this agency to evaluate the merits of such empirical claims regarding the ability of licensees to pass through fee costs to their customers. (See 58 FR 38666, 38667–68; July 20, 1993.) The Commission "does not believe it has the expertise or information needed to undertake the subtle and complex inquiry whether in a market economy particular licensees can or cannot easily recapture the costs of annual fees from their customers." (58 FR 38667; July 20, 1993.) This statement applies equally to medical licensees as it does to all others whose products cannot be characterized as a "public good."

Addressing the petition's second major point, the Commission disagrees with those commenters who call for new individualized exemption criteria for medical licensees. The Commission believes that the current exemption process for materials licensees, as codified in 10 CFR 171.11(d), provides medical licensees with the opportunity to request an exemption by means of detailing their particularized circumstances.

Both exemption procedures (power reactor and materials licensee) contained in § 171.11 allow the requester to inform the Commission of "[a]ny * * * relevant matter that the licensee believes" should impact on the exemption decision. This allows the Commission flexibility to consider each situation on its own merits. Were the Commission to attempt to establish specific criteria for each type of materials licensee, itself a daunting task, it might then be prevented from considering factors which did not fall precisely within those enumerated. And if the Commission retained the open-ended provision quoted above, it would have expended considerable time and resources to little purpose, as licensees could make the same claims under new criteria that they can at this time.

Petitioners also complained that the NRC had established a high threshold for granting materials exemption requests. In this regard, the Commission explained in the first 100 percent fee recovery rule, in FY 1991, that because it was statutorily required to collect 100 percent, it could not easily exempt licensees from fees. If one licensee or class of licensees is exempted, those fees must then be placed on other licensees, increasing their fee burden. It is for that reason that the Commission only grants exemptions in exceptional circumstances. (See 56 FR 31472, 31485; July 10, 1991.)

Petitioners' third request, that the Commission establish a sliding scale of minimum fees based on the size of the licensee, which "reflects the unique constraints on physicians", also is denied. In its FY 1991 fee rule, the Commission explained in great detail why it devised its fee schedules in the manner it did, basing fees on classes of licensees rather than licensee-by-licensee. (See FY 1991 Final Rule, 56 FR 31472, and Appendix A to the Final Rule; July 10, 1991.) There is no information contained in either the petition or comments on the petition which would lead the Commission to reconsider this approach, and therefore the Commission must deny this aspect of the petition as well.

However, the Commission intends to re-examine the size standards it uses to define small entities within the context of compliance with the Regulatory Flexibility Act. The Commission will conduct this review within the context of revision of the small business size standards proposed by the Small Business Administration ("SBA") (58 FR 46573; September 2, 1993). The Commission will not complete this review until the SBA promulgates its final rule on this matter. These activities may result in a revised definition of "small entity" more favorable to petitioners.

Finally, the Commission denies petitioners' request that licensees be provided more power over the development of NRC regulations, and that a new backfit rule incorporating cost-benefit analysis be instituted to evaluate the agency's regulatory programs. The Commission denied similar requests in its FY 1991 fee rule, explaining that the NRC is not exempt "from the normal Government review and budgetmaking process." The Commission at that time pointed out that "the Government is not subject to audit by outside parties," and that "[a]udits are performed by the General Accounting Office or the agency's Inspector General, as appropriate." (56 FR 31472, 31482; July 10, 1991.) Additionally, the NRC complies with Federal regulations such as the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) that require agency analysis of the economic effects of new regulations on licensees. The NRC Staff also prepares detailed cost-benefit analyses to justify any new regulatory requirements; these analyses are carefully reviewed by the Commission. The Commission has seen nothing either in the petition or comments on the petition that would lead it to change its approach in this area. The Commission would like to emphasize, however, that licensees are always welcome and expected to comment on proposed rulemakings, including the accompanying cost-benefit analyses, and that such comments, along with petitions such as the present one, workshops, meetings of the Advisory Committee on the Medical Use of Isotopes, and the day-to-day interaction between licensees and the agency, in the Commission's view provide an adequate and successful method of keeping each group apprised of the other's concerns.

2. *Comment.* The Commission received a potpourri of comments on other aspects of the petition. A number of commenters disagreed with the petition, arguing that medical licensees should not receive an exemption, as the costs of such an exemption would be borne by other licensees to whom the additional fees would have no relation, and that every licensee should pay its fair share. Other commenters stated that the fees should be abolished entirely, which would remove the dilemma over granting exemptions. One commenter argued for basing an exemption on the function for which the license is utilized, not the function of the licensed organization. Some commenters argued that fees should be based on factors such as the amount of radioactive sources possessed, the number of procedures performed or the size of the nuclear department within a hospital. Certain commenters suggested expanding the number of exemptions to include Government agencies, along with those licensees which provide products and services to medical and educational entities. One commenter requested that the NRC take Agreement State schedules into account when setting its own fee schedule. Another commenter raised concerns as to the expense of NRC contractors and the quality of NRC regulation. And a few commenters urged the NRC to reevaluate or abolish its then-recently instituted Quality Management (QM) Program.

*Response.* As the Commission stated above, it is denying this petition for rulemaking, and therefore not exempting medical licensees for services provided in a nonprofit institution.

The Commission cannot abolish its fees unilaterally, as the requirement to collect 100 percent of the agency's

annual budget authority through user and annual fees is statutorily mandated by Congress, see section 6101 of OBRA–90.

The Commission has explained in the past why it did not believe that basing fees on factors such as number of sources or the size of the facility would result in a fairer allocation of the 100 percent recovery requirement. (See FY 1991 Final Rule, 56 FR 31472; July 10, 1991, and Appendix A to that Final Rule; and Limited Revision of Fee Schedules, 57 FR 13625; April 17, 1992.) The Commission has seen no evidence in the petition or comments on the petition which would lead it to change its current approach of charging fees by class of licensee. For reasons similar to those stated in the earlier rules cited above, the Commission does not believe it would be feasible to base an exemption on the function for which a license is utilized rather than on the function of the licensed organization.

The Commission has also explained in prior rulemakings why it has decided to charge Federal agencies annual fees, and has seen nothing in comments on the petition which would cause it to change its position on this policy matter. (See FY 1991 Final Rule, 56 FR 31472, 31474–45; July 10, 1991.) The Commission also does not believe that the exemption for nonprofit educational institutions should be expanded to cover those private companies supplying services and products to medical or educational licensees. The fact that the cost of these services and products impacts upon exempt licensees is not sufficient reason to exempt private for-profit licensees. By exempting nonprofit educational institutions from fees, the Commission has addressed the direct impact of its fees on those institutions. Additionally, the Commission has discussed in both prior and current rulemakings the necessity of a high threshold for exemption requests and the overarching requirement to collect as close to 100 percent of its annual budget authority as possible; these factors remain valid here.

While the Commission acknowledges that in many cases Agreement States base their fee schedules in some measure on the NRC's fee schedule, the NRC cannot do the reverse. The NRC must conform its fees to the 100 percent recovery requirements mandated by OBRA–90, independent of Agreement State fee schedules over which the agency has no control.

Finally, the Commission believes that comments on the agency's QM program, NRC contracting practices and the overall quality of NRC regulation are beyond the scope of this notice. However, the Commission notes that the agency's regulation codifying its QM program was challenged and ultimately upheld in court. See *American College of Nuclear Physicians and Society of Nuclear Medicine* v. *United States Nuclear Regulatory Commission and United States of America*, No. 91–1431, slip op. at 2 (DC Cir. May 22, 1992) (per curiam).

Because each of the issues raised in the petition has been substantively resolved, the NRC has denied this petition.

Dated at Rockville, Maryland this 11th day of March, 1994.

For the Nuclear Regulatory Commission.

**Samuel J. Chilk,**

*Secretary of the Commission.*

[FR Doc. 94–6232 Filed 3–16–94; 8:45 am]

BILLING CODE 7590–01–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 93–NM–216–AD]**

### Airworthiness Directives; McDonnell Douglas Model MD–11 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the supersedure of an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–11 series airplanes, that currently requires inspections to verify the installation of shear pins, shear pin retainers, and shear pin retainer attaching parts in the aft end of the center pylon thrust link, and repair, if necessary. That AD also provides an optional terminating action, which, if accomplished, would terminate the repetitive inspections. That AD was prompted by a report that both shear pins that attach the aft end of the center engine pylon thrust link to the tail pylon were missing. This action would add inspections to verify that the shear pin retainer attaching parts are tightened within specified limits; and a terminating modification for those inspections. This action would also remove the optional terminating action, and expand the applicability of the rule to include additional airplanes. The actions specified by the proposed AD are intended to prevent structural damage to the engine mount structure, which could lead to loss of airplane components.

**DATES:** Comments must be received by May 10, 1994.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–216–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 McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, CA 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Dept. L51, M.C. 2–98. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office (ACO), 3229 East Spring Street, Long Beach, California.

**FOR FURTHER INFORMATION CONTACT:** Wahib Mina, Aerospace Engineer, Airframe Branch, ANM–121L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office (ACO), 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5324; fax (310) 988–5210.

**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 93–NM–216–AD." The postcard will be date 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. 93–NM–216–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

**Discussion**

On October 14, 1992, the FAA issued AD 92–23–03, Amendment 39–8403 (57 FR 47991, October 21, 1992), applicable to certain McDonnell Douglas Model MD–11 series airplanes, to require repetitive visual inspections to verify the installation of shear pins, shear pin retainers, and shear pin retainer attaching parts at the aft end of the center engine (No. 2) pylon thrust link; repair of any discrepancy found; and submission of a report of inspection findings to the FAA. That AD also provides an optional terminating action for the repetitive inspections. That AD was prompted by a report that both shear pins that attach the aft end of the center engine pylon thrust link to the tail pylon were missing. The requirements of that AD are intended to prevent structural damage to the engine mount structure, which could lead to loss of airplane components.

Since the issuance of AD 92–23–03, one operator has reported that, during the initial visual inspection conducted in accordance with that AD, all bolts and nuts were found installed; however, during a subsequent repetitive inspection, one nut and one bolt that attach the retainer were missing. If the retainers are missing, the shear pins may also be missing and the engine thrust loads will be improperly distributed to the airplane structure. This condition, if not corrected, could result in structural damage to the engine mount structure, which could lead to loss of airplane components.

The FAA has reviewed and approved McDonnell Douglas MD–11 Alert Service Bulletin A54–31, Revision 1, dated June 3, 1993. This service bulletin revision adds procedures for performing repetitive inspections to verify that the shear pin retainer attaching parts are tightened within specific limits. This service bulletin revision also describes procedures for replacement of the existing retainer and attaching parts with a new retainer and attaching parts. Incorporation of this replacement eliminates the need for repetitive visual inspections and repetitive tightness verifications. The effectivity listing of this service bulletin revision includes 34 additional airplanes identified as being subject to the addressed unsafe condition.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 92–23–03 to continue to require repetitive visual inspections to verify the installation of the shear pins, the shear pin retainers, and the shear pin retainer attaching parts in the aft end of the center engine (No. 2) pylon thrust link. The proposed AD would add repetitive inspections to verify that the shear pin retainer attaching parts are tightened within specified limits. If any shear pin, shear pin retainer, or shear pin retainer attaching part is missing during any inspection, this proposal would continue to require repair in accordance with a method approved by the FAA. The "optional terminating action" provided by AD 92–23–03, which consists of a one-time verification for tightness of the nuts of the four shear pin retainer attaching bolts, would no longer be provided in the proposed rule.

The proposed AD would also require eventual replacement of the existing retainer and attaching parts with a new retainer and attaching parts. When accomplished, this replacement would be considered terminating action for the currently required repetitive visual inspections and the proposed repetitive verifications of tightness. The actions would be required to be accomplished in accordance with the revised alert service bulletin described previously.

This proposal would also require that operators submit a report to the FAA of any discrepancy found during any inspection.

Additionally, this proposal would expand the applicability of the rule to include additional airplanes that have been identified as being subject to the addressed unsafe condition.

There are approximately 94 Model MD–11 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 42 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 16 work hours per airplane to accomplish the proposed actions and that the average labor rate is $55 per work hour. Required parts would be provided at no cost to operators. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $36,960, or $880 per airplane.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

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 "significant regulatory action" under Executive Order 12866; (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 removing amendment 39–8403 (57 FR 47991, October 21, 1992), and by adding a new airworthiness directive (AD), to read as follows:

**McDonnell Douglas:** Docket 93–NM–216–AD. Supersedes AD 92–23–03, Amendment 39–8403.

*Applicability:* Model MD–11 series airplanes; as listed in McDonnell Douglas MD–11 Alert Service Bulletin A54–31, dated September 17, 1992, and McDonnell Douglas MD–11 Alert Service Bulletin A54–31, Revision 1, dated June 3, 1993; certificated in any category.

*Compliance:* Required as indicated, unless accomplished previously.

To prevent structural damage to the engine mount structure, which could lead to loss of airplane components, accomplish the following:

(a) For airplanes listed in McDonnell Douglas MD–11 Alert Service Bulletin A54–31, dated September 17, 1992: Within 15 days after November 5, 1992 (the effective date of AD 92–23–03, Amendment 39–8403), unless previously accomplished within the last 30 days, perform a visual inspection of the thrust link of the center engine forward mount to verify installation of the shear pins, the shear pin retainers, and the shear pin retainer attaching parts in accordance with McDonnell Douglas MD–11 Alert Service Bulletin A54–31, dated September 17, 1992, or Revision 1, dated June 3, 1993.

(1) If shear pins, shear pin retainers, and shear pin retainer attaching parts are installed, repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 60 days in accordance with the service bulletin until accomplishment of paragraph (d) of this AD.

(2) If any shear pin, shear pin retainer, or shear pin retainer attaching part is missing, prior to further flight, repair in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 60 days in accordance with the service bulletin until accomplishment of paragraph (d) of this AD.

(b) For airplanes listed in McDonnell Douglas MD–11 Alert Service Bulletin A54–31, Revision 1, dated June 3, 1993, and not subject to the requirements of paragraph (a) of this AD: Within 15 days after the effective date of this AD, unless previously accomplished within the last 30 days, perform a visual inspection of the thrust link of the center engine forward mount to verify installation of the shear pins, the shear pin retainers, and the shear pin retainer attaching parts in accordance with McDonnell Douglas MD–11 Alert Service Bulletin A54–31, Revision 1, dated June 3, 1993.

(1) If shear pins, shear pin retainers, and shear pin retainer attaching parts are installed, repeat the inspection required by paragraph (b) of this AD thereafter at intervals not to exceed 60 days in accordance with the service bulletin until accomplishment of paragraph (d) of this AD.

(2) If any shear pin, shear pin retainer, or shear pin retainer attaching part is missing, prior to further flight, repair in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Repeat the inspection required by paragraph (b) of this AD thereafter at intervals not to exceed 60 days in accordance with the service bulletin until accomplishment of paragraph (d) of this AD.

(c) Within 18 months after the effective date of this AD, verify that the tightness of the shear pin retainer attaching parts is within the limits specified in accordance with McDonnell Douglas MD–11 Alert Service Bulletin A54–31, Revision 1, dated June 3, 1993. Repeat the verification required by paragraphs (c) of this AD thereafter at intervals not to exceed 18 months in accordance with the service bulletin until accomplishment of paragraph (d) of this AD.

(d) Within 3 years after the effective date of this AD, replace the existing retainer and bolts with safety wire with a new retainer and new bolts with safety wire in accordance with McDonnell Douglas MD–11 Alert Service Bulletin A54–31 Revision 1, dated June 3, 1993. Accomplishment of this replacement constitutes terminating action for the repetitive actions required by paragraphs (a), (b) and (c) of this AD.

(e) Within 15 days after detecting any discrepancy during any inspection or verification action required by this AD, submit a report of the inspection results to the Manager, Los Angeles ACO, FAA, Transport Airplane Directorate, 3229 East Spring Street, Long Beach, California 90806–2425; fax (310) 988–5210. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

(f) 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, Los Angeles ACO, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

**Note:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(g) Special flight permits may be issued in accordance with Federal Aviation Regulations (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 March 11, 1994.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 94–6209 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–13–U

**14 CFR Part 39**

**[Docket No. 94–NM–05–AD]**

## Airworthiness Directives; Boeing Model 747 Series Airplanes Equipped With Pratt & Whitney JT9D–3 or JT9D–7 Series Engines, Excluding JT9D–70 Series Engines

**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 Boeing Model 747 series airplanes. This proposal would require inspections of the inboard and outboard strut chords, stiffeners, and web to detect cracks and loose fasteners; repair of the chords, stiffeners, or web, if necessary; and replacement of any loose fastener. This proposal is prompted by reports of fatigue cracks and loose fasteners found in the forward lower spar web of the inboard strut on Model 747 series airplanes equipped with Pratt & Whitney JT9D–3 and JT9D–7 series engines. The actions specified by the proposed AD are intended to prevent separation of the strut from the wing of the airplane due to fatigue cracking.

**DATES:** Comments must be received by May 10, 1994.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–05–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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Tim Backman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2776; fax (206) 227–1181.

**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 94–NM–05–AD." The postcard will be date 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. 94–NM–05–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

**Discussion**

The FAA has received six reports of fatigue cracks and one report of loose fasteners found in the forward lower spar web of the inboard strut on Model 747 series airplanes equipped with Pratt & Whitney JT9D–3 and JT9D–7 series engines. The cracks were found in the area under the stiffeners and baffle and along the web chord. The airplanes on which these cracks were found had accumulated between 6,451 and 18,350 flight cycles and between 17,797 and 83,960 flight hours. All cracks reported have been found on the web of the inboard strut.

During investigation of a recent in-flight engine loss, a similar crack of approximately two inches in length was found on the forward lower spar web. Although the in-inflight engine loss incident is still under investigation, the crack in the web was determined to be a contributing cause of the accident.

Cracking in the forward lower spar web of the inboard strut could reduce the lateral strength of the strut. This condition, if not detected and corrected in a timely manner, could result in separation of the strut from the wing of the airplane due to fatigue cracking.

Although all cracks reported were found on the web of the inboard strut, given standard design tolerances, little difference exists between the thickness of the web of the inboard strut (0.025 inch) and that of the outboard strut (0.032 inch). Additionally, the inboard and outboard webs are similar in configuration and loading environments. For these reasons, the FAA finds that the outboard strut web is subject to the same unsafe condition as the inboard strut web.

The FAA has reviewed and approved Boeing Service Bulletin 747–54–2160, dated September 9, 1993, that describes procedures for repetitive detailed visual inspections of the inboard strut chords, stiffeners, and web to detect cracks and loose fasteners; repair of the chords, stiffeners, or web, if necessary; and replacement of any loose fastener found. These same procedures are effective for inspecting the outboard strut chord.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require repetitive detailed visual inspections of the inboard and outboard strut chords, stiffeners, and web to detect cracks and loose fasteners; repair of the chords, stiffeners, or web, if necessary; and replacement of any loose fastener. The actions would be required to be accomplished in accordance with the procedures specified in the service bulletin described previously.

This is considered to be interim action. The manufacturer has advised that it is currently developing a modification program for the engine strut that will positively address the unsafe condition addressed by this AD. Once this modification program is developed, approved, and available, the FAA may consider additional rulemaking.

There are approximately 380 Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 140 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 22 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $169,400, or $1,210 per airplane.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

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 "significant regulatory action" under Executive Order 12866; (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:

**Boeing:** Docket 94–NM–05–AD.

*Applicability:* Model 747 series airplanes equipped with Pratt & Whitney JT9D–3 or JT9D–7 series engines, excluding JT9D–70 series engines; line numbers 001 through 510 inclusive; certificated in any category.

*Compliance:* Required as indicated, unless accomplished previously.

To prevent separation of the strut from the wing of the airplane due to fatigue cracking, accomplish the following:

(a) Perform a detailed visual inspection of the inboard and outboard strut forward lower spar chords, stiffeners, and web to detect cracks and loose fasteners, in accordance with the procedures described in Boeing Service Bulletin 747-54-2160, dated September 9, 1993, at the time specified in paragraph (a)(1), (a)(2), or (a)(3) of this AD, as applicable. Repeat this inspection thereafter at intervals not to exceed 2,000 landings or 8,000 hours time-in-service, whichever occurs first.

(1) For airplanes that have accumulated less than 6,000 total landings as of the effective date of this AD: Perform the initial inspection at the later of the times specified in paragraphs (a)(1)(i) and (a)(1)(ii) of this AD.

(i) Prior to the accumulation of 6,000 total landings on the strut. Or

(ii) Within 8 months after the effective date of this AD.

(2) For airplanes that have accumulated 6,000 or more total landings, but less than 15,000 total landings, as of the effective date of this AD: Perform the initial inspection within 6 months after the effective date of this AD.

(3) For airplanes that have accumulated 15,000 or more total landings as of the effective date of this AD: Perform the initial inspection within 4 months after the effective date of this AD.

(b) If any crack is found during any inspection required by paragraph (a) of this AD, prior to further flight, repair in accordance with procedures specified in Chapter 54-10-03 of the 747 Structural Repair Manual.

(c) If any loose fastener is found during any inspection required by paragraph (a) of this AD, prior to further flight, replace the fastener in accordance with procedures specified in Chapter 51-30-02 of the 747 Structural Repair Manual.

(d) 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, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

**Note:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(e) Special flight permits may be issued in accordance with Federal Aviation Regulations (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 March 11, 1994.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 94-6210 Filed 3-16-94; 8:45 am]

BILLING CODE 4910-13-U

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

## 21 CFR Part 1310

## Elimination of Threshold for Ephedrine

**AGENCY:** Drug Enforcement Administration (DEA), Justice.

**ACTION:** Proposed rule.

**SUMMARY:** The DEA proposes to eliminate the threshold for ephedrine under provisions of the Chemical Diversion and Trafficking Act of 1988 (CDTA) in order to reduce the diversion of ephedrine to clandestine laboratory operators. This would subject all transactions involving bulk ephedrine and single entity ephedrine drug products to the applicable provisions of the Controlled Substances Act (CSA).

**DATES:** Written comments and objections must be received on or before May 2, 1994.

**ADDRESSES:** Comments and objections should be submitted in quintuplicate to the Administrator, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/CCR.

**FOR FURTHER INFORMATION CONTACT:** Howard McClain, Jr., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537 Telephone (202) 307-7183.

**SUPPLEMENTARY INFORMATION:** Ephedrine is the primary precursor utilized in the clandestine synthesis of methamphetamine and methcathinone, both potent central nervous system (CNS) stimulants controlled under the CSA. The public health risks from the abuse of these drugs are well known and documented.

Ephedrine is a listed chemical under the Chemical Diversion and Trafficking Act of 1988 (CDTA) (Pub. L. 100-690). Under provisions of the CDTA (21 U.S.C. 802(34)(c)), thresholds were originally assigned to each listed chemical. The CDTA imposes reporting and recordkeeping requirements for regulated transactions which meet or exceed these threshold amounts of a listed chemical.

The Domestic Chemical Diversion Control Act (DCDCA) of 1993 (Pub. L. 103-200) was recently enacted and will become effective on April 16, 1994. This Act amends the CSA to permit that no threshold be established for a listed chemical via modification of 21 U.S.C. 802(39)(A) by redefining the term "regulated transaction" as a "distribution, receipt, sale, importation, or exportation, or an international transaction involving shipment of a listed chemical, or if the Attorney General establishes a threshold amount for a specific listed chemical, a threshold amount, including a cumulative threshold amount for multiple transactions" of a listed chemical. By not establishing a threshold for a listed chemical, all regulated transactions regardless of size are subject to CDTA reporting and recordkeeping requirements.

In addition, the DCDCA further modifies the definition of a "regulated transaction" by removing the exemption of those transactions involving products which are marketed or distributed lawfully in the U.S. under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), if these products contain ephedrine or its salts, optical isomers, or salts of optical isomers as the only active medicinal ingredient or contain ephedrine in combination with therapeutically insignificant quantities of another active medicinal ingredient (21 U.S.C. 802(39)(A)(iv)). The DCDCA also provides that the Attorney General shall by regulation remove this exemption for drug products that the Attorney General finds are being diverted in order to obtain a listed chemical for use in the illicit production of a controlled substance.

The threshold for ephedrine was originally established as 1.0 kilogram for domestic and import/export transactions, after internal study and industry consultation (54 FR 31657). The threshold of 1.0 kilogram of ephedrine base is equivalent to greater than 48,000 ephedrine 25 mg tablets or capsules.

Thresholds are continuously reviewed by DEA to determine if they are satisfactory to prevent diversion without overburdening industry. Current evidence indicates that the threshold for ephedrine of 1.0 kilogram is not adequate to prevent the diversion of ephedrine to clandestine laboratory operators. Clandestine laboratory operators are obtaining and utilizing ephedrine in quantities much less than the current 1.0 kilogram threshold in the illicit production of methamphetamine and methcathinone. The DEA has determined that in order to ensure the maximum effectiveness of the CDTA in curtailing the diversion of ephedrine, there should be no threshold for ephedrine. Subsequently, all regulated transactions of ephedrine are subject to reporting and recordkeeping requirements of the CDTA regardless of size.

While seizures of clandestine methamphetamine laboratories have decreased significantly since the

passage of the CDTA, more than 1200 methamphetaime laboratories have been seized in the United States since 1990. The majority of these laboratories utilized ephedrine as the precursor. In 1992, greater than 68 percent of the methamphetamine laboratories seized utilized ephedrine. A preliminary review of 1993 methamphetamine laboratory seizure data indicates that ephedrine was the precursor utilized in approximately 75 percent of these laboratories.

In addition to its use as the preferred precursor for the production of methamphetamine, ephedrine is also utilized in the synthesis of methcathinone. The clandestine manufacture of methcathinone, a methamphetamine analogue known on the street as "Cat", has been identified in the U.S. since 1991, when five laboratories were seized. Methcathinone was temporarily placed in Schedule I on May 1, 1992, pursuant to the emergency scheduling provisions of the CSA (21 U.S.C. 811(h)). Effective October 15, 1993, methcathinone was permanently controlled in Schedule I (58 FR 53404).

Methcathinone (N-methylcathinone) is manufactured in clandestine laboratories via the oxidation of ephedrine. Since June of 1991, all clandestine methcathinone laboratories seized utilized ephedrine as the precursor. These laboratories were located in Indiana, Illinois, Michigan, Washington and Wisconsin. The number of methcathinone laboratory seizures continues to grow from six in 1992 to 21 laboratories in 1993.

Methcathinone is usually produced in small batches. Seizures of illicit methcathinone laboratories indicate that batch sizes routinely utilize less than 20 grams of ephedrine. The vast majority of this ephedrine is obtained via the purchase of over-the-counter (OTC) ephedrine 25 mg tablets sold in bottles of 1000 dosage units or less.

Batch sizes of methamphetamine produced at clandestine labs can vary greatly. Recent information indicates that methamphetamine is also produced in small batches via a procedure known as the "cold process." This procedure has utilized quantities of 40 grams or less of ephedrine.

The smuggling of bulk ephedrine and the purchase of OTC ephedrine tablets are the primary sources of ephedrine utilized at these clandestine laboratories. Ephedrine tablets make up a significant portion of the more than 10 metric tons of ephedrine reportedly seized at clandestine laboratories between 1990 and 1992. This material may be purchased from several different sources at below threshold quantities. The purchase of regulated chemicals from several suppliers in quantities below established thresholds is a common method of diversion and continues to occur with ephedrine.

A comparison of U.S. hospital/pharmacy purchase data with the quantities of ephedrine seized at clandestine laboratories indicates that the use of ephedrine for clandestine laboratories is much greater than amounts purchased by these types of distribution outlets.

Drug products containing ephedrine are used legitimately to treat asthma and other conditions. They are available as OTC products from pharmacies, hospitals and other distribution outlets. Ephedrine products, which are lawfully marketed and distributed under the Federal Food Drug and Cosmetic Act and contain other active medicinal ingredients in therapeutically significant concentrations, are currently exempt from the reporting and recordkeeping requirements imposed under the CDTA. Of the oral OTC products available for medicinal treatment of chronic asthma, these ephedrine combination products are the products more frequently dispensed by pharmacies and hospitals. The elimination of a threshold for ephedrine does not impose any additional requirements on pharmacies, hospitals or points of distribution which distribute only those ephedrine products which are exempted.

The Acting Administrator, Drug Enforcement Administration, hereby certifies that this proposed rulemaking will have no significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. This proposed rule only eliminates the existing threshold for which ephedrine transactions must be reported and records maintained. It only impacts firms involved with small bulk transfers of ephedrine or distribution of single entity ephedrine tablets/capsules. This proposed rule is not a significant regulatory action and therefore need not be reviewed by the Office of Management and Budget pursuant to Executive Order 12866.

This action has been analyzed in accordance with the principles and criteria in E.O. 12612, and it has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**List of Subjects in 21 CFR 1310**

Drug Enforcement Administration, Drug traffic control, Reporting and recordkeeping requirements.

For reasons as set out above, 21 CFR part 1310 is proposed to be amended as follows:

## PART 1310—[AMENDED]

1. The authority citation for part 1310 continues to read as follows:

**Authority:** 21 U.S.C. 802, 830, 871(b).

2. Section 1310.04 is proposed to be amended by revising the introductory text to paragraph (f); removing paragraph (f)(1)(iii); redesignating paragraphs (f)(1)(iv) through (f)(1)(xxiv) as (f)(1)(iii) through (f)(1)(xxiii) respectively; and adding a new paragraph (g) to read as follows:

**§ 1310.04 Maintenance of records.**

* * * * *

(f) For those listed chemicals for which thresholds have been established, the quantitative threshold or the cumulative amount for multiple transactions within a calendar month, to be utilized in determining whether a receipt, sale, importation or exportation is a regulated transaction is as follows:

* * * * *

(g) For listed chemicals for which no thresholds have been established, the size of the transaction is not a factor in determining whether the transaction meets the definition of a *regulated transaction* as set forth in § 1310.01(f). All such transactions, regardless of size, are subject to recordkeeping and reporting requirements as set forth in part 1310.

(1) Listed Chemicals For Which No Thresholds Have Been Established:

(i) Ephedrine, its salts, optical isomers, and salts of optical isomers

(ii) [Reserved]

(2) [Reserved]

Dated: February 28, 1994.

**Stephen H. Greene,**

*Acting Administrator of Drug Enforcement.*

[FR Doc. 94-6234 Filed 3-16-94; 8:45 am]

BILLING CODE 4410-09-M

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

[IA-78-93]

RIN 1545-AS58

### Accuracy-Related Penalty

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** These proposed regulations amend the accuracy-related penalty

regulations under chapter 1 of the Internal Revenue Code. These amendments are necessary to effect changes to the accuracy-related penalty made by the Omnibus Budget Reconciliation Act of 1993. This document also provides notice of a public hearing on the proposed amendments.

**DATES:** Written comments must be received by June 21, 1994. The IRS intends to hold a public hearing on these proposed regulations on July 12, 1994, beginning at 10 a.m. Persons wishing to speak at the hearing must submit outlines of their comments by June 21, 1994.

**ADDRESSES:** Send submissions to: Internal Revenue Service, Attn: CC:DOM:CORP:T:R (IA–78–93), room 5228, POB 7604, Ben Franklin Station, Washington, DC 20044. The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, David L. Meyer, 202–622–6232; concerning submissions, Michael Slaughter, 202–622–7180. (These are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

## Temporary Regulations and 26 U.S.C. 7805(e)(1)

In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations (Treasury Decision 8533) to implement certain changes made to the accuracy-related penalty in section 6662 of the Internal Revenue Code (Code) by section 13251 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993). Section 7805(e)(1) of the Code (26 U.S.C. 7805(e)(1)) requires the publication of a notice of proposed rulemaking whenever the Secretary issues temporary regulations to allow an opportunity for public comment. The substance of T.D. 8533 is reflected in the proposed amendments to sections 1.6662–1 through 1.6662–4. The Internal Revenue Service presently intends to revise §§ 1.6662–1 through 1.6662–4 in response to taxpayers' comments on the proposed regulations and does not presently intend to finalize § 1.6662–7T.

## Background

These proposed regulations set forth certain changes made to the accuracy-related penalty in section 6662 of the Code by section 13251 of OBRA 1993. These changes eliminated the disclosure exception for the negligence penalty (section 6662(b)(1) of the Code) and raised the disclosure standard for purposes of the penalties for disregarding rules or regulations (section 6662(b)(1) of the Code) and a substantial understatement of income tax (section 6662(b)(2) of the Code) from "not frivolous" to "reasonable basis." See section 13251 of OBRA 1993 and H. Rep. No. 213, 103rd Cong., 1st Sess. 669 (1993) (the Conference Report).

The legislative history to OBRA 1993 indicates that this "reasonable basis" standard is a relatively high standard of tax reporting that is significantly higher than the "not frivolous" disclosure standard previously applicable to taxpayers under section 6662 of the Code and currently applicable to preparers under section 6694 of the Code. See Conference Report, at p. 669. A position is not frivolous if it is not "patently improper." See § 1.6694–2(c)(2) of the Income Tax Regulations and current § 1.6662–3(b)(3). The legislative history to OBRA 1993 also provides that the reasonable basis standard is not satisfied by a position that is merely arguable or merely a colorable claim. See Conference Report, at p.669.

In addition to adopting the new reasonable basis standard as the standard that a disclosed return position must satisfy to avoid the disregard and substantial understatement penalties, Congress adopted the new reasonable basis standard as the standard that a return position must satisfy to avoid the negligence penalty. See Conference Report at p.669.

Treasury requests comments on how the new reasonable basis standard should be defined for purposes of the negligence, disregard, and substantial understatement penalties.

## Explanation of Changes

Section 1.6662–3(a) of the regulations generally provides that if any portion of an underpayment, as defined in section 6664(a) of the Code and § 1.6664–2, of any income tax imposed under subtitle A of the Code that is required to be shown on a return is attributable to negligence or disregard of rules or regulations, there is added to the tax an amount equal to 20 percent of such portion. Section 1.6662–3(b)(1) defines "negligence" to include any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return. Currently, § 1.6662–3(c) generally provides that no penalty under section 6662(b)(1) may be imposed on any portion of any underpayment that is attributable to negligence or a position contrary to a rule or regulation if the position is adequately disclosed and is not frivolous, if the requirements of that section are met.

Section 1.6662–4(a) of the regulations generally provides that if any portion of an underpayment of any income tax imposed under subtitle A of the Code that is required to be shown on a return is attributable to a substantial understatement of such income tax, there is added to the tax an amount equal to 20 percent of such portion. Section 1.6662–4(a) further provides that, except in the case of any item attributable to a tax shelter, an understatement is reduced by the portion of the understatement that is attributable to positions for which there was substantial authority or adequate disclosure. Currently, under § 1.6662–4(e)(2), this adequate disclosure exception will not apply if the position on the return is frivolous.

As a result of OBRA 1993, the minimum standard that a disclosed return position must satisfy to avoid either the penalty for disregarding rules or regulations or for a substantial understatement of income tax has been raised from "not frivolous" to "reasonable basis." In addition, there is no longer a disclosure exception for the negligence penalty and, to avoid that penalty, the return position generally must satisfy the new reasonable basis standard.

These rules generally apply to returns that are due (without regard to extensions for filing) after December 31, 1993. However, the rules relating to changes to the penalties for negligence or disregard of rules or regulations will not apply to returns, including qualified amended returns, filed on or before March 14, 1994.

## Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Comments and Public Hearing**

Before the adoption of these proposed regulations, consideration will be given to any written comments that are submitted timely (a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety.

A public hearing will be held on July 12, 1994, in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments, an outline of the topics to be discussed, and the time to be devoted to each topic by June 21, 1994.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

**Drafting Information**

The principal author of these proposed regulations is David L. Meyer, Office of Assistant Chief Counsel, Income Tax and Accounting, Internal Revenue Service. However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

**Par. 2.** Section 1.6662–0 is amended by:

1. Revising the introductory language,
2. Adding entries for § 1.6662–2 (d)(1) and (d)(2),
3. Revising the entry for paragraph (b)(3) under § 1.6662–3, and
4. Adding an entry for § 1.6662–7.
5. The revised and added provisions read as follows:

**§ 1.6662–0 Table of contents.**

This section lists the captions that appear in §§ 1.6662–1 through 1.6662–7.

* * * * *

*§ 1.6662–2 Accuracy-related penalty.*

* * * * *

(d) * * *

(1) Returns due before January 1, 1994.

(2) Returns due after December 31, 1993.

*§ 1.6662–3 Negligence or disregard of rules or regulations.*

* * * * *

(b) * * *

(3) Reasonable basis.

(i) In general [Reserved].

(ii) Relationship to other standards.

* * * * *

*§ 1.6662–7 Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty.*

(a) In general.

(1) Scope.

(2) Effective date.

(b) No disclosure exception for negligence penalty.

(c) Disclosure standard for other penalties is reasonable basis.

(d) Definition of reasonable basis.

(1) In general [Reserved].

(2) Relationship to other standards.

**Par. 3.** In § 1.6662–1, the second and third sentences of the concluding text are revised to read as follows:

**§ 1.6662–1 Overview of the accuracy-related penalty.**

* * * * *

* * * The penalties for disregard of rules or regulations and for a substantial understatement of income tax may be avoided by adequately disclosing certain information as provided in § 1.6662–3(c) and § 1.6662–4 (e) and (f), respectively. The penalties for negligence and for a substantial (or gross) valuation misstatement under chapter 1 may not be avoided by disclosure.* * *

**Par. 4.** Section 1.6662–2 is amended by:

1. Redesignating the text of paragraph (d) as (d)(1) and adding a heading,
2. Revising the first and second sentences of newly designated paragraph (d)(1), and
3. Adding paragraph (d)(2).
4. The revised and added provisions read as follows:

**§ 1.6662–2 Accuracy-related penalty.**

* * * * *

(d) *Effective date*—(1) *Returns due before January 1, 1994.* Section 1.6662–3(c) and § 1.6662–4 (e) and (f) (relating to methods of making adequate disclosure) as codified in 26 CFR revised April 1, 1993, apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1991, but before January 1, 1994. Except as provided in the preceding sentence, §§ 1.6662–1 through 1.6662–5 as codified in 26 CFR revised April 1, 1993, apply to returns the due date for which (determined without regard to extensions of time for filing) is after December 31, 1989, but before January 1, 1994. * * *

(2) *Returns due after December 31, 1993.* Except as provided in the last sentence of this paragraph (d)(2), the provisions of §§ 1.6662–1 through 1.6662–4 reflecting the changes made to the accuracy-related penalty by the Omnibus Budget Reconciliation Act of 1993 apply to returns the due date for which (determined without regard to extensions of time for filing) is after December 31, 1993. These changes include raising the disclosure standard for the penalties for disregarding rules or regulations and for a substantial understatement of income tax from not frivolous to reasonable basis, eliminating the disclosure exception for the negligence penalty, and providing guidance on the meaning of reasonable basis. The Omnibus Budget Reconciliation Act of 1993 changes relating to the penalties for negligence or disregard of rules or regulations will not apply to returns (including qualified amended returns) that are filed on or before March 14, 1994.

**Par. 5.** Section 1.6662–3 is amended by:

1. Revising the second sentence of paragraph (a),
2. Revising paragraph (b)(3), and
3. Revising paragraphs (c) (1) and (2).
4. The revisions read as follows:

**§ 1.6662–3 Negligence or disregard of rules or regulations.**

(a) * * * The penalty for disregarding rules or regulations does not apply, however, if the requirements of § 1.6662–3(c)(1) are satisfied and the position in question is adequately disclosed as provided in § 1.6662–3(c)(2), or to the extent that the reasonable cause and good faith exception to this penalty set forth in § 1.6664–4 applies. * * *

(b) * * *

(3) *Reasonable basis*—(i) *In general.* [Reserved].

(ii) *Relationship to other standards* The reasonable basis standard is significantly higher than the not frivolous standard applicable to preparers under section 6694 and defined in § 1.6694–2(c)(2).

* * * * *

(c) * * *

(1) *In general.* No penalty under section 6662(b)(1) may be imposed on

any portion of an underpayment that is attributable to a position contrary to a rule or regulation if the position is disclosed in accordance with the rules of paragraph (c)(2) of this section and, in case of a position contrary to a regulation, the position represents a good faith challenge to the validity of the regulation. This disclosure exception does not apply, however, in the case of a position that does not have a reasonable basis or where the taxpayer fails to keep adequate books and records or to substantiate items properly.

(2) *Method of disclosure.* Disclosure is adequate for purposes of the penalty for disregarding rules or regulations if made in accordance with the provisions of §§ 1.6662–4(f)(1), (3), (4), and (5), which permit disclosure on a properly completed and filed Form 8275 or 8275–R, as appropriate. In addition, the statutory or regulatory provision or ruling in question must be adequately identified on the Form 8275 or 8275–R, as appropriate. The provisions of § 1.6662–4(f)(2), which permit disclosure in accordance with an annual revenue procedure for purposes of the substantial understatement penalty, do not apply for purposes of this section.

**Par. 6.** Section 1.6662–4 is amended by:

1. Removing the third sentence in paragraph (d)(2), and

2. Revising paragraph (e)(2) to read as follows:

**§ 1.6662–4 Substantial understatement of income tax.**

* * * * *

(e) * * *

(2) *Circumstances where disclosure will not have an effect.* The rules of paragraph (e)(1) of this section do not apply where the item or position on the return—

(i) Does not have a reasonable basis (as defined in § 1.6662–3(b)(3));

(ii) Is attributable to a tax shelter (as defined in section 6662(d)(2)(C)(ii) and paragraph (g)(2) of this section); or

(iii) Is not properly substantiated, or the taxpayer failed to keep adequate books and records with respect to the item or position.

**Par. 7.** Section 1.6662–7 is added to read as follows:

**§ 1.6662–7 Omnibus Budget Reconciliation Act of 1993 changes to the accuracy-related penalty.**

(a) *In general*—(1) *Scope.* The Omnibus Budget Reconciliation Act of 1993 made certain changes to the accuracy-related penalty in section 6662. This section provides rules reflecting those changes.

(2) *Effective date.* This section applies to returns that are due (without regard to extensions of time for filing) after December 31, 1993. However, the provisions of these regulations relating to the penalties for negligence or disregard of rules or regulations will not apply to returns (including qualified amended returns) that are filed on or before March 14, 1994.

(b) *No disclosure exception for negligence penalty.* The penalty for negligence in section 6662(b)(1) may not be avoided by disclosure of a return position.

(c) *Disclosure standard for other penalties is reasonable basis.* The penalties for disregarding rules or regulations in section 6662(b)(1) and for a substantial understatement of income tax in section 6662(b)(2) may be avoided by adequate disclosure of a return position only if the position has at least a reasonable basis. See §§ 1.6662–3(c) and 1.6662–4(e) and (f) for other applicable disclosure rules.

(d) *Definition of reasonable basis*—(1) *In general.* [Reserved].

(2) *Relationship to other standards.* The reasonable basis standard is significantly higher than the not frivolous standard applicable to preparers under section 6694 and defined in § 1.6694–2(c)(2).

**Margaret Milner Richardson,**

*Commissioner of Internal Revenue.*

[FR Doc. 94–6237 Filed 3–14–94; 12:20 pm]

BILLING CODE 4830–01–U

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**27 CFR Part 4**

**[Notice No. 792]**

**RIN 1512–AB25**

## Use of the Term "Reserve" on Wine Labels (93F–033P)

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Bureau of Alcohol, Tobacco and Firearms (ATF) is considering amending the regulations to include a definition for the term "reserve" when used on wine labels. Based on a petition it has received, the Bureau wishes to gather information by inviting comments from the public and industry as to whether the regulations should be amended to provide for a definition of this term.

**DATES:** Written comments must be received on or before June 15, 1994.

**ADDRESSES:** Send written comments to: Chief, Wine and Beer Branch; Bureau of Alcohol, Tobacco and Firearms; P.O. Box 50221; Washington, DC 20091–0221; Attn: Notice No. 792.

**FOR FURTHER INFORMATION CONTACT:** James P. Ficaretta, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW., Washington, DC 20226 (202–927–8230).

**SUPPLEMENTARY INFORMATION:**

### Background

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), vests broad authority in the Director of ATF, as a delegate of the Secretary of the Treasury, to prescribe regulations intended to prevent deception of the consumer, and to provide the consumer with adequate information as to the identity and quality of the product. Regulations which implement the provisions of section 105(e), as they relate to wine, are set forth in Title 27, Code of Federal Regulations (CFR), part 4.

### Petition

ATF has received a petition, dated June 4, 1993, filed on behalf of the Wine Institute, a trade association of California wineries which represents approximately 80 percent of the total U.S. wine production. According to the petitioner, a regulatory definition of "reserve" is necessary to permit U.S. "reserve"—designated wines to be sold for export in European Communities (EC) countries.

Specifically, Council Regulation (EEC) No. 2392/89 of July 24, 1989, Article 26(2)(c) allows for supplemental information on imported wine labels, subject to certain restrictions. Details "regarding superior quality" are allowed on the label "in so far as they are prescribed by the national provisions of the third country in which the wine originates for the domestic market of that country and are recognized by the Community."

ATF has been informed that the EC considers that the term "reserve" is a term which refers to "superior quality." In the absence of a regulatory definition of the term "reserve" in the U.S., which would apply to wines produced for domestic consumption, products bearing this term can be prohibited from being sold in EC member countries. The petitioner states that Germany, for example, prohibits the importation of U.S. wines that bear the term "reserve" on the label. The petition does not state whether other EC member nations have taken this position.

The petitioner also believes that defining the term in the regulations would provide for uniform meaning and, consequently, be of benefit to consumers. They contend that the use of

the term "reserve" is so prolific in the marketplace that its meaning has been lost, resulting in consumer confusion.

In analyzing attempts by foreign countries at defining the term the petitioner has concluded that, although many foreign countries generally provide for rather broad, subjective tests to determine the "reserve" character of table wine, there is no consistent international standard for use of the term.

Although not defined in the regulations, ATF has permitted the use of such terms as "reserve," "vintner's select," "barrel select," "premium," etc. on wine labels. The Bureau considers these terms to be mere "puffery." It has been ATF's position that consumers recognize these terms as expressing the proprietor's subjective evaluation of the wine, rather than as terms denoting any objective standards.

**Wine Institute Proposal**

Based on the reasons mentioned above, the Wine Institute has proposed the following definition for the term "reserve" when used on wine labels:

> For U.S. appellations, any table wine which is a vintage dated grape table wine that is either varietal, or which contains multiple varieties where each of the varieties is listed by percentage of total content, may be designated "reserve" wine.
>
> However, a state, county, or viticultural area may establish more stringent regulations governing the designation of "reserve" under rules and regulations to be established by individual states or local agencies.

Although the Wine Institute's proposed definition applies to domestic wines only, ATF notes that any amendment of the regulations to provide for a definition of the term "reserve" would apply to domestic wine, as well as to foreign wine imported into the U.S. ATF believes that for purposes of consistency a uniform meaning of the term is necessary.

ATF would also point out that the proposed definition applies to grape table wine only, i.e., grape wine having an alcoholic content of between 7 and 14 percent by volume. Consequently, if the petitioner's proposed definition is adopted into the regulations the term could not be used on labels of any other type of wine, such as sparkling wine (e.g., champagne).

**Discussion**

ATF is requesting information from consumers and industry members on the desirability of amending the regulations to provide for a definition of the term "reserve" when used on wine labels. While ATF has traditionally taken the position that the use of subjective puffery on the label does not result in consumer confusion, ATF wishes to solicit comments from both consumers and industry members on whether the term "reserve" is being used in a confusing or misleading fashion on labels. Although ATF is soliciting comments on the following specific questions, the Bureau is also requesting any relevant information on the subject.

1. What does the term "reserve" mean to consumers?
2. What does the term mean to members of the wine industry?
3. Should the term be defined in the wine regulations? If so, should there be a different standard for still wines and sparkling wines?
4. Do other similar terms such as "vintner's select," "barrel select," "premium," etc., mean anything to consumers? What about to members of the industry?
5. Should these terms be defined in the regulations?
6. The term "reserve" also appears on labels of malt beverages and distilled spirits. What does it mean to consumers when it appears on these products? What does it mean to members of the malt beverage and distilled spirits industries who label their products with this term?
7. Should the term be defined in the regulations for malt beverages and distilled spirits?
8. How much American wine labeled with the "reserve" designation is exported into EC member nations? Have exporters of American wine encountered problems in Germany or any other EC member nations concerning wine which is labeled with the term "reserve?"
9. ATF has observed that the term "reserve" often appears on labels of foreign wines imported into the U.S. Do the countries where these wines originate have any laws or regulations governing the use of this term?

**Executive Order 12866**

It has been determined that this advance notice is not a significant regulatory action as defined by Executive Order 12866. Accordingly, this advance notice is not subject to the analysis required by this Executive Order.

**Public Participation**

ATF requests comments from all interested persons. Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

ATF will not recognize any material in comments as confidential. Comments may be disclosed to the public. Any material which the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comment. The name of the person submitting a comment is not exempt from disclosure.

**Drafting Information**

The principal author of this document is James P. Ficaretta, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

**Disclosure**

Copies of the petition, this notice, and the written comments will be available for public inspection during normal business hours at: ATF Public Reading Room, room 6480, 650 Massachusetts Avenue, NW., Washington, DC.

**List of Subjects in 27 CFR Part 4**

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers, and Wine.

**Authority and Issuance**

This advance notice of proposed rulemaking is issued under the authority in 27 U.S.C. 205.

Dated: January 21, 1994.

**Daniel R. Black,**

*Acting Director.*

Dated: February 9, 1994.

**John P. Simpson,**

*Deputy Assistant Secretary, (Regulatory, Tariff and Trade Enforcement).*

[FR Doc. 94–6159 Filed 3–16–94; 8:45 am]

BILLING CODE 4810–31–U

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## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Parts 63 and 430**

**[FRL–4850–9]**

**RIN 2060–AD03 and RIN 2040–AB53**

## Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category; National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Correction and Extension of Comment Period

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

**ACTION:** Proposed rules; correction and extension of comment period.

**SUMMARY:** EPA is correcting minor errors in the preamble and effluent limitations guidelines and standards and the national emission standards for hazardous air pollutants for the pulp, paper, and paperboard production category, which appeared in the **Federal Register** on December 17, 1993 (58 FR 66078). EPA is also extending the comment period for an additional 30 days.

**DATES:** Comments on the proposed rules must be received by April 18, 1994 at the following address.

**ADDRESSES:** Send comments in triplicate on the proposed rules to Ms. Marion Thompson, Engineering and Analysis Division (4303), U.S. EPA, 401 M Street SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Ms. Debra Nicoll at (202) 260–5386.

**SUPPLEMENTARY INFORMATION:** In a Notice of Proposed Rulemaking on December 17, 1993 (58 FR 66078), EPA proposed effluent limitations guidelines and standards for the control of wastewater pollutants and also proposed national emission standards for hazardous air pollutants. The notice contained some minor errors that are discussed briefly below and are corrected by this notice.

In addition, EPA recognizes that the record supporting the proposed rulemaking is large and complex. To better facilitate informed comment, the Agency is extending the comment period by 30 days for a new deadline of April 18, 1994.

Dated: March 8, 1994.

**Mary Nichols,**

*Assistant Administrator for Air and Radiation.*

Dated: March 4, 1994.

**Robert Perciasepe,**

*Assistant Administrator for Water.*

The following corrections are made in FRL–4802–4, effluent limitations guidelines, pretreatment standards, and new source performance standards: pulp, paper, and paperboard category and national emission standards for hazardous air pollutants for source category: pulp and paper production, which was published in the **Federal Register** on December 17, 1993 (58 FR 66078).

1. On page 66086, third column, fifth paragraph, the first sentence should read "All emission points within the pulping component are required to be controlled by the proposed standards, unless the mill can show one of the following conditions exists:"

2. On page 66086, third column, the following paragraph is inserted immediately after the fifth paragraph:

"• The emission point is at a decker or screen at an existing source;"

3. On page 66138, Table X–2, second column, the percent controlled for Foam Breaker Tank or Filtrate Tanks should read "11." The percent controlled for Weak Black Liquor Storage should read "11."

4. On page 66144, first column, fourth paragraph, line 11, the words "or bleaching" should be removed.

5. On page 66146, in the first column, five lines from the bottom, the word "kilopascals (kPa)" is corrected to read "kilograms (kg)". In the second column, in the second new paragraph, the fourth line, the abbreviation "kPa" is corrected to read "kg". In the second bullet under the second column, in the second line, "kPa" is corrected to read "kg", and in the last line of the bullet, kilograms is corrected to read "kPa".

6. On page 66153, Table XI.A–1, Column 5, the words in parentheses should read "(except deckers and screens at existing sources)"

7. On page 66166, third column, Solicitation No. 6, Alternative Limits for TCF Processes, the second sentence should read "EPA solicits comments and data on whether these alternative limits provide meaningful incentives, whether such incentives are appropriate, and recommendations for any additional or different incentives."

8. On page 66170, third column, Solicitation No. 28, Limitation Based on Minimum Levels, the first sentence should read "EPA has proposed some BAT, PSES, PSNS, and NSPS limitations for the Bleached Papergrade Kraft and Soda, Dissolving Kraft, and Dissolving Sulfite subcategories based upon the current minimum levels of the analytical methods."

9. On page 66172, second column, under Solicitation No. 33, second paragraph, the second line should cite section X.D.1.

10. On page 66178, § 63.446(e)(1) introductory text, the last two lines of the first sentence should cite "(e)(1)(i) through (e)(1)(ii) of this section".

11. On page 66178, § 63.446(f)(2), the last four lines of the second sentence should read: ". . . materials containing less than 500 parts per million of total HAP by weight is not allowed for the purposes of complying with this requirement; or"

12. On page 66178, second column, in paragraph (f)(4)(ii) the term "kilopascals" is corrected to read "kilograms" and "kilograms" is corrected to read "kilopascals".

13. On page 66178, § 63.450(a) introductory text, the second citation in the second line should be "§ 63.445(b)".

14. On page 66179, § 63.451(c) introductory text, the third and fourth lines of the first sentence should read: ". . . rates for emission point flow rate, mass flow rate, vent stream concentration, or percent reduction required in . . ."

15. On page 66179, § 63.451(c)(1)(i), the first citation in the third line should be "§ 63.444(a)(2)(i)"; the first citation in the sixth line should be "§ 63.444(a)(ii) and (a)(iii)".

16. On page 66179, § 63.451(c)(1)(ii), the first citation in the fifth line should be "§ 63.444(a)(3)".

17. On page 66179, § 63.451(d)(5), the first citation in the fourth line should be "§ 63.444(a)(2)(iii)".

18. On page 66180, § 63.451(g) introductory text, the citation on line 4 should be "§ 63.446(a)(3) and (h)".

19. On pages 66180 and 66181, the first two lines of § 63.451(h) introductory text, § 63.451(i) introductory text, and § 63.451(j) introductory text should read: "The owner or operator shall use the following procedures when conducting a performance test to demonstrate . . ."

20. On page 66182, § 63.451(m) introductory text, the citation on line 3 should be "§ 63.444(a)(3)".

21. On page 66182, § 63.453(f)(3), the fourth line should cite "paragraph (f)(1) of this section".

22. On page 66183 § 63.455(a)(4)(ii), the citation on the third line should be "§ 63.450(a)(1)".

23 and 24. On page 66189, § 430.02 includes a table of monitoring requirements. The table is corrected to read as follows:

| CAS No. | Pollutant | Monitoring frequency | |
|---|---|---|---|
| | | BPE | FE |
| 1198556 | Tetrachlorocatechol | Monthly | None. |
| 2539175 | Tetrachloroguaiacol | Monthly | None. |
| 2539266 | Trichlorosyringol | Monthly | None. |

| CAS No. | Pollutant | Monitoring frequency | |
|---|---|---|---|
| | | BPE | FE |
| 2668248 | 4,5,6-trichloroguaiacol | Monthly | None. |
| 32139723 | 3,4,6-trichlorocatechol | Monthly | None. |
| 56961207 | 3,4,5-trichlorocatechol | Monthly | None. |
| 57057837 | 3,4,5-trichloroguaiacol | Monthly | None. |
| 58902 | 2,3,4,6-tetrachlorophenol | Monthly | None. |
| 60712449 | 3,4,6-trichloroguaiacol | Monthly | None. |
| 87865 | pentachlorophenol | Monthly | None. |
| 88062 | 2,4,6-trichlorophenol | Monthly | None. |
| 95954 | 2,4,5-trichlorophenol | Monthly | None. |
| 1746016 | 2,3,7,8-TCDD | Monthly | None. |
| 51207319 | 2,3,7,8-TCDF | Monthly | None. |
| 67641 | 2-propanone. (acetone) | Monthly | None. |
| 67663 | chloroform | Weekly | None. |
| 75092 | methylene chloride | Weekly | None. |
| 78933 | 2-butanone. (MEK) | Weekly | None. |
| 59473040 | AOX | Weekly | None. |
| Color | Color | None | Daily. |
| 1004 | COD | None | Daily. |
| 1002 | BOD | None | Daily. |
| 1009 | TSS | None | Daily. |
| | | None | Daily. |

BPE—Bleach Plant Effluent.
FE—Final Effluent.

25. On page 66192, § 430.14(b) includes a table of end-of-pipe effluent limitations, where the table entries are correct, but the column headings were printed incorrectly. The table is corrected to read as follows:

| Pollutant or pollutant property | BAT effluent limitations | | | |
|---|---|---|---|---|
| | Continuous dischargers; kg/kkg (or pounds per 1,000 lb) of product | | Non-continuous dischargers; kg/kkg (or pounds per 1,000 lb) of product | |
| | Maximum for any 1 day | Monthly Average | Maximum for any 1 day | Annual average |
| AOX | 1.67 | 0.650 | N/A | 0.553 |
| COD | 118 | 84.1 | N/A | 70.3 |

26. On page 66204, § 430.45(c) includes a table of end-of-pipe effluent standards where the table entries are correct, but one column heading was printed incorrectly. The table is corrected to read as follows:

| Pollutant or pollutant property | New source performance standards | | | |
|---|---|---|---|---|
| | Continuous dischargers | | Non-continuous dischargers | |
| | Maximum for any 1 day (kg/kkg) | Monthly Average (kg/kkg) | Maximum for any 1 day | Annual average (kg/kkg) |
| AOX | 3.13 | 1.39 | N/A | 1.22 |

27. On page 66206, § 430.55 includes a table of end-of-pipe effluent standards where the table entries are correct, but one column heading was printed incorrectly. The table is corrected to read as follows:

| Pollutant or pollutant property | New source performance standards | | |
|---|---|---|---|
| | Continuous dischargers; kg/kkg (or pounds per 1,000 lb) of product | | Non-continuous dischargers; kg/kkg (or pounds per 1,000 lb) of product |
| | Maximum for any 1 day | Monthly Average | Annual average |
| $BOD_5$ | 4.90 | 2.57 | 1.98 |
| TSS | 7.81 | 3.22 | 2.42 |

[FR Doc. 94-6053 Filed 3-16-94; 8:45 am]
BILLING CODE 6560-50-P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

### 43 CFR Part 3160

**RIN: 1004–AB22**

**[WO–610–4111–02–24 1A]**

### Onshore Oil and Gas Order No. 5: Extension of Comment Period

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** A proposed rule to revise existing Onshore Oil and Gas Order No. 5, Measurement of Gas, was published in the **Federal Register** on January 6, 1994 (59 FR 718), with a 60-day comment period expiring March 7, 1994. The comment period is being reopened for 30 days in response to public request.

**DATES:** The period for the submission of comments is hereby reopened until April 18, 1994. Comments received or postmarked after this date may not be considered as part of the decisionmaking process on issuance of the final Order.

**ADDRESSES:** Comments should be sent to Director (140), Bureau of Land Management, room 5555, Main Interior Building, 1849 C Street NW., Washington, DC 20240. Comments will be available for public review at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Lonny Bagley at (406) 255–2847.

Dated: March 11, 1994.

**Bob Armstrong,**

*Assistant Secretary of the Interior.*

[FR Doc. 94–6268 Filed 3–16–94; 8:45 am]

BILLING CODE 4310–84–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

**[MM Docket No. 94–19; FCC 94–46]**

### Implementation of Section 9 of the Communications Act; Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission begins implementation of section 9 of the Communications Act of 1934 to assess and collect regulatory fees. The Commission's objective is to assure that the fee collection process does not have an adverse impact on its regulatory activities; that fees are collected and deposited in the most cost effective manner possible; and that fees impose little or no additional paperwork burden on the public. Further, the Commission proposes to amend certain of its rules governing the collection of fees for applications and other filings under Section 8 of the Communications Act. We note that the implementation of regulatory fees will further the National Performance Review goals of reinventing Government by requiring beneficiaries of Commission services to pay for such services.

**DATES:** Comment date: April 7, 1994. Reply comment date: April 18, 1994.

**ADDRESSES:** Secretary, Federal Communications Commission, Room 222, 1919 M St., NW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** H. Walker Feaster or Peter Herrick, Office of Managing Director, at (202) 632–0923.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Notice of Proposed Rulemaking in MD Docket No. 94–19, adopted March 4, 1994 and released March 11, 1994. The full text of this document is available for inspection and copying Monday through Friday, 9 a.m. to 4:30 p.m. in the FCC Reference Center (room 239), 1919 M St., NW., Washington, DC 20554. Copies of this document may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.), 2100 M Street, NW., suite 140, Washington, DC 20037, (202) 857–3800.

1. Section 9 of the Communications Act, was added by section 6003(a) of the Omnibus Budget Reconciliation Act of 1993.[1] Section 9(a) authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services, and international activities. Section 9(f)(1) provides that "[t]he Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section." The purpose of this Notice is to set forth proposed rules as provided for in section 9(f)(1). In this Notice, we also propose several conforming and clarifying amendments to our rules concerning application filing fees, which are assessed and collected pursuant to section 8 of the Communications Act ("Section 8 fees"). See 47 U.S.C. 158.

**Establishment, Adjustment and Amendment of Regulatory Fees**

2. Section 9(b)(1)(C) of the Communications Act, 47 U.S.C. 159(b)(1)(C), requires the Commission to collect the fees established by the Schedule of Regulatory Fees in section 9(g), "until adjusted or amended by the Commission pursuant to paragraph (2) or (3)" of section 9(b). The statutory schedule in section 9(g) lists various regulatory fee categories under the Commission's Private Radio Bureau, Mass Media Bureau, and Common Carrier Bureau, and it specifies an annual fee amount for each category. See 47 U.S.C. 159(g); see also Appendix below.

3. The statute requires the Commission, in certain circumstances, to make adjustments or amendments to the Schedule of Regulatory Fees. First, since regulatory fees must result in collections of amounts that can reasonably be expected to equal amounts appropriated by Congress, for any fiscal year after fiscal year 1994,[2] paragraph (2) of section 9(b) requires the Commission to revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect changes in the amount appropriated for that fiscal year for the performance of the Commission's enforcement, policy and rulemaking, information services, and international activities. Such increases or decreases shall also reflect unexpected increases or decreases in the number of licensees or units subject to regulatory fees.[3] Second, amendments to the schedule may also be made to reflect other changes and factors. Paragraph (3) of section 9(b) provides that, "[i]n addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the schedule requires amendment to comply with the requirements of paragraph (1)(A) [of section 9(b)]."

4. For fiscal year 1994, we propose to adopt the fee amounts established by the Schedule of Regulatory Fees as approved by Congress. Adjustments to the statutory schedule required under paragraph (b)(2) may not take place until after the 1994 fiscal year, and thus we do not have authority during the

[1] Pub. L. No. 103–66, Title VI, Section 6002(a), 107 Stat. 397 (approved August 10, 1993). The new Section 9 of the Communications Act is codified at 47 U.S.C. 159.

[2] 47 U.S.C. 159(b)(1)(B). The government's 1994 fiscal year ("FY 1994") commenced on October 1, 1993, and ends September 30, 1994.

[3] 47 U.S.C. 159(b)(2)(A).

current fiscal year to revise the schedule for purposes of matching the amounts actually appropriated for the current fiscal year. With regard to amendments under paragraph (3) of subsection (b), we similarly believe that the statutory scheme does not envision that the Commission would exercise its authority to amend the fee amounts in the schedule until at least after FY 1994. Interested parties are invited to comment on a proposal to adopt the fee amounts set forth in the statutory Schedule of Regulatory Fees.

**Exemptions From Regulatory Fees**

*1. Governmental Entities*

5. Section 9(h) establishes an exemption from fees for "governmental entities." For purposes of the similar exemption in section 8, we have defined a governmental entity as any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs. We propose to apply the definition contained in our application fee rules to governmental entities exempt from regulatory fees. See 47 CFR 1.1112(f). The exemptions under section 9 apply to all FCC-regulated services in which governmental entities operate. Therefore our proposed regulatory fee exemption would apply to applicants, permittees, licensees, as well as any other regulatees who qualify as governmental entities.

6. We must also adopt procedures for identifying regulatees that are governmental entities exempt from regulatory fees under section 9. Commenters should address the option of requiring entities, in lieu of the required fee, to file certifications (or other relevant information) as to their exempt status. Alternatively, for those governmental entities that have already established their governmental status for purposes of section 8 filing fees, we may determine, to the extent possible, that no additional filings are necessary.

*2. Nonprofit Entities*

7. Section 9(h) also establishes an exemption from regulatory fees for all "nonprofit entities." In contrast, section 8(d)(1)(A), governing exemptions from application fees, exempts from application fees only those nonprofit entities licensed in Special Emergency Radio or Public Safety Radio services. Further, the statutory exemption of "nonprofit entities" is clearly broader than the current exemption in the mass media services covering noncommercial, educational broadcast stations and limited categories of other facilities. See 47 CFR 1.1112.

8. In applying the exemption for these nonprofit entities under section 8, we have interpreted the term "nonprofit entities" to mean entities that receive nonprofit, tax exempt status under section 501 of the Internal Revenue Code, 26 U.S.C. 501. We propose, therefore, to interpret the term "nonprofit entities" to include all nonprofit organizations exempt under section 501.

9. Under our section 8 fee rules, an applicant claiming nonprofit status must include a current IRS Determination Letter documenting its nonprofit status. We seek to avoid unnecessary paperwork, to the extent possible, by relying on existing information in Bureau files to identify regulatees that are nonprofit entities exempt from regulatory fees under section 9. However, since the exemption under section 8(d) only applies to nonprofit entities licensed in the Special Emergency Radio or Public Safety Radio services, we propose to require any other regulatee seeking an exemption as nonprofit entity to file, in lieu of the required fee, a current IRS Determination Letter documenting its nonprofit status.[4]

*3. Amateur Licensees*

10. Section 9(h) also provides a specific statutory exemption for "amateur radio operation licenses under part 97 of the Commission's regulations." 47 U.S.C. 159(h)(2). The Schedule of Regulatory Fees does establish a fee category for "Amateur vanity call-signs." We have proposed new rules in PR Docket No. 93–305 that would allow vanity call-signs. See Notice of Proposed Rule Making, 9 FCC Rcd 105, 59 FR 558 (Jan. 5, 1994). After those rules (if adopted) become effective, amateur licensees requesting vanity call-signs will be required to pay the statutory fee under section 9.

*4. Noncommercial Educational Broadcasters*

11. The Schedule of Regulatory Fees in section 9(g) specifies that fees shall be collected from "VHF *Commercial*" television and "UHF *Commercial*" television licensees and permittees. 47 U.S.C. 159(g) (emphasis added). However, the schedule does not specifically provide that regulatory fees apply only to "commercial" AM and FM radio licensees and permittees.[5–6] Nevertheless, based on the legislative history, we believe that Congress intended to exempt all noncommercial educational FM and AM radio licensees and permittees from regulatory fees.

12. Similarly, we believe that Congress intended to exempt noncommercial secondary and auxiliary broadcast services, such as low power television ("LPTV") stations, television translators and boosters, remote pickup stations and intercity relay stations. This interpretation is consistent with our interpretation of the application fee provisions in section 8. Accordingly, we propose to utilize our current noncommercial exemption for LPTV and translator stations for regulatory fees. We also propose to utilize this fee exemption for boosters, auxiliary broadcast services, and other Mass Media, Common Carrier or Private Radio authorizations used in conjunction with qualifying noncommercial educational radio, television, or instructional services.[7]

13. Finally, it does not appear that Congress intended that a noncommercial exemption for regulatory fees be available to international short-wave broadcast stations. As was the case when we were implementing section 8, we do not intend to provide a noncommercial exemption for international broadcast licensees.[8]

14. As with the exemption for governmental and nonprofit entities, to avoid unnecessary paperwork and to the extent possible, we propose to rely on information currently in Bureau files to identify most noncommercial licensees and permittees. However, where necessary, we reserve the option of requiring such entities, in lieu of paying the required fee, to file certifications (and other relevant information) as to their noncommercial status.[9] If additional information beyond a certification is requested, it would be

[4] Such documentation would be filed on or before the payment due date for the relevant regulatory fee category. If proper documentation is not received or a claimed exemption is otherwise rejected, an entity failing to pay the proper fee on time may be subject to a 25 percent late-payment penalty.

[5–6] We also note that the schedule includes Class D FM radio stations which are, by definition, noncommercial stations. *See* 47 CFR part 73, subpart C.

[7] We thus propose to extend the exemption to noncommercial services used in conjunction with ITFS facilities, which are exempted. 47 CFR 1.1112(e)(4).

[8] See Memorandum Opinion and Order, GN Docket No. 86–285, 6 FCC Rcd 5919, 5925, 56 FR 56599 (Nov. 6, 1991).

[9] Entities claiming an exemption would be required to file this information on or before the payment due date for the relevant regulatory fee category. If a showing is not properly documented or a claimed exemption is otherwise rejected, an entity failing to pay the proper fee on time may be subject to a 25 percent late-payment penalty.

done in a case-by-base basis and such information would have to show that the entity qualifies under our rules for the noncommercial exemption.

*5. Public Safety Services*

15. The Schedule of Regulatory Fees does not list specific Private Radio services under the category of "Shared use services." See 47 U.S.C. 159(g). In this regard, however, the legislative history clearly states that Congress intended to exempt public safety licensees from regulatory fees. Accordingly, we propose to exempt all licensees in the Public Safety Radio and Special Emergency Radio Services from regulatory fees, but we also seek comment on whether the exemption should be limited to governmental and nonprofit entities, which are explicitly mentioned in the statute's exemptions.

**Waivers, Reductions and Deferments of Regulatory Fees**

16. Section 9(d) states that "[t]he Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. 15(d). This provision is similar to section 8(d)(2), which we have interpreted narrowly. Specifically, we stated that, under section 8(d)(2), we would permit waivers or deferments on a case-by-case basis in extraordinary and compelling circumstances upon a showing that a waiver or deferment would override the public interest in reimbursing the Commission for its regulatory costs. We propose to apply this same narrow interpretation to our implementation of section 9(d) and thus propose to grant waivers, reductions or deferments of regulatory fees only in such unusual circumstances.

17. As discussed below, small regulatory fees generally must be paid at the time applications are filed. When regulatory fees are due at the same time an application is filed, we propose, when processing requests for regulatory fee waivers, reductions or deferments, to use procedures similar to those now used for application fee waiver requests. See 47 CFR 1.1115(e). Applicants seeking application fee waivers must submit both the request for waiver and the required fee, accompanied by the required form(s). Applications that do not include these materials are dismissed in accordance with section 1.1107 of the rules. For regulatory fees that are supposed to accompany applications, we would also require regulatees seeking a waiver or reduction to submit their regulatory fee payment with their waiver request. Similarly, for standard regulatory fees that are due on a certain date, we propose to require that the appropriate regulatory fee accompany any waiver or reduction request. The regulatory fees submitted would be refunded later if a waiver or reduction were granted. Requests for deferment would have to be filed and approved before the payment due date in order to avoid late payment penalties.

**Procedures for Payment of Regulatory Fees**

*1. Timing of Payments*

18. Section 9(f) of the Communications Act provides that the Commission's regulations implementing regulatory fees must "permit payment by installments in the case of fees in large amounts, and in the case of fees in small amounts, shall require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor." 47 U.S.C. 159(f)(1). We propose to establish three classes of regulatory fees, each of which would be based on the size of the annual fee amount. The three classes of regulatory fees are standard fees, small fees and large fees. The class of the fee would determine the timing of the regulatory fee payment. Pursuant to section 9(f), our regulations will permit regulatees subject to "large" fees to make two installment payments in FY 1994 (rather than single payment). Regulatees subject to "small" fees will have to pay their fees for each year of their license term in advance at the beginning of the license term. Regulatees subject to standard fees would pay their regulatory fee, in full, on an annual basis.

*a. Annual Payments for Standard Fees*

19. We propose to classify most of the fee amounts which will be paid under section 9 as standard fees. Standard regulatory fees would be those that are neither "large" nor "small." (The proposed definitions of these terms are discussed below.) As noted above, standard fees are to be paid in full on an annual basis. We propose further that each licensee or regulatee required to pay a standard fee must pay the full amount specified for each relevant fee category by a date certain each year. The specific payment due dates for each regulatory fee category for the 1994 fiscal year will be announced in the Report and Order in this proceeding or in a Public Notice published in the **Federal Register** to be released well before the first payment due date. We anticipate that all regulatory fees will be collected as early as possible before the end of the fiscal year. In subsequent fiscal years, we intend to establish regular, fixed payment due dates for regulatory fees.

*b. Installment Payments for Large Fees*

20. Section 9(f) states that the Commission's regulations shall permit payment by installments for regulatory fees in "large amounts." However, nowhere in the statute or the legislative history did Congress define the term "large." For purposes of establishing eligibility criteria for FY 1994 for regulatory fee installment payments, we propose generally to classify a fee amount as "large" if it greatly exceeds the average annual fee for regulatees in a particular category. Specifically, for some regulatory fee categories, we propose to establish a fixed annual amount which is based on the relative payment obligations of regulatees within that regulatory fee category. Those fees which are significantly higher than all others would be deemed large and entities who are required to pay significantly more than most other regulatees may elect to make two payments in FY 1994 instead of paying the entire amount all at once. For future years, we seek comment on whether large fee payors should be permitted to pay their annual regulatory fee in four or more installments.

21. We propose that an entity's installment payment eligibility should not be based on its total regulatory fee payments because it happens to hold multiple licenses or authorizations or serve multiple areas. Instead, a regulatory fee would be deemed large based on the fee for each individual license, authorization or authorized service area. If, for example, the regulatory fee is large (as defined herein) for one or more of a regulatee's licenses and not for other licenses, the regulatee will be eligible for installment payments only for those large fee licenses and must pay the entire regulatory fee for all of the other licenses. We invite specific comment on whether, for purposes of determining whether fees are large, telephone local exchange carriers should be assessed fees on an operating company or holding company level.

22. In applying the method described above, we propose several "large" fee amounts that would be eligible for installment payments. In sum, for the 1994 fiscal year we have identified the following fee amounts as large:

| Regulatory fee category | Large fee |
|---|---|
| VHF and UHF commercial television station. | Above $12,000. |
| Cable television system | Above $18,500. |

| Regulatory fee category | Large fee |
|---|---|
| Inter-exchange carrier ... | Above $500,000. |
| Local exchange carrier holding co. | Above $700,000. |

When compared with the amounts to be paid by the average regulatee in these categories, these regulatory fee amounts appear significantly higher.

23. If a regulatee finds it necessary to pay its large regulatory fee by installments, we propose to establish fixed dates on which installment payments will be due. For the 1994 fiscal year, any eligible regulatee that elects to pay a large fee in installments shall make half of its payment on a date to be specified. We also shall specify the date for the second and final installment. Payments in their entirety will be due prior to the end of this fiscal year. As with standard fees, the payment due dates for each large fee category for the 1994 fiscal year will be announced in the Report and Order in this proceeding or in a **Public Notice** published in the **Federal Register** to be released well before the first installment payment due date.

24. To recover the additional costs of maintaining installment payment plans, we propose that each installment payment would be subject to an additional processing charge to cover administrative costs. We tentatively propose that these fees will be $50.00 per payment. Installment payments received after the due date for standard regulatory fees would be subject to interest payments.[10] Further, as discussed below, late installment payments would be subject to a 25 percent late fee and applications filed by delinquent payers would be subject to dismissal. We would also reserve the right to require a regulatee to pay its regulatory fees in a single, full payment if one or more installment payments has not been received in a timely manner.

*c. Advance Payments for Small Fees*

25. Section 9(f) states that the Commission's regulations shall require the payment of "small" regulatory fees "in advance for a number of years not to exceed the term of the license held by the payor." 47 U.S.C. 159(f)(1). Based on the legislative history, for the 1994 fiscal year we propose to require advance payment for regulatory fees in Private Radio services. Due to the large volume of Private Radio licensees and other authorizations, we believe that assessment and collection of these small regulatory fees on an annual basis would be very costly and would likely result in a larger number of delinquent payments unless such payments coincide with the beginning of the license term.

26. We propose to require those who are assessed a small regulatory fee to pay their annual fee for their entire license or authorization term. These regulatory fees would generally be paid concurrently with an applicant's new, renewal or reinstatement application. We propose to require persons holding lifetime restricted radiotelephone and radio operator licenses or permits for commercial use to pay a one-time regulatory fee of $105.00 to cover the entire lifetime license or permit term. If the fee amount is adjusted subsequent to a regulatee's advance payment, the regulatee would not be subject to the new fee amount until its next renewal application and regulatory fee is due. Regulatees thus would only be subject to the fee amounts in effect for the fiscal year in which their application is filed. Finally, for the first round of fee payments for regulatees in the private radio service, we may require payments subsequent to the time when the application is actually filed.[11]

*2. Method of Payment and Payment Location*

27. We propose to use the same general requirements and procedures for the payment of both application fees and regulatory fees. First, in addition to the payment methods in section 1.1108(a) of our Rules, we propose to allow the filing of fee payments by electronic means. We will first allow electronic fee payments only on a limited, experimental basis. We also propose to allow payment by credit card in some circumstances. The credit cards which will be accepted are VISA and Mastercard. When a credit card is employed for a fee payment, the entire fee payment must be made by a single credit card transaction.

28. Second, we propose to allow the use of one payment instrument to cover multiple standard regulatory fee payments and, where applicable, multiple installments.[12] Our new remittance form and payment procedures would allow individual entities to use a single payment method or instrument to pay the standard regulatory fees for each Mass Media and Common Carrier license or authorization it holds. Each individual regulatee will be solely responsible for accurately accounting for and listing each license or authorization and the number of subscribers, antennas, access lines, or other relevant units, and for paying the proper cumulative amount by the single instrument.

29. Finally, in order to efficiently process Mass Media and Common Carrier regulatory fee payments, we propose to set up a single lockbox at the lockbox bank, separate from the lockboxes established for applications and application fees. Regulatory fee payments for both services are to be submitted to this lockbox. This will allow regulatees in the Mass Media and Common Carrier services to combine payments for different fee categories. However, since regulatory fees for Private Radio services will be due at the same time as applications and application fees, these regulatory fees, must be paid to the same lockbox as the application fees. Because they are paid to different lockboxes, Private Radio fees may not be combined with Mass Media and Common Carrier regulatory fees. We request comments on the above proposals.

*Enforcement of Regulatory Fees Statute and Regulations*

30. Section 9(c) of the Communication Act provides the Commission with three methods of enforcing the statute: monetary penalties for late payment, dismissal of applications, and revocation. 47 U.S.C. 159(c). In order to ensure an effective regulatory fee collection program, we intend to use these enforcement mechanisms to the fullest extent possible. In addition, the Commission will pursue all available remedies against delinquent payers under the Debt Collection Act, 31 U.S.C. 3711 *et seq.*, and related statutory provisions. We invite comment on the proposals which follow.

*1. Penalties for Late Payment*

31. We propose to incorporate section 9(c)(1) into our rules. Thus, we will charge a 25 percent penalty to any regulatee that fails to pay its regulatory fee (or installment) in a timely manner. We intend to consider a payment to be late, or "not paid in a timely manner," if the full regulatory fee amount or the

[10] See 4 CFR part 102; 47 CFR 1.1940(c).

[11] We note that some existing private radio licensees will be reclassified as Commercial Mobile Radio Service (CMRS) providers pursuant to section 332 of the Communications Act. 47 U.S.C. 332(c), (d). To the extent that private radio licensees will have paid their "small" fees in advance for the term of their licenses, we would apply the advanced payment toward any new regulatory fee requirement imposed upon such licensees as a result of being reclassified as CMRS.

[12] Since small regulatory fees will be paid at the same time as application fees, our current application fee-filing procedures requiring one instrument per application would apply. However, we are proposing below to modify the one-instrument/one-application rule to allow one payment instrument to cover multiple applications filed in the same bank lockbox.

entire installment payment is not received at the lockbox bank by the due date specified by the Commission. A payment would also be considered late if the payment (check, bank draft or other means) is not collectible.[13]

32. If a regulatory fee is not paid in a timely manner, we will make every effort to identify delinquent payors and to notify them of their delinquency as soon as possible. This notice will, pursuant to the statute, automatically assess the 25 percent penalty and, as proposed below will require the delinquent payor to pay the fee and penalty, may subject the delinquent payors' pending applications to dismissal, and may require a delinquent payor to show cause why its existing instruments of authorization should not be subject to revocation.

*2. Dismissal of Application*

33. Section 9(c)(2) authorizes the Commission to dismiss any application, group of applications or other filings for failure to pay in a timely manner any fee or penalty under section 9. 47 U.S.C. 159(c)(2). Because application and regulatory fees may be combined, we propose that, where a regulatory fee is required to accompany a regulatee's new or renewal application (as is the case with the small fees), the application will be returned if the regulatory fee is not included. If the application that must be accompanied by a regulatory fee is a mutually exclusive application with a filing deadline (or any other application that must be filed by a date certain), we also propose to dismiss the application if not accompanied by the regulatory fee.

*3. Revocation*

34. Section 9(c)(3) provides that, '[i]n addition to or in lieu of" the 25 percent penalty required by section 9(c)(1) and the application(s) dismissal authorized by section 9(c)(2), "the Commission may revoke any instrument of authorization held by any entity that has failed to make payment of a regulatory fee assessed pursuant to this section." 47 U.S.C. 159(c)(3). The statute specifies that the Commission must provide notice to the licensee of the Commission's intent to take such action and must allow the licensee at least 30 days to either pay the fee or show cause why the fee does not apply to the licensee or should otherwise be waived or payment deferred. A hearing is not required under this revocation provision unless the licensee's response presents a "substantial and material question of fact." In any case where a hearing is conducted, it shall be based on written evidence only, and the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee.

35. While we do not foresee that revocation will be necessary except in egregious circumstances, we reserve the right to invoke these abbreviated revocation proceedings against any delinquent regulatee. We note that this provision requires only that a regulatee "has failed to make *payment of a regulatory fee." Id.* (emphasis added). It does not require "willful or repeated" failure to pay. Compare 47 U.S.C. 312(a)(3), (4) and (7). Therefore, if we deem it appropriate, our notification to a regulatee that is delinquent with its regulatory fee payment will take the form of an "Order to Show Cause," allowing the regulatee to either pay the fee or show cause why the fee does not apply or should otherwise be waived or payment deferred. We propose to provide a 60 day period for a reply by the subject regulatee in order to afford an adequate opportunity for the regulatee to obtain any necessary financing of its fee payment and to otherwise prepare its response.

*4. Debt Collection Act Remedies*

36. In addition to the above-described remedies under section 9(c), we intend to invoke our authority under the Debt Collection Act against any person or entity failing to meet its regulatory fee payment obligations. See 31 U.S.C. 3711 *et seq.* In accordance with part 1, subpart 0 of our rules (47 CFR §§ 1.1901–1.1952), we intend to pursue the collection of outstanding debts arising from regulatory fee payment failures at the same time we proceed against the debtor with the other sanctions authorized by section 9(c). Moreover, where circumstances require, we will refer outstanding debts to the Internal Revenue Service. See 31 U.S.C. § 3720A.

Included in the recovery of the unpaid fee will be the assessment of interest on the debt due, penalty for nonpayment and the full cost incurred by the Federal government in the collection process. See 31 U.S.C. 3717.

**Explanation of Regulatory Fee Categories**

37. An explanation of regulatory fee categories is contained in the Commission's Notice of Proposed Rulemaking and is based on the categories established by the Schedule of Regulatory Fees in section 9(g) of the Communications Act. 47 U.S.C. 159(g). Where regulatory fee categories from the schedule need additional interpretation or clarification, we have relied on the legislative history of section 9 and our own experience in establishing and regulating the various services.

*1. Private Radio Bureau*

38. The two levels of statutory fees for Private Radio services, exclusive use service and shared use services, were established on the basis that those licensees who generally receive a higher quality communications channel, due to exclusive or lightly shared frequency assignments, will pay a higher fee than those who share marginal quality channels. In addition, as noted above, because of the relatively small annual fee amounts in the Private Radio Services, applicants for a new license, reinstatement and renewal will be required to pay a regulatory fee covering an entire license term, with only a percentage of all licensees paying a regulatory fee in any one year. Applications for modification or assignment of an existing authorization do not require payment of a regulatory fee. The expiration date of these authorizations will not reflect a new license term when either modifications or assignments are processed. In an effort to reduce public confusion, the Commission has provided separate lockbox addresses for these applications.

*2. Mass Media Bureau*

39. Television stations. As discussed above, we propose to allow installment payments for regulatory fees if a television licensee's annual fee exceeds $12,000. We propose that this amount be deemed large because it greatly exceeds the estimated average regulatory fee obligations to be incurred by most other television licensees. Specifically, according to our estimates, the 551 commercial VHF television licensees will pay an average fee of $8,826. Most VHF licensees (379, or 69 percent) will pay $8,000 or under in fiscal year 1994 and only 18.5 percent of VHF licensees will be asked to pay over $12,000. Similarly, under the statutory schedule 561 commercial UHF television licensees will pay an average fee of $8,294. The vast majority of UHF licensees (406, or 72 percent) will pay under $10,000 in fiscal year 1994 and only 27.63 percent of UHF licensees will be asked to pay over $12,000. Thus, we tentatively conclude that television licensees subject to a regulatory fee above $12,000 will be automatically eligible to make two equal installment payments, subject to additional administrative and interest charges.

[13] We will also continue our policy of not accepting instruments other than cashier's checks for payers who are notified that other payment methods are unacceptable.

40. In determining a TV station's market rank, the Commission has traditionally relied on the Arbitron Company's publication "Television Markets and Ranking Guide." See, *e.q*, 47 CFR §§ 73.658(k) note 1 (prime-time access rule). We note, however, that Arbitron has recently announced that it will no longer provide television ratings services. See Cooper, Arbitron Drops Local TV and Cable Ratings, Broadcasting & Cable, Oct. 25, 1993, at 45. Thus, we seek comment on whether we should rely on the latest Arbitron publication's rankings which would be placed in our rules (see, *e.q.*, 47 CFR 76.51 (major television markets)), or should we use some other source (such a A.C. Nielsen) to determine a television station's market ranking reach year for purposes of assessing regulatory fees. In this regard, we tentatively conclude that we will need to rely on the most recent market rankings to assess fees each fiscal year because a static list in our rules may become outdated after a few years. Thus, any changes in market rankings may affect regulatory fee amounts for the following fiscal year.

*3. Cable Services Bureau*

41. Cable television systems. We seek comment on how to verify a cable television operator's regulatory fee obligation, which, as noted is based on its total number of subscribers. We propose to initially rely on a cable operator's good faith representation on its fee remittance form as to the number of subscribers it has as of the date of its annual regulatory fee payment. We also intend to perform random audits to determine whether individual cable systems have based their fee payments on the correct number of subscribers. Commenters are invited to suggest other alternatives.

42. As indicated above, we propose to allow installment payments for these regulatory fees if a cable television system's annual fee exceed $18,500.00 (*i.e.*, systems with more than 50,000 subscribers).[14] We propose that this amount be considered large in this context in part because it significantly exceeds the estimated average fee that will be paid by most cable systems. Specifically, according to our estimates, the average fee in this category will be approximately $1,914.00 in FY 1994. However, a relatively few systems (approximately 2 percent of all systems) will be subject to fees over $18,500.00 and significantly above the $1,914.00 average. These systems will pay, on average, a fee of approximately $36,000. Thus, we believe that $18,500 is a reasonable cut-off. Therefore, pursuant to the statute, we propose to permit cable systems whose regulatory fee for FY 1994 exceeds $18,500 to pay in two equal installments on the dates later specified by the Commission, subject to additional administrative and interest charges. We invite comment on this proposal.

*4. Common Carrier Bureau*

43. Most common carrier regulatory fees are based on the size of a regulatee's communication operation as determined by number of stations, subscribers, access lines, or antennas. We intend to rely on the Bureau's licensing data bases to confirm the identity and fee amount for most radio common carriers, to the extent possible. However, where the Commission does not have information on hand to verify a regulatory fee multiplier (*e.g.* number of subscribers), we intend to rely on the good faith representations made on a regulatee's fee remittance form. We also intend to perform random audits to determine whether individual regulatees have reported the correct multiplier. Additionally, we request comment with respect to how well the specific regulatory fee multiplier set forth in the statutory schedule are "reasonable related to the benefits provided" to regulatees.[15] Commenters should proposed specific alternatives, which we may either recommend to Congress as technical amendments to the statutory schedule or incorporate into our own schedule of regulatory fees.

44. Mobile services. Licensed personal communications services ("PCS") will consist of a wide variety of commercial or private mobile communications services, including advanced paging, microcellular telephone communications, portable facsimile and other video and data transmission services. See generally, First Report and Order, Gen. Docket No. 90–314 and ET Docket No. 92–100, 8 FCC Rcd 7162, 58 FR 42681 (August 11, 1993) *on recon.*, FCC 94–30 (released March 4, 1994) (narrowband PCS); Second Report and Order, Gen. Docket No. 90–314, 8 FCC Rcd 7700, 58 FR 59174 (Nov. 8, 1993) *recon.* pending (broadband PCS). The statutory Schedule of Regulatory Fees enacted in the 1993 Budget Act established an annual fee of $60.00 per 1000 subscribers for PCS licensees. At the same time, the 1993 Budget Act recognized that PCS licenses have not yet been issued. In particular, Congress directed the Commission to conclude its PCS rulemaking proceedings (Gen. Docket No. 90–314 and ET Docket No. 92–100) by February 6, 1994, and to commence the PCS licensing process by May 7, 1994.[16] In addition, our new PCS service rules provide licensees five years to meet minimum construction requirements. Accordingly, since it is unlikely that may PCS licensee will have a significant number of subscribers in the immediate future, we tentatively conclude that no regulatory fees will be collected from PCS licensees during the 1994 fiscal year. We intend to begin assessing and collecting regulatory fees for PCS in the 1995 fiscal year.

45. Space stations. Domestic and international non-geostationary satellites, positioned in a low-earth orbit ("LEO"), may be authorized to transmit to satellites and fixed or mobile earth stations. These services include the new non-vioice, non-geostationary mobile-satellite service in bands below 1 GHz, see Report and Order, CC Docket No. 92–76, 8 FCC Rcd 8450, 58 FR 68053 (Dec. 23, 1993) and Mobile Satellite Services in bands above 1 Ghz, see Notice of Proposed Rulemaking, CC Docket No. 92–166, FCC 94–11 (released Feb. 18, 1994). Entities authorized to operate LEO systems will be assessed an annual regulatory fee of $90,000.00 for each such system. We note that the Commission's new rules do not define how many space stations in low-earth orbit would constitute a "system." See Below 1 GHZ Report and Order at para. 3. Although no LEO systems are currently operational, for purposes of assessing regulatory fees, we propose to require a LEO operator to begin paying annual regulatory fees in the fiscal year in which they launch the first satellite in their system even though all the space stations specified in its application or instrument of authorization have not become operational. We request comment on this proposal. While it appears unlikely that a LEO system will be launched in the 1994 fiscal year, should be LEO system be launched during that period, we tentatively propose to collect a regulatory fee for such launched systems and request comment on whether the entire annual fee amount should be required or if the fee should be assessed on a pro-rata basis.

46. Interexchange and local exchange carriers. For FY 1994, interexchange carriers (long distance telephone companies) ("IXCs") will be assessed an annual regulatory fee of $60.00 per 1,000 presubscribed access lines. Similarly, local exchange carriers (local telephone operating companies)

[14] The term "subscriber" is defined in section 76.5 of the Commission's Rules. 47 CFR 76.5.

[15] See 47 U.S.C. 159(b)(1)(A).

[16] Section 6002(d)(2), 1993 Budget Act.

("LECs") will be assessed an annual regulatory fee of $60.00 per 1,000 access lines. As noted above, for IXCs, we have identified regulatory fee payment amounts greater than $500,000.00 as large. For LEC holding companies, we have identified $700,000.00 as a large amount. Thus, we propose to permit IXCs whose annual regulatory fee exceed $500,000.00 and LEC holding companies whose fee payments exceed $700,000 to make installment payments. A relatively small number of companies will incur annual fees in excess of these amounts compared with many other entities who are subject to much lower fees. Specifically, we have estimated that the average fee for all interexchange carriers will be approximately $20,000. However, the top three carriers will be paying from $530,000 to $6 million dollars per year in regulatory fees. The estimated average fee for only the top 20 local exchange carriers is approximately $417,000. We have tentatively chosen as a logical cut-off point $700,000 because only a few carriers will pay this above-average fee and the vast majority of carriers will pay a fee that is significantly below the top 20 average fee. In fiscal year 1994, large fees may be paid in two installments. Given the higher annual operating revenues of these types of companies, we also believe that the proposed amounts for "large" fees are appropriate in this context.

**Conforming and Clarifying Amendments to Application Fee Rules**

47. In addition to the new rules for regulatory fees, we are proposing to revise several sections of our rules governing the payment and collection of fees associated with applications and other filings. As noted above, these fees are assessed and collected pursuant to section 8 of the Communications Act and are separate and apart from the regulatory fees authorized under section 9. However where appropriate, our section 7 and section 9 fee collection procedures will be integrated. For the most part, the proposed modifications related to our filing fees are ministerial in nature to conform our application fee and regulatory fee regulations or will clarify existing fee payment requirements.

48. *Fees for resubmitted applications.* First, we propose to amend section 1.1107(d) of the rules, which governs fee payments relating to applications and other filings when resubmitted in the appropriate timeframe following a staff request for additional or corrected information. Ordinarily, no additional fee payment is required for resubmitted applications and other filings. However, the rules do require a supplemental fee payment whenever the revised information causes a change in the category of the filing with the result that a higher fee payment is now due under the fee schedule. Our rules provide that the additional fee payment, *i.e.*, the difference between the fee initially submitted and the correct fee payment now due, must be submitted with the revised application or other filing.

49. In order to clarify our rule governing those procedures applicable when an additional fee is due, we propose to amend § 1.1107(d) to require persons submitting revised applications and other filings to submit any fee payment balance due when the revised application or other filing is submitted. Such applications and fees must be filed at the lockbox bank. In the event that the staff discovers, within 30 days after the resubmission, that the additional fee payment was not submitted, the application or other filing will be dismissed as deficient and the previously submitted section 8 fee payment will be retained under this proposal. A new fee payment (covering the entire amount) will be required with any future filing of the application or other filing. However, if the staff discovers the fee payment deficiency more than thirty days subsequent to the resubmission, the application or other filing will be retained but a 25 percent late fee will be assessed on the deficient amount even if the Commission has completed its action on the application or other filing involved.

50. *Stale checks.* The Commission's correspondent bank for fee collections will not process a personal or business check dated more than six months prior to its submission. Therefore, we propose to revise § 1.1108(a) of the rules to make clear that these "stale" checks will not be accepted as fee payments. Under this revision, and consistent with the Uniform Commercial Code, we will not accept any instrument of payment dated more than six months prior to the date of its filing with the lockbox bank, and we will return to the filer any application or other filing submitted with a stale payment instrument.

51. *Receipts.* Next, with regard to receipts requested for application fee payments, the Commission's practice is to furnish receipts only upon specific requests of the submitter rather than to provide receipts automatically for all fee payments received. We propose to clarify these procedures by amending § 1.1108 of the rules. In order to obtain a receipt for a fee payment, we propose to require that the application and fee package include a copy of the first page of the application or other filing, clearly marked "copy", submitted expressly for the purpose of serving as a receipt of the filing. The copy should be the top document in the fee payment package. The staff will date-stamp the copy immediately and provide it to the bearer of the submission, if hand delivered. For submissions by mail, the receipt copy will be provided through return mail if the filer has attached to the receipt copy a stamped self-addressed envelope of sufficient size to contain the date stamped copy of the application. We do not intend to provide receipts for regulatory fee payments.

52. *Electronic payment.* In addition, pursuant to our proposal above regarding the submission of regulatory fee payments by electronic means, we propose to amend §§ 1.1107 and 1.1108 of the rules to allow the payment of application and other filing fees by electronic means. Although such a system for electronic payment is not yet in place, we believe that it is appropriate in this proceeding, and in conjunction with the development of our pilot project, to propose changing these rules at this time and to seek comment on one particular aspect of this payment method as it specifically applies to applications and other filings. Specifically, we are concerned about matching electronically paid fees with submitted hard-copy applications. If a party chooses to pay its application filing fee electronically, we believe that it should follow existing procedures for filing its application at the lockbox bank. However, in lieu of the current payment methods, the party will indicate on its remittance advice (FCC Form 159 or the underlying application form with fee information incorporated therein) that payment is being sent to the bank electronically. We tentatively conclude that in such situations the electronic payment must be made on or before the day the application is filed. Upon receipt of an application, the bank will confirm that a fee payment has been received electronically. If the electronic payment is not received on the filing date, the application or request would be returned without processing. We believe these procedures are necessary to ensure the most efficient processing of electronic fee payments (when authorized) and applications or other filings. Finally, during the pilot phase of our electronic payment program, regulatees will be required to obtain our authorization before making electronic fee payments.

53. *One-check/one-application rule.* We propose to modify our rules to allow the use of a single payment instrument or method to cover multiple applications for the same or different

applicants, so long as all the applications are filed at the same time at the same lockbox. Any applicant desiring to pay for multiple regulatory/application filings in the same lockbox with a single payment instrument, or when paying by credit card, must also complete FCC Form 159, FCC Remittance Advice. Each item must be listed separately on the form with its own Payment Type Code. If another space is needed for multiple filings, the applicant must use FCC Form 159–S, FCC Supplemental Remittance Advice.[17]

54. *Payment by cashier's check required.* Section 1.1108(d)(1)(i) of the Commission's Rules provides that payment of fees by cashier's check may be required when a person or organization has, on two or more occasions, made payment with a payment instrument on which the Commission does not receive final payment and such failure is not excused by bank error. 47 CFR 1.1108(d)(1)(i); see also *id.* § 1.1110(a). Under these circumstances, the Commission will send a letter detailing the terms and conditions of future payments, including a requirement that no form of payment, other than a cashier's check is acceptable. Despite this apparently strict response to "bounced" checks and other insufficient payment instruments, we continue to receive numerous checks that are not drawn on sufficient funds for payment. To ensure that payment instruments will result in a final payment being made to the Commission, we believe that our cashier's check safeguard should be strengthened. Accordingly, we propose that, when a person or organization has, on a single occasion, submitted a payment instrument on which final payment is not received (and not excused by bank error), we will immediately notify the party that future fee payments must be made by cashier's check. If, subsequent to such notice, payment is not made by a cashier's check, that party's other payment instrument will not be accepted and its application or other filing will be returned.

55. *Filing locations for petitions, waivers, and deferrals.* Finally, we will be making a few ministerial changes to the rules. Specifically, we will revise §§ 1.1109(a)(3) and 1.1115 to clarify that any petition for reconsideration, application for review, and any petition for waiver or deferral of a fee payment, accompanied by an application or regulatory fee payment, must be submitted to the lockbox bank. If no fee payment is required and the matter is within the scope of the fee rules, the petition or application for review should be filed with the Secretary and clearly marked to the attention of the Managing Director. Petitions for deferral or waiver for which no fee payment is required should also be directed to the attention of the Managing Director.

**Comment Period and Procedures**

56. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 7, 1994, and reply comments on or before April 18, 1994. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

**Ex Parte Rules**

57. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See 47 CFR 1.1202, 1.1203 and 1.1206(a).

**Initial Regulatory Flexibility Analysis**

58. As required by section 603 of the Regulatory Flexibility Act (Pub. L. No 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981)), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

*Reason for Action*

This rulemaking proceeding is initiated to obtain comment regarding the Commission's proposed implementation of newly enacted Section 9 of the Communications Act in which Congress directed the Commission to establish rules for the collection of regulatory fees.

*Objectives*

The Commission seeks to implement the collection of regulatory fees, as contained in Schedule of Regulatory Fees, in the most efficient manner possible and without undue burden to the public.

*Legal Basis*

The proposed action is authorized under sections (4)(i) and (j), 8, 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and (j), 158, 159, and 303(r).

*Reporting, Recordkeeping and Other Compliance Requirements*

The Commission is developing an FCC Remittance Advice form (FCC Form 159) for submission to the Commission with single regulatory fee payments and an FCC Supplemental Remittance Advice Form (FCC Form 159S) for submission with multiple regulatory fee payments.

*Federal Rules That Overlap, Duplicate or Conflict With Proposed Rule*

None.

*Description, Potential Impact, and Number of Small Entities Involved*

This proposed implementation of the collection of regulatory fees will affect permittees, licensees and other regulates in the cable, common carrier, mass media and private radio services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

*Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives*

The Notice solicits comments on a variety of alternatives.

[17] All non-private radio section 9 regulatory fee payers must use FCC Form 159/159S when submitting single or multiple regulatory fees. Under current application fee rules, applicants are required to submit one check and one application. However, effective April 1, 1994, applicants will also be allowed to pay for multiple filings in the same lockbox with a single payment instrument. These applicants must also use FCC Form 159/159S for multiple filings.

**Authority**

59. Authority for this proceeding is contained in sections 4(i) and (j), 8, 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 158, 159, and 303(r).

**List of Subjects in 47 CFR Part 1**

Administrative practice and procedure.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

**Appendix—Statutory Schedule of Regulatory Fees**

| Bureau/Category | Annual regulatory fees |
|---|---|
| Private Radio Bureau: | |
| Exclusive use services (per license): | |
| Land mobile (above 470 MHz, base station and SMRS) (47 CFR Part 90) | $16 |
| Microwave (47 CFR Part 94) | 16 |
| Interactive video data service (47 CFR Part 16) | 16 |
| Shared use services (per license unless otherwise noted) | 7 |
| Amateur vanity call-signs | 7 |
| Mass Media Bureau (per license): | |
| AM radio (47 CFR Part 73): | |
| Class D fulltime | 250 |
| Class A fulltime | 900 |
| Class B fulltime | 500 |
| Class C fulltime | 200 |
| Construction permits | 100 |
| FM radio (47 CFR Part 73): | |
| Classes C, C1, C2, B | 900 |
| Classes A, B1, C3 | 600 |
| Construction permits | 500 |
| TV (47 CFR Part 73): | |
| VHF commercial: | |
| Markets 1 thru 10 | 18,000 |
| Markets 11 thru 25 | 16,000 |
| Markets 26 thru 50 | 12,000 |
| Markets 51 thru 100 | 8,000 |
| Remaining markets | 5,000 |
| Construction permits | 4,000 |
| UHF commercial: | |
| Markets 1 thru 10 | 14,400 |
| Markets 11 thru 25 | 12,800 |
| Markets 26 thru 50 | 9,600 |
| Markets 51 thru 100 | 6,400 |
| Remaining markets | 4,000 |
| Construction permits | 3,200 |
| Low power TV, TV translator, and TV booster (47 CFR Part 74) | 135 |
| Broadcast auxiliary (47 CFR Part 74) | 25 |
| International (HF) broadcast (47 CFR Part 73) | 200 |
| Cable antenna relay service (47 CFR Part 78) | 220 |
| Cable television system (per 1,000 subscribers) (47 CFR Part 76) | 370 |
| Common Carrier Bureau: | |
| Radio Facilities: | |
| Cellular Radio (per 1,000 subscribers) (47 CFR Part 22) | 60 |
| Personal Communications (per 1,000 subscribers) (47 CFR) | 60 |
| Space Station (per operational station in geosynchronous orbit) (47 CFR Part 25) | 65,000 |
| Space Station (per system in low-earth orbit) (47 CFR Part 25) | 90,000 |
| Public Mobile (per 1,000 subscribers) (47 CFR Part 22) | 60 |
| Domestic Public Fixed (per call sign) (47 CFR Part 21) | 55 |
| International Public Fixed (per call sign) (47 CFR Part 23) | 110 |
| Earth stations (47 CFR Part 25): | |
| VSAT and equivalent C-Band antennas (per 100 antennas) | 6 |
| Mobile satellite earth stations (per 100 antennas) | 6 |
| Earth station antennas: | |
| Less than 9 meters (per 100 antennas) | 6 |
| 9 Meters or more: | |
| Transmit/Receive and Transmit Only (per meter) | 85 |
| Receive only (per meter) | 55 |
| Carriers: | |
| Inter-exchange carrier (per 1,000 presubscribed access lines) | 60 |
| Local exchange carrier (per 1,000 access lines) | 60 |
| Competitive access provider (per 1,000 subscribers) | 60 |
| International circuits (per 100 active 64KB circuit or equivalent) | 220 |

[FR Doc. 94-6246 Filed 3-16-94; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 14

**RIN 1018-AB22**

### Humane and Healthful Transport of Wild Mammals and Birds to the United States

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Service proposes to make a technical amendment to regulations published on June 17, 1992, pertaining to the humane and healthful transport of wild mammals and birds to the United States. This proposed technical amendment updates the edition of the Live Animals Regulations published by the International Air Transport Association that is incorporated by reference. This proposal to incorporate by reference the 20th edition of the International Air Transport Association Live Animals Regulations is for the convenience of the public and in order to facilitate consistency and enforceability.

**DATES:** The Service will consider comments received by April 1, 1994 in formulating a final rule.

**ADDRESSES:** Comments and information should be sent to Director, U.S. Fish and Wildlife Service, c/o Office of Management Authority, 4401 N. Fairfax Drive, room 420C, Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:** Mr. Marshall P. Jones, Chief, Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Dr., room 432, Arlington, VA 22203, telephone (703) 358-2093.

**SUPPLEMENTARY INFORMATION:** On June 17, 1992, the U.S. Fish and Wildlife Service (Service) published a final rule (57 FR 27094) amending regulations pertaining to the humane and healthful transport of wild mammals and birds to the United States. That rule became effective September 15, 1992. That rule, 50 CFR part 14 subpart J, incorporates by reference the 18th edition of the Live Animal Regulations (LAR) of the International Air Transport Association, such that all primary enclosures used to transport live wild mammals or birds to the United States are required to comply with the Container Requirements of the 18th LAR. Since the publication of the final rule, IATA has published the 20th edition of the LAR, effective October 1, 1993. The 20th LAR contains no major substantive differences from the 18th LAR, but does clarify some of the Container Requirements. When the public orders the LAR from IATA, they can only obtain the 20th edition. If the public complies with the 20th LAR, they will satisfy all of the requirements of the final rule for the Humane and Healthful Transport of Wild Mammals and Birds (50 CFR part 14). This proposal to incorporate by reference the 20th edition of the LAR is therefore for the convenience of the public and in order to facilitate consistency and enforceability.

**Executive Orders 12866, 12612, and 12630 and the Regulatory Flexibility Act**

This document is not subject to Office of Management and Budget review under Executive Order 12866. This proposed revision is a technical amendment that allows the regulation to conform with the current edition of a publication that has been incorporated by reference, which will make compliance and enforcement more practical and efficient. Also, this current action is not expected to have significant taking implications, as per Executive Order 12630, since compliance with the revised regulations will have neither greater nor lesser effect on constitutionally protected individual property rights. The revision to Part 14 certified not to have a significant economic effect on a substantial number of small entities as described by the Regulatory Flexibility Act. Small entities are already required to comply with the current regulations and the 18th edition of the IATA Live Animals Regulations. It is expected that the revisions would reduce the burden on small entities by adopting the current edition of the industry guidelines rather than imposing a requirement for an outdated version. Since the rule applies to importations of live wildlife into the United States, it does not contain any Federalism impacts as described in Executive Order 12612.

**Author**

The author of this proposed rule is Dr. Susan S. Lieberman, Office of Management Authority, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/358–2095).

**List of Subjects in 50 CFR Part 14**

Exports, Imports, Incorporation by Reference, Labeling, Reporting requirements, Transportation and Wildlife.

**Proposed Regulation Promulgation**

Accordingly, it is proposed to amend part 14 of chapter I of title 50 of the Code of Federal Regulations as follows:

**PART 14—[AMENDED]**

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

**Authority:** 18 U.S.C. 42(c); 16 U.S.C. 3371–3378; 16 U.S.C. 1538(d)–(f), 1540(f); 16 U.S.C. 1382; 16 U.S.C. 705, 712; 31 U.S.C. 483(a).

2. Section 14.106 is amended by revising the first sentence of paragraph (a) to read as follows:

**§ 14.106 Primary enclosures.**

* * * * *

(a) The Container Requirements of the Live Animal Regulations (LAR), 20th edition, October 1, 1993, published by the International Air Transport Association (IATA) shall be complied with by all parties transporting wild mammals or birds to the United States. * * *

* * * * *

Dated: February 26, 1994.

**George T. Frampton, Jr.,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 94–5950 Filed 3–16–94; 8:45 am]

BILLING CODE 4310–55–P

# Notices

Federal Register
Vol. 59, No. 52
Thursday, March 17, 1994

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

### Forms Under Review by Office of Management and Budget

March 11, 1994.

The Department of Agriculture has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extension, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from:

Department Clearance Officer, USDA, OIRM, room 404–W Admin. Bldg., Washington, DC 20250, (202) 690–2118.

**Revision**

• Farmers Home Administration.
7 CFR 1980–J, Agricultural Resource Conservation Demonstration Program.
FmHA 1980–74, 75, 76, 78.
Recordkeeping; On occasion; Annually.
State or local governments; Farms; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 323 responses; 1,354 hours.
Jack Holston, (202) 720–9736.

**Extension**

• Agricultural Marketing Service.
Irish Potatoes Grown in Washington, Marketing Order No. 946.
Recordkeeping; On occasion; Monthly; Annually; Every three years Farms; Businesses or other for-profit; 1,451 responses; 241 hours.
Jim Wendland, (202) 720–2170.

• Agricultural Marketing Service.
Sweet Cherries Grown in Designated Counties in Washington-Marketing Order No. 923.
On occasion.
Farms: Businesses or other for-profit; 241 responses; 68 hours.
Mark J. Kreagor, (202) 720–1755.

• Office of Personnel.
USDA Applicant Supplemental Sheet.
AD–1086.
On occasion.
Individuals or households; Federal agencies or employees; 60,000 responses; 9,600 hours.
Mary Ann Jenkins, (202) 720–6905.

**Reinstatement**

• Rural Electrification Administration
Deferments of REA Loan Payments for Rural Development Projects
Recordkeeping; On occasion.
Small businesses or organizations; 108 responses; 421 hours.
Walt Petty (202) 690–0419.

• Farmers Home Administration.
7 CFR 1901–E, Civil Rights Compliance Requirements.
FmHA 400–1, 4, 6, 7, 8, HUD 935–2, CC–257.
Recordkeeping; On occasion.
Individuals or households; State or local governments; Farms; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 50,985 responses; 532,764 hours.
Jack Holston, (202) 720–9736.

• Food and Nutrition Service.
Civil Rights Title VI Collection Reports.
FNS–191 and FNS–101.
Annually.
State or local governments; 2,982 responses; 6,710 hours.
Laurie Hickerson, (703) 305–2715.

**Donald E. Hulcher,**
*Deputy Department Clearance Officer.*

[FR Doc. 94–6179 Filed 3–16–94; 8:45 am]
BILLING CODE 3410–01–M

## Agricultural Stabilization and Conservation Service

### List of Warehouses and Availability of List of Cancellations and/or Terminations

**AGENCY:** Agricultural Stabilization and Conservation Service, USDA.

**ACTION:** Notice of publication of list of warehouses licensed under the U.S. Warehouse Act and availability of list of cancellations and/or terminations occurring during calendar year 1993.

**SUMMARY:** Notice is hereby given that the Agricultural Stabilization and Conservation Service has published a list of warehouses licensed under the U.S. Warehouse Act (7 U.S.C. 241 *et seq.*) as of December 31, 1993, as required by section 26 of that Act (7 U.S.C. 266). Also, a list of cancellations and/or terminations that occurred during calendar year 1993 is available. Interested parties may obtain a copy of either list from the person listed below.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Judy Fry, Agricultural Stabilization and Conservation Service, Licensing Authority Division, U.S. Department of Agriculture, P.O. Box 2415, room 5962, South Agriculture Building, Washington, DC 20013–2415, telephone: 202–720–6004.

Signed at Washington, DC, on March 14, 1994.

**Bruce R. Weber,**
*Administrator, Agricultural Stabilization and Conservation Service.*

[FR Doc. 94–6243 Filed 3–16–94; 8:45 am]
BILLING CODE 3410–05–P

## Forest Service

### Vail Category III Ski Area Development; White River National Forest; Eagle County, CO

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service, USDA will prepare an Environmental Impact Statement (EIS) to disclose the effects of alternative plans for developing the Category III portion of Vail Ski Area. Vail Ski Area is located on the Holy Cross Ranger District of the White River National Forest and operates under a Forest Service special use permit.

**DATES:** Written comments concerning the preliminary assessment of the scope of the analysis, the issues, or the alternatives, should be received on or before April 1, 1994.

**ADDRESSES:** Send written comments to William A. Wood, District Ranger, P.O. Box 190, Minturn, CO 81645.

**FOR FURTHER INFORMATION CONTACT:** Loren Kroenke, Project Manager, Holy Cross Ranger District. Ph. (303) 827-5715.

*Responsible official:* Veto J. LaSalle, Forest Supervior, White River National Forest.

**SUPPLEMENTARY INFORMATION:** Vail Ski Area operates on the White River National Forest, Holy Cross Ranger District, and is located about 100 miles west of Denver, Colorado. The Category III area encompasses the upper (eastern) portion of the Two Elk Creek watershed and comprises the southern extent of the special use permit boundary. It is approximately 4,000 acres in size.

The proposal consists of two parts. The first includes a request to construct 3 ski lifts, one restaurant, 2 picnic facilities, and provide about 1,000 acres of lift-accessed ski terrain. The ski terrain would be composed of about equal portions of existing open bowls, gladed trails through trees, and traditional runs cut in more dense, forested areas. A system of service road/ski-ways would be constructed to circulate skiers and provide construction and maintenance access. The area is currently closed to public motorized use and would remain so.

In the second part of the proposal, Vail Associates, Inc. has proposed construction of lift in a mostly developed portion of the ski area called Tea Cup Bowl. Construction of several ski trails and a short section of road would also be associated with the Tea Cup lift. For both the Category III and Tea Cup projects, implementation is proposed to begin 1995 and would span several summers.

The proposed project is consistent with prior agency decisions and plans. The area is included in the Rocky Mountain Regional Guide (1983, Revised May 1992) as a Category 1 priority for future ski area development study. The 1984 White River National Forest Land and Resource Management Plan EIS and Record of Decision allocated this area to management emphasizing developed alpine skiing. Finally, an Environmental Assessment prepared in 1986 examined a proposed Master Development Plan for the entire Vail Ski Area. In the Decision Notice approving this Master Development Plan, the Forest Service authorized additions to the permit boundary and provided site-specific approval for construction of developments on much of the special use permit area. However, the Decision Notice required further environmental analysis for the Category III area following submission of a detailed development plan.

The proposed action is intended to improve existing ski conditions at Vail Ski Area, address skier preferences for bowl and gladed skiing opportunities, and better distribute skiers, particularly during the critical Christmas to New Year's Day period and when unfavorable weather or snow conditions prevail in the existing Back Bowls. As well, action is needed to respond to a request which would implement previous land allocation decisions.

Public participation will be fully incorporated into preparation of the EIS. The first step is the scoping process during which the Forest Service will seek information, comments, and assistance from Federal, State, and local agencies, and other individuals or groups who may be interested or affected by this action. This information will be used in preparation of the EIS. Scoping includes inviting participation, determining the project's scope, and identifying potential issues. The public will also be invited to participate in developing the alternatives and identifying and reviewing the potential environmental effects of the proposed action and its alternatives.

Preliminary issues associated with this proposal include effects relating to elk habitat, habitat for North American lynx, biological diversity, non-motorized recreation, wetlands, water quality, maintaining quality skiing opportunities, and the demand for additional skiing opportunities. As well, there are concerns regarding parking and transportation in the Town of Vail. The process will examine these and other issues. This analysis will focus on key issues and eliminate from detailed study insignificant issues or those which have been addressed in previous environmental review.

Alternatives will be developed and examined which respond to the significant issues and which are consistent with the purpose and need for the action. Tentatively, the alternatives include the applicant's proposal (described above) and No Action, which assumes that no development will be allowed. Additional preliminary alternatives include: the proposal outlined in Vail's 1985 Master Development Plan, which included additional trail development and a modified version of Vail's current proposal which would include less trail development. These alternatives will be modified as a result of public scoping. In the EIS, the direct and indirect effects of each of the alternatives, together with effects of past, present, and reasonably foreseeable future actions will be evaluated.

The lead Agency in the preparation of the EIS is the Forest Service. The process will also include consideration of designating cooperating agencies. Among those who may become cooperating agencies are the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service. Implementation of this proposal may require a permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act.

The Forest Service anticipates the Draft EIS will be filed in the Fall of 1994, and the Final EIS in the Spring of 1995. The comment period on the Draft EIS will be 60 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 an agency to the reviewers position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement 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.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin 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 made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final 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: February 25, 1994.

**Veto J. Lasalle,**

*Forest Supervisor.*

[FR Doc. 94–6203 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–11–M

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## Food Safety and Inspection Service

**[Docket No. 93–019N]**

## Update on Livestock and Poultry Connected With Biotechnology Research

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice (1) reaffirms an earlier policy statement, published on June 26, 1986, concluding that livestock and poultry involved in biotechnology experiments are subject to current regulations relating to eligibility for slaughter at official establishments, (2) reaffirms an earlier policy statement, published on December 27, 1991, concluding that livestock and poultry involved in biotechnology experiments are transgenic research animals and, therefore, are subject to existing regulations for livestock and poultry used for research, (3) advises that the Food Safety and Inspection Service (FSIS) will inspect for human food use livestock and poultry which were involved in biotechnology experiments, and (4) announces the availability of a document prepared by FSIS entitled "Points to Consider for the Evaluation of Transgenic Animals from Transgenic Animal Research" (Points to Consider).[1]

**FOR FURTHER INFORMATION CONTACT:** Dr. Pat Basu, Director, Technology Transfer and Coordination Staff, Science and Technology, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 720–8623.

**SUPPLEMENTARY INFORMATION:** FSIS is responsible for ensuring the safety, wholesomeness, and accurate labeling of all meat, meat food products, and poultry products under the Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*, and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.* Livestock and poultry involved in biotechnology experiments to introduce genetic improvements by transgenesis, i.e., transgenic research animals, may be offered for slaughter for food purposes in official establishments. Agency review and approval in accordance with 9 CFR 309.17 and 381.75 are required before these transgenic research animals may be slaughtered for human food use at official establishments. In addition, persons who intend to slaughter transgenic research animals or their progeny for human food use at official establishments may obtain a copy of the Points to Consider document, and follow the voluntary guidelines set forth in that document. Persons who follow both the applicable regulations cited above and the Points to Consider document should note that the inspector in charge (IIC) may still deny or withdraw the approval to slaughter transgenic research animals for human food use when the IIC deems it necessary to assure that products prepared at the official establishment are not adulterated, in accordance with the FMIA and the PPIA. The approval to slaughter commercially produced, nonresearch transgenic animals will be handled separately at a later date.

Currently, trangenesis is usually conducted by injecting deoxyribonucleic acid (DNA) into fertilized eggs to achieve desired genetic and/or physical changes. This procedure results in only a small proportion of animals being born with genetic changes. Animals born without genetic change may be used for human food under current policies set forth in the U.S. Department of Agriculture's (USDA's) June 26, 1986, policy statement published in the **Federal Register** (51 FR 23336) which states that existing regulations would be applied to food animals involved in biotechnology experiments. Also, USDA's policy for the inspection for human food use of livestock and poultry which are involved in biotechnology research but which are not genetically modified products of biotechnology, published in the **Federal Register** (56 FR 67054) on December 27, 1991, concerns transgenic research livestock and poultry in which genetic change has not occurred. Due to the small number of transgenic research animals produced in biotechnology experiments, such transgenic research animals have not been presented for slaughter in the past. However, FSIS anticipates that production of such transgenic animals will increase. This notice reaffirms USDA's June 26, 1986, and December 27, 1991, notices, specifically with regard to animals involved in biotechnology experiments.

Because of the high level of public and Congressional interest in biotechnology, FSIS is advising in this notice the actions it will take to ensure that meat, meat food products, and poultry products derived from livestock and poultry involved in biotechnology experiments are safe, wholesome, and accurately labeled. This document also provides guidance to those using biotechnology to produce genetic changes in livestock and poultry and offering the same for slaughter at official establishments.

This notice announces the availability of the Points to Consider document, which discusses FSIS policy for the food safety assessment of transgenic animals and their progeny and sets forth voluntary guidelines regarding the presentation of transgenic research animals and their progeny for slaughter for human food use at official establishments. For the purpose of this Points to Consider document, which may be updated as needed, without notice, transgenic animals are animals whose genetic composition has been changed by introducing selective genes (e.g., recombinant DNA), whether or not the change physically manifests itself. This definition includes animals developed by antisense, amplification, and deletion technologies. Individuals interested in performing transgenic animal research and presenting such animals for slaughter may obtain the most recent copy of the Points to Consider document from the address identified in footnote 1 in this notice prior to starting his or her research.

Under 9 CFR 309.17 and 9 CFR 381.75, an investigator interested in presenting transgenic research animals for slaughter should submit data or a summary evaluation of the data to FSIS. When assessing the human food safety of meat, meat food products, and poultry products from transgenic research animals. FSIS may utilize the recommendations adopted by the Transgenic Animal Working Group of the USDA's Agricultural Biotechnology Research Advisory Committee. These recommendations are described in the Points to Consider document.

Upon receipt of all the data or the summary evaluation of data, FSIS will review and assess the data or summary evaluation of the data. The data or summary of the data must demonstrate that the research conducted on the transgenic research animals will not result in the products of the transgenic research animals or their progeny being adulterated. Further, the Administrator

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[1] Copies of this document may be obtained from Dr. Pat Basu, Director, Technology Transfer and Coordination Staff, Science and Technology, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 720–8623.

of FSIS, or the Administrator's designee, must approve the slaughter of transgenic research animals at official establishments prior to slaughter. Transgenic research animals approved for slaughter at an official establishment are subject to the same inspection procedures as other animals offered for slaughter at official establishments.

Done at Washington, DC on: March 11, 1994.

**Terry L. Medley,**

*Acting Administrator, Food Safety & Inspection Service.*

[FR Doc. 94–6240 Filed 3–16–94; 8:45 am]

BILLING CODE 3410–DM–M

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**[Docket No. 94–004N]**

## Exemption for Retail Stores; Adjustment of Dollar Limitations

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces that the dollar limitations currently in effect on the annual sales of meat and poultry products that can be sold by retail stores exempt from Federal inspection requirements to consumers other than household consumers, such as hotels, restaurants and similar institutions, have been adjusted to conform with price changes for meat and poultry products as indicated by the Consumer Price Index. The dollar limitation for meat products increases from $37,800 to $38,900 for calendar year 1994 and the dollar limitation for poultry products increases from $33,100 to $34,500 for calendar year 1994.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Dr. Judith A. Segal, Director, Policy Evaluation and Planning Staff, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 720–7773.

### Background

Federal inspection of meat and poultry products prepared for sale or distribution in commerce or in States designated under section 301(c) of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 661(c)) and section 5(c) of the Poultry Products Inspection Act (PPIA) (21 U.S.C. 454(c)) is required by law and administered by the Food Safety and Inspection Service (FSIS). However, section 301(c)(2) of the FMIA (21 U.S.C. 661(c)(2)) and section 5(c)(2) of the PPIA (21 U.S.C. 454(c)(2)) state that the general requirement of routine Federal inspection ". . . shall not apply to operations of types traditionally and usually conducted at retail stores . . . when conducted at any retail store . . . for sale in normal retail quantities . . . to consumers. . . ."

FSIS regulations (9 CFR 303.1(d) and 381.10(d)) define retail stores that qualify for exemption from routine Federal inspection under the FMIA or PPIA. Under the regulations, for an establishment to be an exempt retail establishment depends, in part, upon the percentage and volume of its trade with consumers other than household consumers, such as hotels, restaurants and similar institutions. Accordingly, the Federal meat and poultry products inspection regulations state in terms of dollars the maximum amount of meat and poultry products which may be sold to nonhousehold consumers if the establishment is to remain an exempt retail establishment. During calendar year 1993, the maximum amount for meat products was $37,800; for poultry products, the amount was $33,100.

The Federal meat and poultry products inspection regulations (9 CFR 303.1(d)(2)(iii)(*b*) and 381.10(d)(2)(iii)(*b*) further provide that the dollar limitation on product sales by retail stores to consumers other than household consumers will be automatically adjusted during the first quarter of each calendar year whenever the Consumer Price Index, published by the Bureau of Labor Statistics (BLS), Department of Labor, indicates a change during the previous year in the price of the same volume of product exceeding $500, upward or downward. The regulations also require that notice of the adjusted dollar limitation be published in the **Federal Register**.

The BLS Consumer Price Index for 1993 indicates an average annual price increase in meat products of 3.0 percent and an average annual price increase in poultry products of 4.2 percent. When rounded off to the nearest $100, the price increase for meat products amounts to $1,100 and the price increase for poultry products amounts to $1,400. As a percentage of the existing dollar limitation, change in excess of $500 is indicated for both meat and poultry products.

Accordingly, FSIS, in accordance with §§ 303.1(d)(2)(iii)(*b*) and 381.10(d)(2)(iii)(*b*) of the regulations, has automatically raised the dollar limitation of permitted sales of meat products from $37,800 to $38,900 and raised the dollar limitation of permitted sales for poultry products from $33,100 to $34,500.

Done at Washington, DC on: March 11, 1994.

**Patricia Jensen,**

*Acting Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 93–6241 Filed 3–16–93; 8:45 am]

BILLING CODE 3410–DM–M

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## DEPARTMENT OF COMMERCE

### Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* Bureau of the Census.

*Title:* Questionnaire for Building Permit Official.

*Form Number(s):* SOC–903.

*Agency Approval Number:* 0607–0125.

*Type of Request:* Revision of a currently approved collection.

*Burden:* 209 hours.

*Number of Respondents:* 835.

*Avg Hours Per Response:* 15 minutes.

*Needs and Uses:* The Bureau of the Census uses the Questionnaire for Building Permit Official in conjunction with the Survey of Housing Starts, Sales, and Completions (OMB number 0607–0110). Data collected in the Survey of Housing Starts are used to produce statistics on residential construction and are needed by economic policymakers to monitor this sector of the economy. Census field interviewers use the Questionnaire for Building Permit Official to obtain information on the operating procedures of a sample of the building permit issuing offices in the United States in order to locate, classify, list, and sample building permits for residential construction. This information is used to carry out the sampling for the Survey of Housing Starts and to verify and update the geographic coverage of permit offices. In calendar years 1995–96, we plan to automate the data collection by replacing the paper questionnaire with laptop computers.

*Affected Public:* State or local governments.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Maria Gonzalez, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: March 14, 1994.

**Edward Michals,**

*Departmental Forms Clearance Officer, Office of Management and Organization.*

[FR Doc. 94–6271 Filed 3–16–94; 8:45 am]

BILLING CODE 3510–07–F

## Bureau of the Census

**[Docket Number 940369–4069]**

## Annual Capital Expenditures Survey

**AGENCY:** Bureau of the Census, Commerce.

**ACTION:** Notice of consideration.

**SUMMARY:** Notice is hereby given that the Bureau of the Census is considering a proposal to conduct the Annual Capital Expenditures Survey for the years 1993, 1994, and 1995 under the authority of Title 13, United States Code, Sections 182, 224, and 225. On the basis of information and recommendations received by the Bureau of the Census, the data have significant application to the needs of the public and industry and are not available from nongovernmental sources.

**DATES:** Any suggestions or recommendations concerning the proposed survey should be submitted in writing by April 18, 1994, to receive consideration.

**ADDRESSES:** Director, Bureau of the Census, Washington, DC 20233.

**FOR FURTHER INFORMATION CONTACT:** Elinor Champion on (301) 763–7161.

**SUPPLEMENTARY INFORMATION:** The primary users of these data will be numerous Government agencies, including the Bureau of the Census, Bureau of Economic Analysis, Bureau of Labor Statistics, and the Treasury Department. Other users include Government agencies, business firms, academics, and research and consulting organizations. The data will be used for calculation of the National Income and Product Accounts and to measure and analyze fixed capital stocks and capital formation. Companies in the survey represent private nonfarm businesses. The information to be developed from this survey is necessary for comprehensive and detailed measurement of capital investment. The data collected in this survey will be within the general scope and nature of those inquiries covered in the economic census.

This survey has been submitted to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act, Public Law 96–511, as amended. Copies of the proposed form are made available on request to the Director, Bureau of the Census, Washington, DC 20233.

Dated: February 8, 1994.

**Harry A. Scarr,**

*Acting Director, Bureau of the Census.*

[FR Doc. 94–6157 Filed 3–16–94; 8:45 am]

BILLING CODE 3510–07–P

## International Trade Administration

**[C–122–816]**

## Court Decision and Suspension of Liquidation on Certain Softwood Lumber Products From Canada

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of court decision and suspension of liquidation.

**SUMMARY:** On March 7, 1994, the U.S.-Canada Free Trade Agreement (FTA) binational panel (the Panel) affirmed the U.S. Department of Commerce's (the Department) determination on remand that no subsidies were provided on U.S. imports of softwood lumber products from Canada. Article 1904.13 of the FTA provides that a government may request a review of a Panel decision by an Extraordinary Challenge Committee (ECC).

The Office of the United States Trade Representative (USTR) has announced that it will file for an ECC review of the Panel's decision. The Department will implement the decision of the ECC.

In accordance with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decision in *Timken Company* v. *United* this proceeding.

**EFFECTIVE DATE:** March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Joe Kaesshaefer or Kelly Parkhill, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, 14th & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2786.

**SUPPLEMENTARY INFORMATION:**

### Background

On May 28, 1992, the Department determined that U.S. imports of Canadian softwood lumber products are subsidized (57 FR 22570). The Commerce decision was appealed under Chapter 19 of the FTA. The Panel issued an adverse decision on May 6, 1993, finding that the Department had not demonstrated that countervailable subsidies existed, and remanded the case to the Department for further deliberations. The Department completed a redetermination and on December 17, 1993, the Panel issued a second adverse decision, finding that the Department still had not supported its determination that countervailable subsidies existed. It ordered a second remand, requiring the Department to find that there were no subsidies. The Department complied with this order, and filed its second redetermination, on January 6, 1994. The Panel affirmed this redetermination on February 23, 1994 and issued a Notice of Final Panel Action on March 7, 1994. USTR has until April 6, 1994 to file a request for an ECC review.

### Suspension of Liquidation

In accordance with the *Timken* decision, the Department must publish notice of a decision of the Panel which is not "in harmony" with the Department's final determination. The Panel's March 7, 1994 decision constitutes a decision not in harmony with the Department's affirmative subsidy determination. Accordingly, the Department is publishing this notice. The *Timken* decision also held that the Department must suspend liquidation pending a "conclusive" court decision in the action. Therefore, the Department will continue the suspension of liquidation of the subject merchandise until the ECC issues a conclusive decision in this action. The Department will implement the decision of the ECC.

Dated: March 15, 1994.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 94–6433 Filed 3–16–94; 8:45 am]

BILLING CODE 3510–DS–P

## National Oceanic and Atmospheric Administration

**[I.D. 030394A]**

## Marine Mammals

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Receipt of application for a public display permit (P462G).

**SUMMARY:** Notice is hereby given that Ervin and Sonja Strong, dba/The Dolphin Connection, 215 Bridgeport Avenue, Suite 4, Corpus Christi, TX

78402, have applied in due form for a permit to take marine mammals.

**DATES:** Written comments must be received on or before April 18, 1994.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, room 13130, Silver Spring, MD 20910 (301/713–2289); and

Director, Southeast Region, NMFS, NOAA, 9450 Koger Boulevard, room 206, St. Petersburg, FL 33702 (813/893–3141).

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, NMFS, NOAA, U.S. Department of Commerce, 1315 East-West Highway, Silver Spring, MD 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate. The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries.

Concurrent with the publication of this notice in the **Federal Register**, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The applicants request authorization to approach, harass, observe, and feed Atlantic bottlenose dolphin (*Tursiops truncatus*) in the wild in Corpus Christi Bay, for purposes of public display. It should be noted that on October 14, 1993, the NMFS published in the **Federal Register** (58 FR 53320) a Proposed Rule to Revise Regulations for Public Display, Scientific Research and Enhancement Permits which would clarify that public display activities may occur in captive settings only. Thus, if this rule becomes final as proposed, it will not provide for conduct of the type of activity being requested by the applicants.

In addition, NMFS regulations define the term "take" as including feeding wild populations of marine mammals due to increased incidental interactions with commercial fishing vessels, alterations in feeding behaviors and migratory patterns, and vulnerability to disease transmission. [See Final Rule published in the **Federal Register** March 20, 1991 (56 FR 11693–97).]

Dated: March 10, 1994.

**William W. Fox, Jr.,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 94–6211 Filed 3–16–94; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Meeting of the Advisory Council on Dependents' Education

**AGENCY:** Department of Defense Dependents Schools (DoDDS), Office of the Secretary of Defense.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Dependents' Education (ACDE). It also describes the functions of the Council. Notice of this meeting is required under the National Advisory Committee Act. Although the meeting is open to the public, because of space constraints, anyone wishing to attend the meeting should contact the point of contact listed below.

**DATES:** April 22, 1994, 9 a.m. to 4:30 p.m. and April 23, 1994, 9 a.m. to 2 p.m.

**ADDRESSES:** April 22, The Pentagon, room 3E869, Washington, DC; April 23, Embassy Suites Hotel, Adams Morgan Room, 1402 Eads Street, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marilyn, Witcher, Public Affairs Officer, DoD Dependents Schools, 4040 N. Fairfax Drive, Arlington, Virginia 22203–1635; Telephone number: 703–696–4236.

**SUPPLEMENTARY INFORMATION:** The Advisory Council on Dependents' Education is established under title XIV, section 1411, of Public Law 95–561, Defense Dependents' Education Act of 1978, as amended by title XII, section 1204(b) (3)–(5), of Public Law 99–145, Department of Defense Authorization Act of 1986 (20 U.S.C., chapter 25A, section 929, Advisory Council on Dependents' Education). The Council is cochaired by designees of the Secretary of Defense and the Secretary of Education. In addition to a representative of each of the Secretaries, 12 members are appointed jointly by the Secretaries. Members include representatives of educational institutions and agencies, professional employee organizations, unified military commands, school administrators, parents of DoDDS students, and one DoDDS student. The Director, DoDDS, serves as the Executive Secretary of the Council. The purpose of the Council is to advise the Secretary of Defense and the DoDDS Director about effective educational programs and practices that should be considered by DoDDS and to perform other tasks as may be required by the Secretary of Defense. The agenda includes discussions about the national goals for education, academic achievement encouragement, multicultural diversity and awareness, education of handicapped dependents, communications throughout the system, increased parental involvement, drawdown planning, educational technologies, and responses to the recommendations made by the Council during its October 1993 meeting.

Dated: March 14, 1994.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 94–6244 Filed 3–16–94; 8:45 am]

BILLING CODE 5000–04–M

### Department of the Army

### Army Science Board; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92—463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: 11 April 1994.

Time of Meeting: 0900–1700.

Place: Vienna, Va.

Agenda: The Army Science Board's Ad Hoc Subgroup on "Science and Engineering Requirements for Military Officers and Civilian Personnel in the High Tech Army of Today and Tomorrow" will meet to discuss the Terms of Reference and outline the Study. This meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (703) 695–0781.

**Sally A. Warner,**

*Administrative Officer, Army Science Board.*

[FR Doc. 94–6205 Filed 3–16–94; 8:45 am]

BILLING CODE 3710–08–M

### Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

*Name of Committee:* Army Science Board (ASB).

*Date of Meeting:* 5 April 1994.

*Time of Meeting:* 0830–1100 (classified).

*Place:* McLean, VA.

*Agenda:* The Threat Team of the Army Science Board's 1994 Summer Study on "Capabilities Needed to Counter Current and Evolving Threat" will meet to receive an Intelligence Support Status Report. This meeting will be closed to the public in accordance with section 552b(c) of title 5, U.S.C., specifically subparagraph (1) thereof, and title 5, U.S.C., appendix 2, subsection 10(d). The unclassified and classified matters to be discussed are so inextricably intertwined so as to preclude opening all portions of the meeting. The ASB Administrative Officer Sally Warner, may be contacted for further information at (703) 695–0781.

**Sally A. Warner,**

*Administrative Officer, Army Science Board.*

[FR Doc. 94–6206 Filed 3–16–94; 8:45 am]

BILLING CODE 3710–08–M

## Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

*Name of Committee:* Army Science Board (ASB).

*Date of Meeting:* 19 April 1994.

*Time of Meeting:* 0830–1100 (classified).

*Place:* McLean, VA.

*Agenda:* The Threat Team of the Army Science Board's 1994 Summer Study on "Capabilities Needed to Counter Current and Evolving Threat" will meet to receive an Intelligence Support Status Report. This meeting will be closed to the public in accordance with section 552b(c) of title 5, U.S.C., specifically subparagraph (1) thereof, and title 5, U.S.C., appendix 2, subsection 10(d). The unclassified and classified matters to be discussed are so inextricably intertwined so as to preclude opening all portions of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (703) 695–0781.

**Sally A. Warner,**

*Administrative Officer, Army Science Board.*

[FR Doc. 94–6207 Filed 3–16–94; 8:45 am]

BILLING CODE 3710–08–M

# DEPARTMENT OF EDUCATION

## National Assessment Governing Board; Meeting

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

Dates: April 5, 1994.

Time: 11 a.m.–12:30 p.m. est.

Location: 800 North Capitol Street NW., suite 825, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, suite 825, 800 North Capitol Street NW., Washington, DC 20002–4233, Telephone: (202) 357–6938.

**SUPPLEMENTARY INFORMATION:** The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by Section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III–C of the Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100–297), (20 U.S.C. 1221e–1).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

The Executive Committee of the National Assessment Governing Board will meet April 5, 1994 from 11 a.m. until 12:30 p.m. Because this is a teleconference meeting, facilities will be provided so the public will have access to the Committee's deliberations. The agenda includes four topics: (1) Proposed competition for alternative designs for establishing achievement levels; (2) Update on the reauthorization legislation; (3) Briefing on assessment framework development; and (4) Presentation of the NAEP schedule.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, suite 825, 800 North Capitol Street NW., Washington, DC, from 8:30 a.m. to 5 p.m.

Date: March 11, 1994.

**Roy Truby,**

*Executive Director, National Assessment Governing Board.*

[FR Doc. 94–6148 Filed 3–16–94; 8:45 am]

BILLING CODE 4000–01–M

# DEPARTMENT OF ENERGY

## Office of Energy Efficiency and Renewable Energy

**[Case No. F–067]**

## Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver From the Furnace Test Procedure to Goodman Manufacturing Company

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Decision and order.

**SUMMARY:** Notice is given of the Decision and Order (Case No. F–067) granting a Waiver to Goodman Manufacturing Company (Goodman) from the existing Department of Energy (DOE) test procedure for furnaces. The Department is granting Goodman Petition for Waiver regarding blower time delay in calculation of Annual Fuel Utilization Efficiency (AFUE) for its GMN series central furnaces.

**FOR FURTHER INFORMATION CONTACT:**

Cyrus H. Nasseri, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–7140.

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9507.

**SUPPLEMENTARY INFORMATION:** In accordance with 10 CFR 430.27(g), notice is hereby given of the issuance of the Decision and Order as set out below. In the Decision and Order, Goodman has been granted a Waiver for its GMN series central furnaces, permitting the company to use an alternate test method in determining AFUE.

Issued in Washington, DC, March 11, 1994.

**Frank M. Stewart, Jr.,**

*Chief of Staff, Energy Efficiency and Renewable Energy.*

### Decision and Order

In the Matter of: Goodman Manufacturing Company. (Case No. F–067)

### Background

The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act (EPCA), Public Law 94–163, 89 Stat. 917, as amended by the National Energy

Conservation Policy Act (NECPA), Public Law 95–619, 92 Stat. 3266, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, the National Appliance Energy Conservation Amendments of 1988 (NAECA 1988), Public Law 100–357, and the Energy Policy Act of 1992 (EPAct), Public Law 102–486, 106 Stat. 2776, which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including furnaces. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making purchasing decisions. These test procedures appear at 10 CFR part 430, Subpart B.

The Department amended the prescribed test procedures by adding 10 CFR 430.27 to create a waiver process. 45 FR 64108, September 26, 1980. Thereafter, DOE further amended its applicance test procedure waiver process to allow the Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 51 FR 42823, November 26, 1986.

The waiver process allows the Assistant Secretary to waive temporarily test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of the waiver.

The Interim Waiver provisions added by the 1986 amendment allow the Assistant Secretary to grant an Interim Waiver when it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. An Interim Waiver remains in effect for a period of 180 days or until DOE issues its determination on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary.

Goodman filed a "Petition for Waiver," dated November 29, 1993, in accordance with § 430.27 of 10 CFR part 430. The Department published in the **Federal Register** on February 23, 1994, Goodman's petition and solicited comments, data and information respecting the petition. 58 FR 8608. Goodman also filed an "Application for Interim Waiver" under section 430.27(g) which DOE granted on February 10, 1994. 58 FR 8608, February 23, 1994.

No comments were received concerning either the "Petition for Waiver" or the "Interim Waiver." The Department consulted with the Federal Trade Commission (FTC) concerning the Goodman Petition. The FTC did not have any objections to the issuance of the waiver to Goodman.

**Assertions and Determinations**

Goodman's Petition seeks a waiver from the DOE test provisions that require a 1.5-minute time delay between the ignition of the burner and the starting of the circulating air blower. Goodman requests the allowance to test using a 40-second blower time delay when testing its GMN series central furnaces. Goodman states that since the 40-second delay is indicative of how these models actually operate and since such a delay results in an improvement in efficiency of 0.6 to 1.0 percent, the petition should be granted.

Under specific circumstances, the DOE test procedure contains exceptions which allow testing with blower delay times of less than the prescribed 1.5-minute delay. Goodman indicates that it is unable to take advantage of any of these exceptions for its GMN series central furnaces.

Since the blower controls incorporated on the Goodman furnaces are designed to impose a 40-second blower delay in every instance of start up, and since the current provisions do not specifically address this type of control, DOE agrees that a waiver should be granted to allow the 40-second blower time delay when testing the Goodman GMN series central furnaces. Accordingly, with regard to testing the GMN series central furnaces, today's Decision and Order exempts Goodman from the existing provisions regarding blower controls and allows testing with the 40-second delay.

It is, therefore, ordered that:

(1) The "Petition for Waiver" filed by Goodman Manufacturing Company (Case No. F–067) is hereby granted as set forth in paragraph (2) below, subject to the provisions of paragraphs (3), (4), and (5).

(2) Notwithstanding any contrary provisions of Appendix N of 10 CFR Part 430, Subpart B, Goodman Manufacturing Company, shall be permitted to test its GMN series central furnaces on the basis of the test procedure specified in 10 CFR Part 430, with modifications set forth below.

(i) Section 3.0 of Appendix N is deleted and replaced with the following paragraph:

3.0 Test Procedure. Testing and measurements shall be as specified in section 9 in ANSI/ASHRAE Standard 103–82 with the exception of sections 9.2.2, 9.3.1, and 9.3.2, and the inclusion of the following additional procedures:

(ii) Add a new paragraph 3.10 to appendix N as follows:

3.10 Gas- and Oil-Fueled Central Furnaces. The following paragraph is in lieu of the requirement specified in section 9.3.1 of ANSI/ASHRAE Standard 103–82. After equilibrium conditions are achieved following the cool-down test and the required measurements performed, turn on the furnace and measure the flue gas temperature, using the thermocouple grid described above, at 0.5 and 2.5 minutes after the main burner(s) comes on. After the burner start-up, delay the blower start-up by 1.5 minutes (t−), unless: (1) The furnace employs a single motor to drive the power burner and the indoor air circulating blower, in which case the burner and blower shall be started together; or (2) the furnace is designed to operate using an unvarying delay time that is other than 1.5 minutes, in which case the fan control shall be permitted to start the blower; or (3) the delay time results in the activation of a temperature safety device which shuts off the burner, in which case the fan control shall be permitted to start the blower. In the latter case, if the fan control is adjustable, set it to start the blower at the highest temperature. If the fan control is permitted to start the blower, measure time delay, (t−), using a stopwatch. Record the measured temperatures. During the heat-up test for oil-fueled furnaces, maintain the draft in the flue pipe within ±0.01 inch of water column of the manufacturer's recommended on-period draft.

(iii) With the exception of the modifications set forth above, Goodman Manufacturing Company shall comply in all respects with the test procedures specified in appendix N of 10 CFR part 430, subpart B.

(3) The waiver shall remain in effect from the date of issuance of this Order until DOE prescribes final test procedures appropriate to the GMN

series central furnaces manufactured by Goodman Manufacturing Company.

(4) This Waiver is based upon the presumed validity of statements, allegations, and documentary materials submitted by the petitioner. This Waiver may be revoked or modified at any time upon a determination that the factual basis underlying the petition is incorrect.

(5) Effective March 11, 1994, this Waiver supersedes the Interim Waiver granted the Goodman Manufacturing Company on February 10, 1994. 58 FR 8608, February 23, 1994 (Case No. F–066).

Issued in Washington, DC, March 11, 1994.

**Frank M. Stewart, Jr.,**

*Chief of Staff, Energy Efficiency and Renewable Energy.*

[FR Doc. 94–6260 Filed 3–16–94; 8:45 am]

BILLING CODE 6450–01–P–M

## Intent To Prepare an Environmental Impact Statement for the Interim Management of Nuclear Materials at the Savannah River Site

**AGENCY:** Department of Energy.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 et seq.). DOE proposes to evaluate nuclear materials currently stored at the Savannah River Site (SRS) and determine what materials can safely remain in their current form for an interim period (approximately 5 years) until disposition decisions can be made. DOE will also determine what materials are at risk and therefore require near-term stabilization to assure continued safe management. DOE will evaluate the nuclear materials using a proposed set of criteria to determine materials which require near-term stabilization to help maintain the health and safety of workers and the public and to maintain environmental quality. DOE would then stabilize the materials determined to be of concern.

DOE also proposes that some nuclear materials at the SRS should be converted, or should be considered for conversion, to a useable form. Plutonium-242 is used for research and development programs and the SRS inventory of this material is needed for this programmatic purpose. As a result, DOE proposes to convert the SRS inventory of plutonium-242 solution to an oxide. Additionally, DOE is in the process of determining whether a programmatic need exists for americium-243, curium-244, and neptunium-237. If it is determined that a need for this material exists, the EIS will also evaluate its conversion to a useable form. Any conversion of this material would be for purposes other than the production of nuclear weapons.

The nuclear materials to be evaluated will be those which have historically been either the feed materials for, or the in-process material of, SRS production and reprocessing programs.[1] The need for the EIS is driven by the evolving requirements associated with the defense programs of the United States and the resultant requirement to manage the materials in the interim pending disposition decisions.

DOE plans to address waste management activities at SRS in a separate EIS. The waste management EIS for SRS will be announced shortly, by a separate Notice of Intent.

**INVITATION TO COMMENT:** To ensure the EIS addresses the full range of issues and alternatives related to this proposal, DOE invites comments on the proposed scope of the EIS from all interested parties. Please direct written comments to assist DOE in identifying significant environmental issues and defining the appropriate scope of the EIS to Mr. Stephen R. Wright at the address indicated below. DOE also invites agencies, organizations, and the general public to present oral comments pertinent to the preparation of this EIS at the public scoping meetings on the dates indicated below. In addition, DOE will accept comments electronically via voice mail or facsimile transmission by calling 1–800–242–8269. DOE will give equal consideration to all comments.

After the completion of the public scoping process, DOE will prepare an EIS Implementation Plan and make it available to the public upon request. The Implementation Plan will record the results of the scoping process and define the alternatives and issues that DOE will evaluate in the EIS. DOE intends to complete the Draft EIS in late 1994, and will announce its availability in the **Federal Register**. DOE will solicit comments from the public, organizations, and other agencies on the Draft EIS, and will consider all comments in its preparation of the Final EIS.

**DATES:** The public scoping period will continue until May 31, 1994. DOE will consider all written comments postmarked by May 31, 1994, and will consider comments postmarked after that date to the extent practicable.

**ADDRESSES:** Please direct written comments or suggestions on the scope of the EIS and questions concerning the project to: Mr. Stephen R. Wright, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, South Carolina 29802, (803) 725–3957.

Mark the envelopes: "Nuclear Materials Interim Management EIS."

For general information on the DOE NEPA review process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Oversight (EH–25), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600 or (800) 472–2756.

**PUBLIC SCOPING PROCESS:** DOE will host a series of informal sessions to provide the public with additional information on the materials to be evaluated and the proposed action and alternatives discussed in this NOI. These sessions are intended to be interactive and DOE representatives will be available to answer questions. These informal sessions are scheduled at the following times and locations: 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., April 12, 1994, North Augusta Community Center, 495 Brookside Avenue, North Augusta, South Carolina; 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., April 19, 1994, DeSoto Hilton Hotel, 15 Liberty Street, Savannah, Georgia; 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., April 21, 1994, Holiday Inn Coliseum at USC, 630 Assembly Street, Columbia, South Carolina.

DOE will then conduct public scoping meetings to assist in defining the appropriate scope of the EIS and identifying significant environmental issues to be addressed. DOE representatives will be available at the meetings to discuss, in informal conversations, SRS nuclear materials programs. These meetings are scheduled at the following times and locations: 1 p.m. to 4 p.m and 6 p.m. to 9 p.m., May 12, 1994, Coastal Georgia Center for Continuing Education, 305 Martin Luther King Boulevard (Battlefield Park), Savannah, Georgia; 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., May 17, 1994, North Augusta Community Center, 495 Brookside Avenue, North Augusta, South Carolina; 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., May 19, 1994, Holiday Inn Coliseum at USC, 630 Assembly Street, Columbia, South Carolina.

DOE will publish additional notices on the dates and locations of the information sessions and scoping meetings in local newspapers well in

[1] This material does not include that associated with the plutonium-238 production mission in HB-Line. The purpose of that mission is to support the National Aeronautics Space Administration deep space probe program. This effort is the subject of separate NEPA documentation.

advance of the scheduled dates. DOE is committed to providing opportunities for the involvement of interested individuals and groups in this and other DOE planning activities.

The public, organizations, and agencies are invited to present oral and written comments concerning (1) the scope of the EIS, (2) the issues the EIS should address, and (3) the alternatives the EIS should analyze. Please address written comments to Mr. Wright at the address indicated above. These comments should be postmarked by May 31, 1994, to ensure full consideration.

Organizations and individuals wishing to participate in the public meetings can call 1–800–242–8269 between 8:30 a.m. and 5 p.m. Eastern Time, Monday through Friday, or submit their requests to Mr. Wright at the address indicated above. DOE requests that anyone who wishes to speak at one of the scoping meetings pre-register by contacting Mr. Wright, either by phone or in writing. Pre-registration should occur at least two days before the designated meeting. Persons who have not pre-registered to speak may register at the meeting and will be called to speak as time permits.

DOE will document comments received during the public scoping process. Copies will be available for inspection at these locations during regular business hours, Monday through Friday:

The DOE Freedom of Information Reading Room, room 1E–190, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–6020; and

The DOE Public Document Room, University of South Carolina, Aiken Campus, University Library, 2nd Floor, 171 University Parkway, Aiken, South Carolina 29801, (803) 648–6851.

Additional locations may be selected through the scoping process.

**SUPPLEMENTARY INFORMATION:** The Savannah River Site is an 800 square-kilometer (300 square-mile), controlled area in southwestern South Carolina. The Site is approximately 25 miles southeast of Augusta, Georgia and 20 miles south of Aiken, South Carolina. Since its establishment, the mission of the SRS has been to produce nuclear materials that support the defense, research, and medical programs of the United States.

Historically, reactor fuel or target assemblies were chemically dissolved into aqueous solutions in the F- or H-Canyon chemical separations facilities.

Various processes were performed to separate the useful isotopes (uranium-235, uranium-238, neptunium-237, plutonium-238, americium-243, curium-244, and plutonium-239) from the rest of the fuel and target material. The uranium-235 solutions were shipped off the site for conversion to a solid form and the uranium-238 in solution was converted to an oxide using the FA-Line facility at SRS. The neptunium-237 was recovered, and when required, converted to a solid and fashioned into new targets. The plutonium was recovered and converted to metal or oxide products using the FB- and HB-Line facilities. Most converted materials were shipped to other DOE sites. Any product materials stored onsite were placed in "vaults" designed for storage.

In March 1992, chemical processing operations were suspended in the canyons to address a potential safety concern. The concern was subsequently addressed, but prior to resumption of processing, the Secretary of Energy directed that defense-related chemical separations activities (i.e., reprocessing) be phased out at SRS. Since this decision, the Department has determined that further action related to the disposition of nuclear material is subject to the NEPA process. Non-safety related facility operations have remained shut down, with the exception of plutonium-238 processing associated with the support of NASA missions.

As a result of these shutdowns, the canyons and the reactor fuel and target storage basins [2] have a large inventory of in-process solutions, fuel assemblies, and targets. This inventory includes materials containing a wide variety of special isotopes (plutonium-239, uranium-235, plutonium-242, americium-243, curium-244, neptunium-237, etc.). There are approximately 100,000 gallons of in-process solutions in storage and approximately 200 metric tons of spent fuel and targets in storage.

In addition to the above solutions and targets, there are over 90,000 gallons of uranyl nitrate hexahydrate (UNH) stored in tanks outside the facility. The UNH contains the uranium-235 recovered from the processing of fuel from SRS production reactors, and DOE, domestic, and foreign research reactors.

There are also approximately 35,000 55-gallon drums of uranium-238 (known as "depleted uranium") oxide stored on the site. This material is the product of processing the targets from which plutonium-239 is recovered.

For some solutions (e.g., enriched uranium and americium/curium) no conversion capability exists. Conversion, stabilization, or disposition options must be developed for such solutions.

DOE has established a Secretarial task force to evaluate disposition of surplus nuclear materials stored at various locations within the weapons complex. Until disposition decisions are made (approximately 5 years), some of the materials at SRS, due to their form or to the condition in which they are currently maintained, could represent an unreasonable risk to public and worker health and safety or an unreasonable risk to the environment. For example, the aluminum cladding on some of the targets is deteriorating due to corrosion. As the cladding corrodes, highly radioactive material is exposed to the water in the storage basin. Some of this material is released into the water, which can result in increased worker exposures and environmental releases. Another example of material that could present an unreasonable risk is stored solutions containing plutonium, other transuranic elements, and uranium. These solutions require continuing vigilance to assure their continued safe storage and to avoid potentially severe radiological impacts should an accident occur.

Additionally, DOE wants to reduce the cost of maintaining and storing these nuclear materials. The cost to maintain just the SRS canyons, with their current inventory of material, is about $300 million a year. These costs could be reduced through consolidation, conversion, and stabilization.

**Proposed Action**

The Department proposes to stabilize nuclear materials currently stored at the SRS that are in a condition that may not be safe over the time that is necessary to make decisions regarding their long-term disposition (approximately 5 years). The EIS will evaluate and identify which nuclear materials should be stabilized because of a health, safety, or environmental concern related to the condition of the material.[3]

The Department also proposes to convert to a useable form those

[2] There are several storage basins currently in use. These are the K-, L-, and P-Reactor basins, the Receiving Basin for Off-site Fuels (RBOF) located in H-Area, and the Canyon receiving basins.

[3] If at any time during the course of preparing the environmental impact statement the Department were to determine that an emergency condition such as unreasonable risk to public or worker health and safety or the environment exists with respect to any of the unstable materials, the Department would take action to respond immediately to the situation and consult with the Council on Environmental Quality regarding alternative arrangements for compliance with NEPA.

materials for which a programmatic need exists. These materials are used in research and development programs. Specifically, DOE has identified a need for additional plutonium-242, and proposes to convert the existing inventory of that material at SRS from a solution to an oxide. In addition, if during the development of this EIS, a programmatic need is identified for neptunium-237, americium-243, or curium-244, this material will also be proposed for conversion to a useable form. Any programmatic need for americium-243 and curium-244 could not be satisfied until conversion technology is developed.

**Alternatives Proposed for Consideration**

DOE will examine various methods to accomplish stabilization. Based on current information, the preferred alternative for some of these materials, (e.g., in-process liquids) would be to operate the canyon facilities (including FB-Line and HB-Line, Phases I and II) only as may be necessary for stabilization, and then to place the facilities in a standby condition. For some materials, (e.g., americium and curium solutions) the Department currently has no preferred alternative, and the EIS will assist the Department in identifying a preferred alternative. The Department solicits public participation in identifying and evaluating alternatives. Alternatives could include dry storage, new wet storage, and processing for vitrification without chemical separation. Alternatives to the conversion of material required for programmatic needs have not been identified. Consistent with NEPA's requirement that the "no action" alternative be considered, DOE will evaluate the environmental impacts of continuing to manage all materials in their current form until decisions regarding disposition are made.

**Material Inventory Evaluation Criteria**

DOE proposes to evaluate the inventory of nuclear materials at the SRS and place the material into one of three categories. These categories are: (1) Materials that may warrant near-term stabilization in order to maintain the health and safety of workers and the public and to maintain environmental quality; (2) material for which there is still a programmatic need; and (3) materials for which there is currently no designated programmatic need and which are already in a stable form. DOE proposes to use the following criteria to categorize material that warrants near-term stabilization and solicits public comments on how these criteria may be further refined:

1. Materials which, without stabilization, would present a near-term (i.e., approximately 5 years) risk of increasing worker radiation exposure or exposure to hazardous materials by an amount that is not insignificant.

2. Materials which, without stabilization, would present a near-term risk of a release of radioactive or hazardous material to the public or the environment that is not insignificant.

3. Materials for which stabilization or use of an alternative storage method will, in the near-term, reduce the degree of hazard presented by the material in its current form by an amount that is not insignificant.

4. Material for which stabilization in the near-term would reduce the generation of radioactive waste by an amount that is not insignificant.

DOE intends that decisions regarding which materials merit near-term stabilization will be based exclusively on the risk they pose to the safety and health of workers or the public, or to the environment. Although DOE expects to realize some maintenance related cost savings by stabilizing at-risk materials, DOE does not intend to consider economics as a criterion in the categorization process. That is, DOE does not propose to process materials that DOE determines, after public input, will remain stable until decisions regarding disposition can be made, even if it were judged to be cost effective to process them in conjunction with materials to be stabilized.

DOE solicits public comments on the criteria and approach described above.

**Identification of Environmental and Other Issues**

DOE has identified the following issues for analysis for proposed and alternative actions in the EIS.

*Environmental Issues*

1. Public and Worker Safety, Health Risk Assessment—Radiological and nonradiological impacts, including projected effects on workers and the public from normal operations and potential accidents.

2. Waste Management—The impact on the generation, treatment, storage, and disposal of high-level radioactive waste, low-level radioactive waste, transuranic (TRU) waste, hazardous waste, and mixed waste on new and existing onsite waste management and storage facilities. The EIS will describe the types and quantities of waste that would be generated by implementation. It will not consider specific waste disposal alternatives (e.g., a comparison of the impacts caused by the treatment and interim storage of vitrified reprocessing waste with those caused by the treatment and interim storage of unprocessed forms). These will be evaluated in the SRS waste management EIS.

3. Regulatory Compliance—A determination of the status of compliance with all applicable Federal, state, and local statutes and regulations; required Federal and state environmental consultations and notifications; and

DOE Orders on waste management, including waste minimization initiatives, and environmental protection.

4. Air Quality—Potential effects on air quality from radiological and nonradiological emissions.

5. Water Resources—Effects on the quality and the quantity of ground- and surface-water resources, including wetlands, and on downstream water users.

6. Onsite Transportation—Impacts on the onsite workers and transportation systems resulting from transportation of raw materials, supplies, equipment, products, and wastes for both routine transportation and accident scenarios.

7. Socioeconomic—Socioeconomic impacts in the SRS area.

**Related NEPA Reviews**

The following is a list of existing or forthcoming NEPA documentation related to materials or activities at SRS.

**Savannah River Site Waste Management EIS**

DOE will shortly announce its intent to prepare an EIS on waste management activities at the SRS. The purpose of the EIS is to provide a basis for DOE to select a sitewide strategic approach to managing present and future SRS waste generated as a result of ongoing operations, environmental restoration activities, transition, and decontamination and decommissioning activities. The EIS will address, at a minimum, the generation, minimization, treatment, storage, and disposal of low-level waste, liquid high-level waste, nonradioactive hazardous waste, mixed waste, and transuranic waste.

**PEIS for Waste Management**

DOE has published a Notice of Intent (NOI) to prepare a Programmatic EIS on Environmental Restoration and Waste Management (EM PEIS) (55 FR 42633, October 22, 1990). An Implementation Plan for this PEIS was published in February 1994. A draft PEIS is currently

expected to be issued by September 1994.

**EIS for Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory (INEL) Environmental Restoration and Waste Management**

This EIS is currently in preparation and will include, among other issues, a programmatic analysis for the transportation, receipt, processing and storage of spent nuclear fuel, including consideration of sites other than INEL. SRS is one of the alternative sites being evaluated.

**Environmental Assessment (EA) for HB-Line Operation**

HB-Line is currently operating to provide plutonium-238 for future space missions. In July 1991, DOE issued an Environmental Assessment for Radioisotope Heat Source Fuel Processing and Fabrication, DOE/EA–0534. Based on the analysis in the EA, DOE determined that the proposed action, which included operation of HB-Line Phases I and III, does not significantly affect the quality of the human environment. DOE issued a Finding of No Significant Impact (FONSI) on July 21, 1991; the FONSI was published in the **Federal Register** on July 25, 1991 (56 FR 34057). As part of a negotiated court settlement, DOE is preparing an additional EA that will examine impacts of operating HB-Line Phases I and III beyond those activities currently underway. The cumulative impacts of operation of HB-Line Phases I and III in conjunction with the proposed action and alternatives will be addressed in this nuclear materials interim management EIS.

**EA and EIS for Foreign Research Reactor Spent Fuel**

DOE is preparing an EIS on the proposed adoption and implementation of a policy for the acceptance of up to 15,000 spent nuclear fuel elements from foreign research reactors. This EIS is scheduled to be completed by the end of June 1995. In the interim, to meet the needs of certain foreign research reactor operators and to avoid failure of a key United States nuclear nonproliferation objective, DOE proposes to accept a small number of foreign research reactor spent fuel elements for storage at an existing SRS wet storage facility. DOE has prepared and has issued for public comment, a draft EA (February 1994) to evaluate the environmental impact of this proposed interim action.

**Canyon Ventilation Upgrade EIS**

On March 20, 1992, DOE published an NOI to prepare an EIS for the upgrade of canyon exhaust systems at SRS (57 FR 9693). An Implementation Plan was issued in January 1993. The scope of the upgrade is being substantially reduced and DOE is presently evaluating what level of analysis is required under NEPA, as a result of the change in scope.

**EA for Plutonium Storage in Building 247–F Vault**

DOE is preparing an environmental assessment to evaluate the impacts of consolidating certain stable plutonium materials for interim storage into an existing vault located in Building 247–F at the SRS. The EA will evaluate the consolidated storage of plutonium materials currently stored at several locations on the SRS.

**EISs for Reactor Operation**

DOE has published two Final EISs on nuclear reactor operation at SRS: L-Reactor Operation, DOE/EIS–0108, 1984, and Continued Operation of K-, L-, and P-Reactors (ROEIS), DOE/EIS–0147, 1990. DOE stated in the Final ROEIS that it will prepare an EIS "that includes more detail on the environmental impacts of support facilities." The EIS addressed by this NOI partially fulfills that commitment.

**Reconfiguration PEIS**

On July 23, 1993, DOE published a revised Notice of Intent to prepare a PEIS for reconfiguration of its nuclear weapons complex (56 FR 39528) due to nuclear weapons stockpile reductions. The Department is reviewing the reconfiguration alternatives based on scoping comments resulting from public review of the revised Notice of Intent and budget projections. The results of this review will be presented in a revised Implementation Plan that will replace the earlier (February 1992) Implementation Plan. The SRS will be analyzed as a candidate site.

**Related Publications**

The following recent publications are available in the public reading rooms listed at the end of the Public Scoping Meetings section of this NOI. These publications deal with nuclear material management issues and provide current information on the environmental impact of SRS operations:

Office of Technology Assessment, 1993. Dismantling the Bomb and Managing the Nuclear Materials. OTA–0–572. Washington, DC U.S. Government Printing Office.

National Academy of Sciences, 1994. Management and Disposition of Excess Weapons Plutonium. National Academy Press, Washington, DC.

Spent Fuel Working Group, 1993. Inventory and Storage of the Department's Spent Nuclear Fuel and Other Reactor Irradiated Nuclear Materials and Their Environmental, Safety, and Health Vulnerabilities. U.S. Department of Energy, Washington, DC.

Westinghouse Savannah River Company, 1993. Savannah River Site Environmental Report for 1992, WSRC-TR–93–075, Savannah River Site, Aiken, South Carolina.

Issued in Washington, DC, this 11th day of March 1994.

**Tara O'Toole, M.D., M.P.H.,**

*Assistant Secretary, Environment, Safety and Health.*

[FR Doc. 94–6258 Filed 3–16–94; 8:45 am]

BILLING CODE 6450–01–P

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## Alaska Power Administration

## Snettisham Surplus Power Marketing Plan

**AGENCY:** Alaska Power Administration, Department of Energy.

**ACTION:** Final surplus power marketing plan and call for application for power.

**SUMMARY:** The final marketing plan for the sale of surplus energy from the Snettisham Project is published herein together with a discussion of the issues raised during the public comment process. Alaska Power Administration (APA) published the Draft Surplus Power Marketing Plan on January 7, 1994 (59 FR 1013), to start the process to establish allocations of surplus energy and surplus energy sales contracts for the Snettisham Project. The Marketing Plan is fully compatible with the Department of Energy's legislative proposal for APA divestiture which is currently undergoing Congressional consideration.

**DATES:** Applications for an allocation of surplus energy must be received in APA's Headquarters Office by the close of business on May 6, 1994. See section II for further details.

**ADDRESSES:** Applications for an allocation of surplus energy should be submitted to Mr. Michael Deihl, Alaska Power Administration, 2770 Sherwood Lane, Suite #2B, Juneau, AK 99801.

**FOR FURTHER INFORMATION CONTACT:** Mr. Scott Willis, Alaska Power Administration, P.O. Box 020889, Juneau, AK 99802–0889, (907) 586–6963.

SUPPLEMENTARY INFORMATION:

**Draft Surplus Marketing Plan—Snettisham Project**

*I. Background*

APA published the Draft Surplus Power Marketing Plan in the **Federal Register** on January 7, 1994 (FR 59 1013). A public information and comment forum was held January 18, 1994. Written comments were accepted until February 7, 1994. Two written comments were received. A discussion of the comments is presented in section III.

APA has considered the comments received and is publishing herein the Final Surplus Power Marketing Plan. This **Federal Register** notice also formally invites requests for allocation of surplus energy in accordance with the plan. Based on the provisions of the Plan, APA will then allocate surplus energy and sign contracts with customers receiving allocations.

An Environmental Assessment was prepared for these power marketing activities and a Finding of No Significant Impact was issued by the Department of Energy.

*II. Application Procedures*

APA formally invites requests for allocations of surplus energy from the Snettisham Project from qualified applicants. Applicants should advise APA's Administrator in writing of their requests. Written requests must be received at the APA Headquarters Office at 2770 Sherwood Lane, Suite #2B, Juneau, AK 99801, by the close of business on May 6, 1994. Applicants must identify the amount of energy desired.

*III. Discussion of Public Comments and Summary of Revisions*

APA received two written comments on the Draft Surplus Power Marketing Plan. The points raised in the comments are discussed below.

1. *Comment:* As originally proposed, a "major industrial load" would have been one which was not currently a firm customer of AEL&P, does not conduct utility type operations, and which has the capability to meet its own energy requirement in the absence of Snettisham energy.

Both commentators objected to the definition excluding a potential major industrial load, such as a mine, simply because it is presently a firm customer of AEL&P for a small amount of firm energy used at an office facility. They proposed that the definition be changed so as not to preclude such loads.

One commentator suggested that the definition be strengthened as to the requirement for being able to meet its own energy requirement. They pointed out that a qualified load should be able to meet its own baseload energy requirement rather than its peak requirements or its requirement during intermittent curtailment of Snettisham energy.

*Discussion:* APA believes these suggestions clarify the intent of the marketing plan. As revised, a major industrial load is one which does not conduct utility-type operations and whose major load is not currently served as a firm load by AEL&P. The major industrial load must also have the capability to meet its own baseload energy requirement in the long-term absence of Snettisham energy.

2. *Comment:* One commentator felt that there was apparently a conflict between the provision in section C that "entities receiving an allocation of Snettisham resources will be offered an electric service contract . . ." and the provision in section B.3. that "allocations will be made to AEL&P." They asked for clarification as to whether a major industrial load would enter into a contract with APA, with AEL&P, or with both.

*Discussion:* Potential surplus energy customers are encouraged to work directly with AEL&P. In this case, AEL&P will make the request, the allocation will be to AEL&P, and the contract will be between APA and AEL&P. The major industrial customer and AEL&P will presumably have their own contractual arrangements. As indicated in the plan, if service through AEL&P is demonstrated to be infeasible, then APA will consider an allocation and contract directly with the major industrial customer.

3. *Comment:* The contracts for surplus energy should not only include assurance that the allocation will continue after divestiture with APA, but that the rates charged for energy will continue also.

*Discussion:* The contracts will contain language to assure that the allocation continues, but will not contain language which binds the new owner to a given rate structure. The existing purchase agreement for Snettisham was negotiated to assure only that allocations would continue, but that the new owner would set their own rates. The contracts will not "guarantee" rates for APA, but will allow APA to adjust rates within its own procedures and guidelines. This has been clarified in the final plan.

4. *Comment:* The allocation reservation fee should be refundable to the extent that allocated energy is not made available for taking during the year.

*Discussion:* This has been clarified in the final plan.

5. *Comment:* APA should not allocate energy among competing applicants by dividing it equally, but should be made some other way, such as proportionate to the size of the requests, or by benefit to the local economy, etc.

*Discussion:* There are any number of ways to allocate a limited resource. APA expects that if there are competing requests for allocation, they will all be in excess of the resource available and they will all be based on estimates of future loads rather than historic use. For this reason APA will divide the resource equally as explained in the plan.

*IV. Final Surplus Power Marketing Plan*

A. Conditions for Allocation

Allocations of surplus energy will be made in accordance with the provisions of the Marketing Plan. These provisions include:

1. No energy will be allocated for export outside the Juneau market area (that is, the AEL&P service territory) without firm plans and commitment to finance and build the necessary transmission facilities.

2. In allocating surplus energy, APA will give preference to public bodies and cooperatives who conduct utility-type operations.

3. Surplus energy not allocated to preference customers may be available to serve major industrial loads. For this marketing plan, a major industrial load is one which does not conduct utility-type operations and whose major load is not currently served as a firm load by AEL&P. The major industrial load must also have the capability to meet its own baseload energy requirement in the long-term absence of Snettisham energy. Major industrial loads are encouraged to work directly with AEL&P so that AEL&P can request an allocation to serve their needs. In this case, allocations will be made to AEL&P. APA will consider requests for direct service of major industrial loads only if it is demonstrated that service through the utility is infeasible.

B. Contract Provisions

Entities receiving an allocation of Snettisham resources will be offered an electric service contract which will include the following provisions:

1. Contracts will be for a period of 20 years or less beginning at contract execution. Contracts for less than 20 years may include an option to extend the period up to a total length of 20 years. Contracts will be compatible with

the proposed APA divestiture. Contracts will contain language guaranteeing the continuation of the allocation after divestiture.

2. Surplus energy will be marketed at the Snettisham firm rate. The rate is presently 3.21 cents/kwh and is subject to periodic review and adjustment.

3. The contractor will be required to sign a contract within 270 days of APA's letter granting an allocation.

4. In order to reserve the allocation, the contractor will be required to deposit 10% of the expected cost of the following year's energy with APA. If the allocated energy is taken during the year, the deposit will be credited toward the cost of the energy. To the extent that energy is available for delivery, if the allocation is not completely taken the deposit is non-refundable. In any year, energy reserved in this way but not taken by the contractor may be marketed by APA. In any case, an applicant must be ready, willing, and able to take initial delivery of power by January 1, 1997 or the allocation will be withdrawn and the energy reallocated.

5. If the contractor has not committed to a 20-year contract, the contractor will be required to pay a one-time, non-refundable payment within 30 days after contract execution. This payment will be based on 3% of the average estimated annual energy delivery during the years between the end of the contract period and the 20-year period times each year less than 20 years.

*C. Amount Available for Allocation*

Firm energy output (energy available 9 years out of 10) from the Snettisham Project is estimated at 275 gwh/year. Secondary energy is estimated to vary from 0 to 100 gwh/year and average around 50 gwh/year. This invitation is for requests for allocation for energy that is surplus to the needs of the Juneau community. An estimate of that need is shown in the table below. Applicants must be aware that these are only estimates and that the amount of energy required by the community may vary from these projections. In the event that there are competing requests from qualified applicants, the surplus energy will be divided equally among the applicants up to their maximum request.

| Water community energy surplus: year | Estimated requirement | Estimated available |
|---|---|---|
| 1994 | 232 | 93 |
| 1995 | 242 | 83 |
| 1996 | 250 | 75 |
| 1997 | 255 | 70 |
| 1998 | 258 | 67 |
| 1999 | 259 | 66 |
| 2000 | 260 | 65 |
| 2001 | 263 | 62 |
| 2002 | 264 | 61 |
| 2003 | 266 | 59 |
| 2004 | 267 | 58 |
| 2005 | 270 | 55 |
| 2006 | 271 | 54 |
| 2007 | 274 | 51 |
| 2008 | 275 | 50 |
| 2009 | 277 | 48 |
| 2010 | 278 | 47 |
| 2011 | 281 | 44 |
| 2012 | 282 | 43 |
| 2013 | 285 | 40 |

Issued at Juneau, Alaska; February 24, 1994.

**Lloyd A. Linke,**

*Director, Power Division.*

[FR Doc. 94–6259 Filed 03–16–94; 8:45 am]

BILLING CODE 6450–01–P

## Federal Energy Regulatory Commission

**[Docket No. RP93–99–000]**

### Colorado Interstate Gas Co.; Informal Settlement Conference

March 11, 1994.

Take notice that an informal settlement conference will be convened in this proceeding on Wednesday, March 23, 1994, at 10 a.m., at the offices of the Federal Energy Regulatory Commission, 810 First Street NE., Washington, DC, for the purpose of exploring settlement in the above-referenced docket.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6195 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

**[Docket No. OR94–5–000]**

### Gaviota Terminal Co.; Complaint

March 11, 1994.

Take notice that on February 28, 1994, The Producer Group filed a complaint with the Commission concerning the February 4, 1994 tariff filing made by Gaviota Terminal Co. (Gaviota), with a proposed effective date of February 14, 1994. The Producer Group complains that the failure of Gaviota to file a tariff prior to February 4, 1994 was in violation of the Interstate Commerce Act for which appropriate sanctions should be provided.

The Producer Group states that Gaviota has been operating since June 1991, and had not submitted a tariff to the Commission until it made its February 4, 1994 filing, notwithstanding that it is an interstate oil transportation company subject to the terms of the Interstate Commerce Act. The Producer Group states that oil pipelines, such as Gaviota, are obligated to file their jurisdictional rates for the Commission's examination, and that Gaviota, for almost three years, provided oil transportation service without a tariff being on file.

The Producer Group requests the Commission to establish a reasonable rate for the period during which Gaviota operated without a tariff and to order refunds for any past payments in excess of that rate.

Any person desiring to be heard or to protest said complaint should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, 385.211. All such motions or protests should be filed on or before April 11, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. Answers to this complaint shall be due on or before April 11, 1994.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6192 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

**[Docket No. RP93–17–003]**

### Tennessee Gas Pipeline Co.; Report of Refunds

March 11, 1994.

Take notice that on March 3, 1994, Tennessee Gas Pipeline Company (Tennessee) filed a refund report with the Federal Energy Regulatory Commission (Commission) which Tennessee states is in accordance with its Stipulation and Agreement (Agreement) filed on October 15, 1993, and approved by Commission order issued December 3, 1993.

Tennessee states that on March 3, 1994, it paid Equitable Gas Company (Equitable) a refund of $2,087,859, including interest computed according to § 154.67(c) of the Commission's regulations, pursuant to Article II of the Agreement. Tennessee states that the refund reflects the adjusted balance for Equitable in Schedule 1 of Tennessee's Workpapers in Tennessee's June 29, 1992 Amended Cosmic Settlement compliance filing, plus interest.

Tennessee further states that a copy of the refund report was sent to Equitable and the state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before March 18, 1994. Protest will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6194 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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**[Docket No. RP93–106–000, et al.]**

## Texas Gas Transmission Corp.; Informal Settlement Conference

March 11, 1994.

Take notice that an informal settlement conference will be convened in the above-captioned proceeding at 10 a.m. on March 16, 1994, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the above-referenced dockets.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information please contact Michael D. Cotleur, (202) 208–1076, or Arnold H. Meltz, (202) 208–2161.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6196 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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**[Docket No. RP94–125–001]**

## Texas Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff

March 11, 1994.

Take notice that on March 9, 1994, Texas Gas Transmission Corporation (Texas Gas) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets:

Substitute First Revised Sheet No. 224
Substitute First Revised Sheet No. 225
Substitute First Revised Sheet No. 226
Original Sheet No. 226A
Original Sheet No. 226B
Original Sheet No. 226C

Texas Gas states that the revised tariff sheets are being filed to comply with the Commission's Order issued March 1, 1994, in Docket No. RP94–125, which requires Texas Gas to refile tariff sheets, working papers, and other information within 15 days of the order. Texas Gas also states that the revised tariff sheets reflect direct billing of Account No. 191 costs on a demand and commodity basis consistent with the Commission's February 10, 1994 order in Texas Gas's restructuring proceeding.

Texas Gas further states that copies of the revised tariff sheets are being mailed to Texas Gas's affected former jurisdictional sales customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before March 18, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6197 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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## Transcontinental Gas Pipe Line Corp.; Proposed Changes in FERC Gas Tariff

**[Docket No. MT88–3–010]**

March 11, 1994.

Take notice that on March 8, 1994, Transcontinental Gas Pipe Line Corporation (TGPL) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 344, proposed to be effective March 8, 1994.

TGPL states that the referenced tariff sheet has been revised to reflect changes in the list of affiliated marketing companies as a result of the sale and reorganization of certain assets by Transco Energy Company as well as a change in the list of directors shared by TGPL and Transco Gas Marketing Company. TGPL states that the tariff sheet has been revised to reflect the fact that TGPL no longer shares any building or building services with any of its affiliated marketing companies.

TGPL states that it has also revised its corporate code of conduct to reflect the changes outlined above. In addition, TGPL states that the requirement for the contemporaneous disclosure of gas sales and gas marketing information if such information is provided to an affiliate was eliminated from TGPL's corporate code of conduct in accordance with Order No. 497–E.

TGPL states that it is serving copies of the filing on its customers, state commissions and other interested parties.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before March 18, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6189 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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**[Docket No. MG88–51–007]**

## Transcontinental Gas Pipe Line Corp.; Filing

**[Docket No. MG88–51–007]**

March 11, 1994.

Take notice that on March 8, 1994, Transcontinental Gas Pipe Line Company (Transco) filed a revised Code of Conduct pursuant to Order No. 497–E.[1]

Transco states that the purpose of the filing is to reflect certain changes in

[1] Order No. 497–E, *order on rehearing and extending sunset date*, 59 FR 243 (January 4, 1994), 65 FERC ¶ 61,381 (December 23, 1993).

accordance with Order No. 497–E and certain organizational and personnel changes at Transco.

Transco states that copies of this filing have been mailed to its customers, state commissions and other interested parties.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions to intervene or protest should be filed on or before (15 days after issuance). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6190 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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**[Docket No. RP92–137–023]**

## Transcontinental Gas Pipe Line Corp.; Tariff Filing

March 11, 1994.

Take notice that on March 8, 1994, Transcontinental Gas Pipe Line Corporation (TGPL) submitted for filing certain revised tariff sheets to its FERC Gas Tariff, Third Revised Volume No. 1, which tariff sheets are enumerated in Appendix A to the filing. The tariff sheets are proposed to be effective as set forth in Appendix A to the filing.

TGPL states that on May 3, 1993 it submitted a Settlement in the referenced proceeding which, among other things, resolved cost-of-service, cost allocation, rate design and throughput mix for the period September 1, 1992 (the effective date of Docket No. RP92–137) through October 31, 1993 (the date immediately preceding the November 1, 1993 effective date of TGPL's Order No. 636 restructuring). On November 4, 1993 the Commission issued an order approving the Settlement (November 4 Order).

TGPL states that the tariff sheets submitted in the instant filing reflect the settlement rates approved by the November 4 Order updated to incorporate tracker filings made subsequent to the date the Settlement was filed (i.e. subsequent to May 3, 1993). The purpose of those filings was to track, under certain TGPL rate schedules, rate changes made effective by upstream providers of storage and transportation services. TGPL states that Appendix B to the filing includes workpapers which support the derivation of TGPL's settlement rates for those services affected by the aforementioned tracker filings. Also, TGPL has revised its historical imbalance tariff provisions (section 5.8 of Rate Schedules FT and IT) consistent with the directives set forth in the November 4 Order.

TGPL states that copies of the instant filing are being mailed to customers, State Commissions and other interested parties.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before March 18, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 94–6193 Filed 3–16–94; 8:45 am]

BILLING CODE 6717–01–M

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## Office of Arms Control and Nonproliferation

### Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement", under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Japan concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/JA(EU)–73 for the transfer of 69.510 kilograms of uranium containing 7.401 kilograms of the isotope uranium–235 (10.65 percent average enrichment) from the Federal Republic of Germany to Japan for fabrication of fuel elements for the High Temperature Reactor.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

Issued in Washington, D.C. on March 11, 1994.

**Edward T. Fei,**

*Acting Director, Office of Nonproliferation Policy, Office of Arms Control and Nonproliferation.*

[FR Doc. 94–6257 Filed 3–16–94; 8:45 am]

BILLING CODE 6450–01–M

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## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–4851–2]**

## Prevention of Significant Deterioration of Air Quality (PSD) Final Determinations

**AGENCY:** United States Environmental Protection Agency.

**ACTION:** Notice of final actions.

**SUMMARY:** The purpose of this notice is to announce that between February 1, 1993 and January 31, 1994, the United States Environmental Protection Agency (EPA) Region II Office, issued 2 final determinations, the New York State Department of Environmental Conservation (NYSDEC) issued 5 final determinations, and the New Jersey Department of Environmental Protection and Energy (NJDEPE) issued 2 final determinations pursuant to the Prevention of Significant Deterioration of Air Quality (PSD) regulations codified at 40 CFR 52.21.

**DATES:** The effective dates for the above determinations are delineated in the following chart (See **SUPPLEMENTARY INFORMATION**).

**FOR FURTHER INFORMATION CONTACT:** Maria N. Stanco of the Permitting and Toxics Support Section, Air Compliance Branch, Division of Air And Waste Management, U.S. Environmental Protection Agency Region II Office, 26 Federal Plaza, room 505, New York, New York 10278, (212) 264–4726.

**SUPPLEMENTARY INFORMATION:** Pursuant to the PSD regulations, the EPA Region II, the NYSDEC, and the NJDEPE have made final PSD determinations relative to the sources listed below:

| Name | Location | Project | Agency | Final action | Date |
|---|---|---|---|---|---|
| Mayflower Energy Partners, L.P. | Islip, New York . | 340 MW combined cycle gas turbine cogeneration project firing natural gas with # 2 oil as backup fuel. | NYSDEC .. | PSD Permit ..... | Feb. 17, 1993. |
| Abbott Puerto Rico Operations. | Barceloneta, Puerto Rico. | Addition of two oil-fired boilers, increased utilization at three existing boilers and other process/manufacturing changes. | EPA ..... | Nonapplicability ..... | Apr. 1, 1993. |
| Brooklyn Navy Yard Cogeneration. | Brooklyn, New York. | 286 MW combined cycle gas turbine cogeneration project firing natural gas with #1 oil as backup fuel. | NYSDEC .. | Nonapplicability ..... | Apr. 21, 1993. |
| Wallkill Generating ..... | Wallkill, New York. | 150 MW combined cycle gas turbine cogeneration project firing natural gas with #2 oil as backup fuel. | NYSDEC .. | Nonapplicability ..... | May 12, 1993. |
| Newark Bay Cogeneration, L.P. | Newark, New Jersey. | Increased annual fuel use limit, and hourly kerosene use limit, eliminate duct burners and vent auxiliary fuel gases to turbine stack. | NJDEPE ... | PSD Permit Modification. | June 9, 1993. |
| Saranac Power Partners ..... | Plattsburgh, New York. | 240 MW combined cycle gas turbine cogeneration project firing natural gas. | NYSDEC .. | PSD Permit Modification. | June 16, 1993. |
| Virgin Islands Water and Power Authority Unit 19. | St. Croix, Virgin Islands. | 20 W oil-fired gas turbine ..... | EPA ..... | PSD Permit ..... | Sept. 3, 1993. |
| Fulton Cogeneration ..... | Fulton, New York. | 79 MW combined cycle gas turbine cogeneration project firing natural gas with #2 oil as backup fuel. | NYSDEC .. | PSD Permit Modification. | Oct. 13, 1993. |
| Crown Vista Energy Project | West Deptford, New Jersey. | Two 1789 MMBTU/HR pulverized coal boilers and 25 additional minor sources consisting of auxiliary boiler, material handling equipment, silos, cooling equipment and other equipment. | NJDEPE ... | PSD Permit ..... | Jan. 5, 1994. |

This notice lists only the sources that have received final PSD determinations. Anyone who wishes to review these determinations and related materials should contact the following offices:

*EPA Actions*

United States Environmental Protection Agency, Region II Office, Air Compliance Branch—Room 505, 26 Federal Plaza, New York, New York 10278.

*NYSDEC Actions*

New York State Department of Environmental Conservation, Division of Air Resources, Source Review and Regional Support Section, 50 Wolf Road, Albany, New York 12233–0001.

*NJDEPE Actions*

New Jersey Department of Environmental Protection and Energy, Division of Environmental Quality, Bureau of Engineering and Technology, 401 East State Street, Trenton, New Jersey 08625.

If available pursuant to the Consolidated Permit Regulations (40 CFR 124), judicial review of these determinations under section 307(b)(1) of the Clean Air Act (the Act) may be sought only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days from the date on which these determinations are published in the **Federal Register**. Under section 307(b)(2) of the Act, these determinations shall not be subject to later judicial review in civil or criminal proceedings for enforcement.

Dated: March 3, 1994.

**William J. Muszynski, P.E.,**

*Acting Regional Administrator.*

[FR Doc. 94–6154 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–P

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[FRL–4851–7]

## Prevention of Significant Deterioration of Air Quality (PSD); SEI Birchwood, Inc., King George County, VA

**AGENCY:** United States Environmental Protection Agency.

**ACTION:** Notice of final action.

**SUMMARY:** The purpose of this Notice is to announce the final Agency action regarding the Prevention of Significant Deterioration (PSD) permit issued by the Virginia Department of Environmental Quality on August 23, 1993 to SEI Birchwood, Inc. in King George County, Virginia, This determination was appealed to the Environmental Protection Agency (EPA).

**DATES:** The Environmental Appeals Board of the EPA issued an Order Denying Review on January 27, 1994.

**FOR FURTHER INFORMATION CONTACT:** Ms. Eileen M. Glen, Chief, New Source Review Section, Air Enforcement Branch, Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, Mail Code 3AT22, 841 Chestnut Building, Philadelphia, Pennsylvania, 19107, (215) 597–8379.

**SUPPLEMENTARY INFORMATION:** On September 24, 1993 and September 29, 1993, petitions were submitted to the Environmental Appeals Board requesting review of a PSD permit issued to SEI Birchwood, Inc. (SEI) for construction of a 220-megawatt coal-fired electric generating facility in King George County, Virginia. These petitions were submitted by Sarah Nasta and Citizens for Sensible Power (CSP), respectively. The PSD permit was issued by the Virginia Department of Environmental Quality (VDEQ) on August 23, 1993, pursuant to a delegation of authority from the EPA, Region III, Philadelphia, Pennsylvania. Because of the delegation, any PSD permit issued by the VDEQ is an EPA-issued permit for purposes of federal law (40 CFR 124.41; 45 FR 33413 (May 19, 1980)), and is subject to review by the Agency under 40 CFR 124.19 before becoming final.

The Environmental Appeals Board issued an Order Denying Review of the permit on January 27, 1994, concluding that review of VDEQ'S permit

determination was not warranted and that it met all necessary requirements of federal law.

Anyone wishing to review the final permit, petitions, Order Denying Review, or related materials should contact one of the following offices:

U.S. Environmental Protection Agency, Region III,
Air Enforcement Branch,
New Source Review Section (3AT22),
841 Chestnut Building,
Philadelphia, Pennsylvania 19107.
Virginia Department of Environmental Quality,
P.O. Box 10089,
Richmond, Virginia 23240.

Pursuant to 40 CFR 124.19(f)(2), for purposes of judicial review, final Agency action occurs when a final PSD permit is issued and Agency review procedures are exhausted. This Notice, being published today in the **Federal Register**, constitutes notice of the final Agency action denying review of the PSD permit. If available, judicial review of these determinations under section 307(b)(1) of the Clean Air Act (Act) may be sought only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days from the date on which this determination is published in the **Federal Register**. Under section 307(b)(2) of the Act, this determination shall not be subject to later judicial review in any civil or criminal proceedings for enforcement.

Dated: March 4, 1994.

**Elaine B. Wright,**

*Acting Regional Administrator.*

[FR Doc. 94–6155 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–M

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[OPP–100135; FRL–4763–2]

## Oakridge National Laboratory and Martin Marietta Inc.; Transfer of Data

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

**ACTION:** Notice.

**SUMMARY:** This is a notice to certain persons who have submitted information to EPA in connection with pesticide information requirements imposed under the Federal Food, Drug, and Cosmetic Act (FFDCA). The Oak Ridge National Laboratory (ORNL) and Martin Marietta Inc., under an Interagency Agreement (IAG) will perform work for the EPA Office of Pesticide Programs, and will be provided access to certain information submitted to EPA under FIFRA and the FFDCA. Some of this information may have been claimed to be confidential business information (CBI) by submitters. This information will be transferred to ORNL and Martin Marietta Inc. consistent with the requirements of 40 CFR 2.209(c) and 2.308(i)(2), and will enable ORNL and Martin Marietta Inc. to fulfill the obligations of the agreement.

**DATES:** ORNL and Martin Marietta Inc. will be given access to this information no sooner than March 28, 1994.

**FOR FURTHER INFORMATION CONTACT:** By mail: BeWanda B. Alexander, Program Management and Support Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 234 Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5259

**SUPPLEMENTARY INFORMATION:** Prior to the registration or reregistration of a pesticide, the Office of Pesticide Programs (OPP), must determine whether the chemical will cause unreasonable adverse effects on humans and the environment under FIFRA. In the process of making the determination, OPP reviews all data submitted by the registrant to support the effectiveness and safety of the chemical, published reports or studies from the open literature unpublished reports or studies which bear on the issues at hand, and the chemical's general and environmental chemistry relationship to possible human and domestic animal exposure. In some instances, OPP requests the registrant to conduct additional studies, or directly funds research to complete the registration.

OPP, under IAG DW89936171–01, is contracting with ORNL and Martin Marietta Inc. for specialized technical assistance in the identification of information shortfalls dealing with the registration of pesticides. This research effort will concentrate on systematically identifying, analyzing, and evaluating data associated with pesticide registrations. The intent is to catalog data gaps from the registrant to fully characterize the safe manufacture, application, re-entry, and residue issues prior to a decision to issue a registration under FIFRA.

OPP has determined that the IAG herein described involves work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to be made under this IAG. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirement of 40 CFR 2.209(c), 2.307(h), and 2.308(h)(2), this IAG with ORNL and Martin Marietta Inc. prohibits use of the information for any purpose other than the purposes specified in this IAG; prohibits disclosure of the information in any form to a third party without prior written approval from the Agency; and requires that each official and employee sign an agreement to protect the information from unauthorized release and to handle it in accordance with the FIFRA Information Security Manual. In addition ORNL and Martin Marietta Inc. are required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided until the above requirements have been fully satisfied. Records of information provided under this IAG will be maintained by the Project Officer for this contract in OPP.

All information supplied to ORNL and Martin Marietta Inc. by EPA for use in connection with this IAG will be returned to EPA when ORNL and Martin Marietta Inc. have completed their work.

### List of Subjects

Environmental protection, Transfer of data.

Dated: March 7, 1994.

**Douglas D. Campt,**

*Director, Office of Pesticide Programs.*

[FR Doc. 94–6166 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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[OPP–100136; FRL–4763–3]

## Syracuse Research Corporation; Transfer of Data

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

**ACTION:** Notice.

**SUMMARY:** This is a notice to certain persons who have submitted information to EPA in connection with pesticide information requirements imposed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). Syracuse Research Corporation (SRC) has been awarded a contract to perform work for the Environmental Criteria and Assessment Office, and will be provided access to certain information submitted

to EPA under FIFRA and the FFDCA. Some of this information may have been claimed to be confidential business information (CBI) by submitters. This information will be transferred to SRC consistent with the requirements of 40 CFR 2.307(h)(3) and 40 CFR 2.308(i)(2), and will enable SRC to fulfill the obligations of the contract.

**DATES:** SRC will be given access to this information no sooner than March 22, 1994.

**FOR FURTHER INFORMATION CONTACT:** By mail: BeWanda B. Alexander, Program Management and Support Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 234, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5259.

**SUPPLEMENTARY INFORMATION:** Under contract number 68–C3–0369, SRC will provide technical support to EPA's Environmental Criteria and Assessment Office (ECAO) in the evaluation of health environmental effects including aquatic toxicity and environmental fate studies on the chemicals boron, methyl mercury and ziram. Other chemicals may be included in SRC's work later in the contract. Readers may contact the person named above in approximately 1 year to learn if chemicals other than boron, methyl mercury and ziram will be involved in this contract. This contract involves no subcontractors.

ECAO and the Office of Pesticide Programs have jointly determined that contract number 68–C3–0369, involve work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to made under this contract. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, 7, and 17 of FIFRA and under sections 408 and 409 of the FFDCA.

In accordance with the requirements of 40 CFR 2.37(h)(3), the contract with SRC, prohibits use of the information for any purpose not specified in the contract; prohibits disclosure of the information in any form to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the FIFRA Information Security Manual. In addition, SRC is required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to this contractor until the above requirements have been fully satisfied. Records of information provided to this contractor will be maintained by the Project Officer for this contract in ECAO. All information supplied to SRC by EPA for use in connection with this contract will be returned to EPA when SRC has completed its work.

### List of Subjects

Environmental protection, Transfer of data.

Dated: March 7, 1994.

**Douglas D. Campt,**

*Director, Office of Pesticide Programs.*

[FR Doc. 94–6167 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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**[OPP–00373; FRL 4758–5]**

## Reregistration Eligibility Decision Documents for Boric Acid and Its Sodium Salts, et al.

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

**ACTION:** Notice of availability of Reregistration Eligibility Decision documents; opening of public comment period.

**SUMMARY:** This Notice announces the availability of the Reregistration Eligibility Decision (RED) documents for the following active ingredients from List A, List C and List D, and this notice also starts a 60–day public comment period. The REDs for the chemicals listed are the Agency's formal regulatory assessments of the health and environmental data base of the subject chemicals and present the Agency's determination regarding which pesticidal uses are eligible for reregistration.

**DATES:** Written comments on the REDs must be submitted by May 16, 1994.

**ADDRESSES:** Three copies of comments identified with the docket number "OPP–00373" and the case number should be submitted to: By mail: OPP Pesticide Docket, Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: OPP Pesticide Docket, Rm. 1132, Crystal Mall 2 (CM#2), 1921 Jefferson Davis Highway, Arlington, VA.

**FOR FURTHER INFORMATION CONTACT:** Technical questions on the listed RED documents should be directed to the appropriate Chemical Review Managers:

Boric Acid and Its Sodium Salts - Mario Fiol - (703) 308–8049

Butylate - Judy Loranger - (703) 308–8056

Daminozide - Andrew Ertman - (703) 308–8063

Eugenol - Ruby Whiters - (703) 308–8079

Glyphosate - Eric Feris - (703) 308–8049 (TDD)

Inorganic Halides - Mark Wilhite - (703) 308–8586

Lauryl Sulfate Salts - Ron Kendall - (703) 308–8068

Phenyl-Ethyl-Propionate - Virginia Dietrich - (703) 308–8157

Sulfuryl Fluoride - Robert Richards- (703) 308–8057

Thymol - Kathleen Depukat - (703) 308–8587

Tris (Hydroxymethyl) Nitromethane - Ernestine Dobbins - (703) 308–8071

Wood Oils and Gums - Virginia Dietrich - (703) 308–8157.

Information submitted as a comment in response to this Notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information (CBI)." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public docket. Information not marked confidential will be included in the public docket without prior notice. The public docket and docket index will be available for public inspection in Rm 1132 at the address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

**SUPPLEMENTARY INFORMATION:** The Agency has issued Reregistration Eligibility Decision (RED) documents for the pesticidal active ingredients listed below. Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of each of the chemicals listed above is substantially complete. EPA has determined that all currently registered products subject to reregistration containing these active ingredients are eligible for reregistration.

List A -

Case 0024 Boric Acid, Sodium Tetraborate Decahydrate (Borax Decahydrate), Sodium Tetraborate Pentahydrate (Borax Pentahydrate), Sodium Tetraborate (Anhydrous Borax), Disodium Octaborate Tetrahydrate, Disodium

Octaborate (Anhydrous), and Sodium Metaborate
Case 0071 Butylate;
Case 0032 Daminozide;
Case 0178 Glyphosate
Case 0172 Sulfuryl Fluoride;

List C -
Case 3110 Phenyl-Ethyl-Propionate;
Case 3143 Thymol;
Case 3149 Tris (Hydroxymethyl) Nitromethane;
Case 3150 Wood Oils and Gums;

List D -
Case 4038 Eugenol;
Case 4051 Inorganic Halides (Sodium Bromide and Sodium Chloride);
Case 4061 Lauryl Sulfate Salts

To request a copy of any of the listed RED documents, or a RED Fact Sheet, contact the OPP Pesticide Docket, Public Response and Program Resources Branch, in Rm 1132 at the address given above or call (703) 305–5805.

All registrants of products containing one or more of the above listed active ingredients have been sent the appropriate RED documents and must respond to labeling requirements and product specific data requirements (if applicable) within 8 months of receipt, with the exception of eugenol and phenyl-ethyl-propionate. Products containing the other active ingredients will not be reregistered until adequate product specific data have been submitted and all necessary product label changes are implemented.

For products containing eugenol and phenyl-ethyl-propionate, the Agency is considering these products for exemption from registration under Section 25(b) of the Federal Insecticide and Rodenticide Act. Therefore, no product specific labeling or data are being required at this time.

The reregistration program is being conducted under Congressionally mandated time frames, and EPA recognizes both the need to make timely reregistration decisions and to involve the public. Therefore, EPA is issuing these REDs as final documents with a 60–day comment period. Although the 60–day public comment period does not affect the registrant's response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments will be carefully considered by the Agency. If any comment significantly affect a RED, EPA will amend the RED by publishing the amendment in the **Federal Register**.

### List of Subjects

Environmental protection.

Dated: March 8, 1994.

**Daniel M. Barolo,**

*Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. 94–6169 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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**[OPP–66190; FRL 4764–1]**

## Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations.

**DATES:** Unless a request is withdrawn by June 15, 1994, orders will be issued cancelling all of these registrations.

**FOR FURTHER INFORMATION CONTACT:** By mail: James A. Hollins, Office of Pesticide Programs (7502C), Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. Office location for commercial courier delivery and telephone number: Room 216, Crystal Mall No. 2, 1921 Jefferson Davis Highway Arlington, VA 22202, (703) 305–5761.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

Section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, provides that a pesticide registrant may, at any time, request that any of its pesticide registrations be cancelled. The Act further provides that EPA must publish a notice of receipt of any such request in the **Federal Register** before acting on the request.

### II. Intent to Cancel

This notice announces receipt by the Agency of requests to cancel some 27 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in the following Table 1.

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

| Registration No. | Product Name | Chemical Name |
|---|---|---|
| 000352–00376 | Dupont Krenite Brush Control Agent | Ammonium ethyl carbamoylphosphonate |
| 000352 PA–91–0004 | Du Pont Lannate Insecticide | *S*-Methyl *N*-((methylcarbamoyl)oxy)thioacetimidate |
| 000524–00400 | Partner WDG | Alachlor (2-Chloro-*N*-(2,6-diethylphenyl)-*N*-(methoxymethyl)acetamide)<br>Avermectin B1 |
| 000524–00408 | MON-9850 Herbicide | Alachlor (2-Chloro-*N*-(2,6-diethylphenyl)-*N*-(methoxymethyl)acetamide)<br>2-(4,5-Dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1*H*-imidazol-2-yl)-3- |
| 000769–00746 | Trac Anticoagulant Tracking Powder Kills Rats & Mice | 2-Isovaleryl-1,3-indandione, calcium salt |
| 000769–00763 | AFC General Purpose Spray Type III | Aliphatic petroleum hydrocarbons<br>(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>Pyrethrins |
| 000769–00766 | Kleen-Out Total Release Aerosol Insecticide | Aliphatic petroleum hydrocarbons<br>(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>Pyrethrins |
| 000769–00771 | P.C.E. Industrial Aerosol | *N*-Octyl bicycloheptene dicarboximide<br>Aliphatic petroleum hydrocarbons |

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

| Registration No. | Product Name | Chemical Name |
|---|---|---|
| | | (Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>Pyrethrins |
| 000769–00812 | Omnicide Pet Special | Isopropanol<br>Aliphatic petroleum hydrocarbons<br>(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>1,2-Propanediol<br>Pyrethrins<br>Triethylene glycol |
| 000769–00814 | Superior Beer Case Concentrate | 2-Hydroxyethyl octyl sulfide<br>*N*-Octyl bicycloheptene dicarboximide<br>Aliphatic petroleum hydrocarbons<br>(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>Pyrethrins |
| 000769–00858 | Pratt Wasp and Hornet Spray for Outdoor Use Only | *o*-Isopropoxyphenyl methylcarbamate<br>*N*-Octyl bicycloheptene dicarboximide<br>Aliphatic petroleum hydrocarbons<br>(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%<br>Pyrethrins |
| 000769–00878 | Pratt Turf Fungicide 50% Wettable Powder | 2,4-Dichloro-6-(*o*-chloroanilino)-*s*-triazine |
| 000935–00061 | Convert-A-Clor 56 Granules | Sodium dichloroisocyanurate dihydrate |
| 000935–00062 | Convert-A-Clor 90 One Inch Tablets | Trichloro-*s*-triazinetrione |
| 000935–00063 | Convert-A-Clor 60 Granules | Sodium dichloro-*s*-triazinetrione |
| 000935–00065 | Towerbrom 90 Tablets, One Inch Tablets | Trichloro-*s*-triazinetrione |
| 000935–00066 | Towerbrom 56 Granules | Sodium dichloroisocyanurate dihydrate |
| 000935–00077 | Tower Brom 90, Three Inch Tablets | Trichloro-*s*-triazinetrione |
| 010163–00022 | Prokil Cryolite 50 Dust | Cryolite |
| 010163–00040 | Prokil Cryolite 75 Dust | Cryolite |
| 033660–00001 | Atrazine Technical | 2-Chloro-4-(ethylamino)-6-(isopropylamino)-*s*-triazine |
| 033660–00035 | Atrazine Technical III | 2-Chloro-4-(ethylamino)-6-(isopropylamino)-*s*-triazine |
| 042052–00001 | Buckman's Sodium Hypochlorite Solution | Sodium hypochlorite |
| 052466–00007 | Blue Death Sugar Bait Fly Killer | Dimethyl (2,2,2-trichloro-1-hydroxyethyl)phosphonate |
| 059639–00045 | Isotox Seed Treater (75) | Lindane (Gamma isomer of benzene hexachloride) (99% pure gamma isomer |
| 062719–00104 | Paarlan E.C. | 2,6-Dinitro-*N*,*N*-dipropylcumidene |
| 064380 NJ–90–0001 | Ethylene Oxide 100% | Ethylene oxide |

Unless a request is withdrawn by the registrant within 90 days of publication of this notice, orders will be issued cancelling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 90-day period. The following Table 2 includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA Company Number.

TABLE 2. — REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

| EPA Company No. | Company Name and Address |
|---|---|
| 000352 | E. I. Du Pont De Nemours & Co, Inc., Barley Mill Plaza, Walker's Mill, Wilmington, DE 19880. |
| 000524 | Monsanto Co., 700 14th St, N.W., Suite 1100, Washington, DC 20005. |
| 000769 | Sureco, Inc., c/o H.R. McLane, Inc., 7210 Red Rd., Suite 206, Miami, FL 33143. |
| 000935 | Occidental Chemical Corp., Development Center, V-81, Box 344, Niagara Falls, NY 14302. |
| 010163 | Gowan Co, Box 5569, Yuma, AZ 85366. |
| 033660 | Industrial Prodotti Chimici S., c/o Pazianos Assoc., 1338 G St., SE, Washington, DC 20003. |
| 042052 | Buckmans Pool & Ski Shop Inc., Rt. 29, Rd 2, Box 101, Perkiomenville, PA 18074. |
| 052466 | Horse Health Products Inc., Director of Regulatory Affairs, 421 E. Hawley St, Mundelein, IL 60060. |

TABLE 2. — REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

| EPA Company No. | Company Name and Address |
|---|---|
| 059639 | Valent U.S.A. Corp., 1333 N. California Blvd., Box 8025, Walnut Creek, CA 94596. |
| 062719 | DowElanco, 9330 Zionsville Rd, Indianapolis, IN 46268. |
| 064380 | New Jersey Department of Agriculture, Division of Plant Industry, CN 330, Trenton, NJ 08625. |

### III. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to James A. Hollins, at the address given above, postmarked before June 15, 1994. This written withdrawal of the request for cancellation will apply only to the applicable 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

### IV. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1–year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in **Federal Register** No. 123, Vol. 56, dated June 26, 1991. Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s). Exceptions to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in Special Review actions, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

### List of Subjects

Environmental protection, Pesticides and pests, Product registrations.

Dated: March 7, 1994.

**Douglas D. Campt,**

*Director, Office of Pesticide Programs.*

[FR Doc. 94–6170 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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[OPP–64019; FRL 4759–8]

## Union Carbide Chemicals and Plastics Co., Inc.; Notice of Receipt of Request To Voluntarily Cancel Certain Pesticides Registrations; Cancellation Order

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

**ACTION:** Notice.

**SUMMARY:** This notice announces that Union Carbide Chemicals and Plastics Company, Inc., has voluntarily requested that EPA cancel the registrations of *PIROR P-15* Paper Slimicide, and Water Treatment Microbiocide (EPA Reg. No. 10352–36) and *PIROR P-05* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–42) and that EPA has granted this request. The cancellation became effective on November 1, 1993. Union Carbide, its distributors and supplemental registrants may not sell, distribute or use these products after November 1, 1993, except in accordance with provisions regarding unregistered pesticide products. Any other person holding stocks of the affected products may sell, distribute, and use their stocks until exhausted.

**DATES:** The cancellation order became effective on November 1, 1993.

**FOR FURTHER INFORMATION CONTACT:** By mail: Kathleen Depukat, Special Review and Reregistration Division (7508W), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Office location and telephone number: Accelerated Reregistration Branch, 3rd floor, 2800 Crystal Drive, Arlington, VA, (703) 308–8587.

**SUPPLEMENTARY INFORMATION:** This notice is issued pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. section 136 et seq. It announces the Agency's decision on a request for cancellation of the registrations of *PIROR P-15* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–36) and *PIROR P-05* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–42).

### I. Request for Voluntary Cancellation

In a letter dated October 15, 1993, Union Carbide requested voluntary cancellation of *PIROR P-15* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–36), and *PIROR P-05* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–42) waived any comment period associated with the request, and waived any requirement for **Federal Register** publication of a notice announcing Agency receipt of this request in advance of Agency acceptance of this request.

### II. Existing Stocks Determination

Union Carbide's October 15, 1993, request for voluntary cancellation expressly stated that, if EPA accepted the request, there would be no sale or distribution of the *PIROR* products after November 1, 1993, except for export in accordance with the provisions of FIFRA which address export of unregistered products. Therefore, after November 1, 1993, Union Carbide, its distributors and supplemental registrants may not sell, distribute or use these products after November 1, 1993. Other persons (people other than Union Carbide, its distributors, or its supplemental registrants) holding stocks of the affected products may sell, distribute, and use their stocks until exhausted.

For the purposes of this order, existing stocks are defined as those

stocks of the affected products which are in the U.S. and were not in the custody or control of Union Carbide, its distributors or supplemental registrants after November 1, 1993, the requested effective date of the cancellation.

### III. EPA's Decision on the Request for Voluntary Cancellation and Cancellation Order

On November 1, 1993, EPA granted Union Carbide's request that the registration(s) of the following products containing Paraclox be voluntarily cancelled: *PIROR P-15* Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–36), and PIROR P05 Paper Slimicide and Water Treatment Microbiocide (EPA Reg. No. 10352–42). Concurrently, EPA is issuing a Cancellation Order for these products. This notice contains the terms and conditions of the Cancellation Order for these products.

Under section 6(f)(1) of FIFRA, a registrant may request at any time that EPA cancel any of its pesticide registrations. EPA must publish in the **Federal Register** a notice of receipt of the request allowing public comment before granting the request unless either the registrant requests a waiver of the notice or the Administrator determines that the continued use of the pesticide would pose unreasonable adverse effects on the environment. Union Carbide expressly requested that the cancellation of its products be effective as of November 1, 1993. Union Carbide also waived any comment period and the requirement for publication of a notice in the **Federal Register** announcing the Agency's receipt of the request for voluntary cancellation prior to the Agency's acceptance of Union Carbide's request.

Accordingly, this Cancellation Order became effective on November 1, 1993. Therefore, as of November 1, 1993, no person may distribute, sell, or use these product, except as described below. Union Carbide, its distributors and supplemental registrants may not sell, distribute or use these products except in accordance with provisions concerning export of unregistered pesticide products. Any other person holding stocks of the affected products may sell, distribute and use such stocks until exhausted. Any sale, distribution or other disposition of existing stocks that is not consistent with the terms of this Order will be considered a violation of FIFRA section 12(a)(2)(K) and/or section 12(a)(1)(A), as appropriate.

### List of Subjects

Environmental protection, Agricultural commodities, Pesticides and pests.

Dated: March 7, 1994.

**Douglas D. Campt,**

*Director, Office of Pesticide Programs.*

[FR Doc. 94–6168 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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[FRL–4851–8]

## Environmental Technology; U.S. EPA Technology Innovation Strategy—Extension of Public Comment Period; Announcement of Public Meetings To Comment on the Strategy

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of availability, extension of comment period, schedule of upcoming public meetings.

**SUMMARY:** On January 28, 1994, the U.S. Environmental Protection Agency (EPA) announced the availability of the Agency's draft Technology Innovation Strategy (S/N 055–000–00466–8) and the Environmental Technology Initiative: FY 1994 Program Plan (S/N 055–000–00465–8) (59 FR 4067) and requested public comments on the Strategy by March 14, 1994. Copies of the draft Strategy were not available for public distribution until the beginning of March. As a result, EPA is extending the comment period to April 15, 1994. Internal Agency deadlines for considering comments in planning and budgeting environmental technology projects for Fiscal Year 1995 are imminent, interested parties are encouraged to submit comments as soon as possible. Comments will continue to be accepted and reviewed after April 15, 1994 in planning projects for FY1996 and future years. Copies of the Strategy and the FY1994 Program Plan are available through the U.S. Government Printing Office.

EPA is also inviting technology developers, vendors, services providers, exporters, the users of environmental technology and services, the investment community, governmental and non-governmental organizations and the general public to discuss the Agency's Strategy in three public meetings:

1. Friday, March 25, 1994. San Francisco, California. Address: Hyatt Regency San Francisco Airport, 1333 Bayshore Highway, Burlingame, CA 94010. Telephone: (415) 347–1234. 9 a.m.–4 p.m.

2. Wednesday, April 6, 1994. Chicago, Illinois. Sheraton Gateway Suites, 6501 North Manheim Road, Chicago, Illinois 60018. Telephone: (708) 699–6300. 9 a.m.–4 p.m.

3. Tuesday, April 12, 1994. Washington, D.C. Ramada Renaissance Hotel, 13869 Park Center Road, Herndon, VA 22071. Telephone: (703) 478–2900. 9 a.m.–4 p.m.

Airport hotels have been selected for the convenience of those traveling by air to the meetings.

**ADDRESSES:** Copies of the Technology Innovation Strategy (S/N 055–000–00466–8) or Environmental Technology Initiative: FY 1994 Program Plan (S/N 055–000–00465–8) are available from the nearest government bookstore, the Government Printing Office phone order information desk (202/783–3238) or by requesting an order form by FAX (202/512–2250). Mail orders may be addressed to the: Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, Pittsburgh, Pennsylvania 15250–7954. When ordering, please identify the document's title and indicate the Government Printing Office publication number.

Written comments are requested. Comments on the Technology Innovation Strategy should be mailed to: Strategy Committee, Innovative Technology Council, Mail Code 2111, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Members of the public wishing to make comments at any of the meetings are invited to identify themselves in writing to Mr. Brendan Doyle, by March 22, 1994, for the San Francisco meeting; by April 1, 1994, for the Chicago meeting; and, April 8, 1994, for the Washington, DC meeting. Those interested in making comments are asked to limit their presentations to no more than five minutes. It is requested that commenters provide a summary of their commentaries by the appropriate date and a complete text, if possible. Please send requests to make comments to: Mr. Brendan Doyle, Office of Policy, Planning and Evaluation (2127), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 or by telefax to: 202/260–2685.

### EPA's Technology Innovation Strategy

The Environmental Protection Agency's (EPA) Innovative Technology Council, comprised of EPA management and staff from across the Agency, has drafted a strategy to focus and target its efforts to accelerate environmental technology development, commercialization and use. The Council recognizes a need to accelerate the development, commercialization, and use of innovative environmental

technologies to maintain and improve environmental quality at home and abroad into the 21st century. Environmental quality would deteriorate, given foreseeable population growth and industrialization, unless technology is developed and more broadly applied, that is more effective in preventing and reducing pollution levels, less costly than existing technology and supportive of sustainable development. EPA, state and local agencies are in a unique position to influence the rate and focus of environmental technology innovation and use because of their legislative and programmatic mandates and regulatory responsibilities (which often influence the demand for environmental technologies, goods and services).

In funding the President's Environmental Technology Initiative, the House Committee on Appropriations directed EPA, "* * * to develop a comprehensive environmental technology strategy characterized by innovation and a nonbureaucratic approach." [1]

EPA's draft *Strategy* provides a plan to directly and indirectly support private sector innovation and diffusion activities sponsored by the public and private sector and close coordination among Federal agencies. It focuses on creating incentives for the development and use of innovative technologies in federal and state environmental regulations, reducing barriers to technology innovation and use, and improving the competitiveness of the environmental technology industry in domestic and international markets. EPA and other Federal, state and local agencies, universities, trade associations and consortia, and numerous private companies are already working in many of the areas identified in the *Strategy*. EPA is seeking public comment on the *Strategy* to focus and target efforts to accelerate environmental technology development, commercialization and use. The Agency's Innovative Technology Council plans to revise and update the *Strategy* based on the comments received.

The definition of "environmental technologies" being addressed in the *Strategy* varies widely for a number of reasons. The "environmental technology industry" has only recently become a focal point for market analysts and policy-makers, and it is highly diversified in terms of the current demand for and supply of technologies, goods and services. Demand often varies based on local environmental conditions. "Environmental technologies" include technologies, goods, and services whose development is triggered primarily by environmental improvement objectives. Sometimes referred to as "dark green" technologies, these include: products and services to monitor and assess pollutant releases and exposure levels; innovative technologies which prevent pollution, control air and water pollution levels, safely manage waste and remediate contaminated soil and groundwater; and, manage environmental data. EPA's *Strategy* also addresses "light green" technologies that are developed primarily for non-environmental reasons; those technologies can have indirect, but important consequences for improving environmental quality. An example, would be local area computer networks designed to enhance office communication, but which also reduce paper use.

EPA is interested in promoting all phases of technological change such as: the research and development of new concepts; preliminary design testing and pilot applications of evolving technologies; performance demonstrations and testing; evaluations of early commercial applications; and diffusion into domestic and international markets.

The draft "*Technology Innovation Strategy*" outlines the general principles that guide EPA in its efforts to foster innovation in its existing programs and new projects being initiated under the President's Environmental Technology Initiative in FY1994 and FY1995 to foster the development and use of environmental technologies in solving the nation's environmental problems. It outlines four objectives:

1. Adapt EPA's policy, regulatory, and compliance framework to promote innovation;
2. Strengthen the capacity of technology developers and users to succeed in environmental technology innovation;
3. Strategically invest EPA funds in the development and commercialization of promising new technologies; and
4. Accelerate diffusion of innovative technologies at home and abroad.

EPA invites comments on the draft *Strategy* and the following questions:

(1) What roles are appropriate for EPA to play in stimulating the development and use of innovative technological solutions to environmental problems?

(2) Do you agree with the *Strategy's* objectives and with EPA's approaches to achieving them? Which objectives should receive the highest priority for action?

(3) Are there additional areas of emphasis that EPA should address in planning and funding its technology development, commercialization, and diffusion activities?

(4) Are there particular environmental technology needs or impediments to development on which you feel the Agency should focus more of its attention?

(5) How can EPA measure the success of its efforts?

(6) Which environmental problems need better, faster, cheaper technological solutions?

(7) Do you have any suggestions for ways for EPA to develop, collect and/or disseminate information on the performance of environmental technologies?

(8) Can you identify specific federal or state environmental regulations, permitting programs or enforcement activities where technology innovation is being impeded?

(9) Are there specific industries or businesses whose environmental problems are not being addressed in the *Strategy*?

Answers to these questions and comments received on the *Strategy* will be considered in EPA's planning and budgeting for technology development and promotion projects in FY 1995 and future years.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brendan Doyle (see address above), or one of the EPA regional office contacts listed below:

Barbara Brown, U.S. EPA Region 1, One Congress Street—RAA, Boston, MA 02203–2211, Tel #: 617–565–3397

Pat Lafornara, U.S. EPA Region 2, 2890 Woodbridge Avenue, Raritan Depot Building 10—MS 100, Edison, NJ 08837–3679, Tel #: 908–906–6988

Norm Kulujian, U.S. EPA Region 3, 841 Chestnut Street, Philadelphia, PA 19107, Tel #: 215–597–1113

Bob Jourdan, U.S. EPA Region 4, 345 Courtland Street, NE—4WNSRB, Atlanta, GA 30365, Tel #: 404–347–7791

Mike Lin, U.S. EPA Region 5, 77 West Jackson Boulevard—WQ–16J, Chicago, IL 60604–3590, Tel #: 312–886–6104

Norman Dyer, U.S. EPA Region 6, 1445 Ross Avenue, 12th Floor, suite 1200, Dallas, TX 75202–2733, Tel #: 214–655–8349

Jody Hudson, U.S. EPA Region 7, 25 Funston Road, Kansas City, KS 66115, Tel #: 913–551–5064

Dave Smith, U.S. EPA Region 8, 999 18th Street, suite 500, Denver, CO 80202–2466, Tel #: 303–293–1475

[1] House of Representatives, 103rd Congress, Committee on Appropriations report, June 22, 1993, Report 103–150, p.47.

Winona Victery, U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, Tel #: 415–744–1021

John Barich, U.S. EPA Region 10, 1200 6th Avenue—ES–098, Seattle, WA 98101, Tel #: 206–553–8562

Dated: March 11, 1994.

**David M. Gardiner,**

*Assistant Administrator for Policy, Planning and Evaluation.*

[FR Doc. 94–6261 Filed 03–16–94; 8:45 am]

BILLING CODE 6560–50–P

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**[OPPTS–59977; FRL–4762–9]**

## Certain Chemicals; Premanufacture Notices

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

**ACTION:** Notice.

**SUMMARY:** Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 12 such PMN(s) and provides a summary of each.

**DATES:** Close of review periods:

*Y 94–34, 94–35,* January 11, 1994.

*Y 94–38,* February 10, 1994.

*Y 94–39,* February 15, 1994.

*Y 94–40,* February 16, 1994.

*Y 94–41,* February 21, 1994.

*Y 94–42,* February 22, 1994.

*Y 94–45, 94–46, 94–47, 94–48, 94–49,* February 28, 1994.

**FOR FURTHER INFORMATION CONTACT:** Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC, 20460 (202) 554–1404, TDD (202) 554–0551.

**SUPPLEMENTARY INFORMATION:** The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Nonconfidential Information Center (NCIC), ETG–102 at the above address between 12 noon and 4 p.m., Monday through Friday, excluding legal holidays.

**Y 94–38**

*Manufacturer.* C.J. Osborn, Div. of Suvar Corporation.

*Chemical.* (S) Polymer of safflower oil; 1,2,3 propane triol; 2,5 furandione; 4,7-methanedisobenzofluran-1,3-dione;4.5.6.7.8.8-hexachloro-3a, 4,7,7a-tetrahydro, and stanna, dibut loxo.

*Use/Production.* (S) Pigmented coatings. Prod. range: 10,000–21,000 kg/yr.

**Y 94–39**

*Manufacturer.* Confidential.

*Chemical.* (G) Polyester resin.

*Use/Production.* (S) Pigmented coatings. Prod. range: Confidential.

**Y 94–40**

*Manufacturer.* Confidential.

*Chemical.* (G) Vinyl/acrylic copolymer.

*Use/Production.* (G) Fiber binder and coating additive. Prod. range: Confidential.

**Y 94–41**

*Manufacturer.* Bostik, Inc.

*Chemical.* (G) Cycloaliphatic polyester.

*Use/Production.* (G) Open, non-dispersive use. Prod. range: Confidential.

**Y 94–42**

*Manufacturer.* Confidential.

*Chemical.* (G) Water-reducible alkyd resin.

*Use/Production.* (S) Printing inks. Prod. range: Confidential.

**Y 94–43**

*Manufacturer.* Confidential.

*Chemical.* (G) Acrylic acid copolymer.

*Use/Production.* (G) Thickener for aqueous systems. Prod. range: Confidential.

**Y 94–44**

*Manufacturer.* Confidential.

*Chemical.* (G) Acrylic acid copolymer salt.

*Use/Production.* (G) Thickener for aqueous systems. Prod. range: Confidential.

**Y 94–45**

*Manufacturer.* Confidential.

*Chemical.* (G) Water borne polyurethane dispersions.

*Use/Production.* (S) Flexible substrate, wood industrial, printing inks and glass fiber sizing. Prod. range: 340,000–1.5m kg/yr.

**Y 94–46**

*Manufacturer.* Confidential.

*Chemical.* (G) Water borne polyurethane dispersions.

*Use/Production.* (S) Flexible substrate, wood industrial, printing inks and glass fiber sizing. Prod. range: 340,000–680,000 kg/yr.

**Y 94–47**

*Manufacturer.* Confidential.

*Chemical.* (G) Water borne polyurethane dispersions.

*Use/Production.* (S) Flexible substrate, wood industrial, printing inks and glass fiber sizing. Prod. range: 340,000–680,000 kg/yr.

**Y 94–48**

*Manufacturer.* Confidential.

*Chemical.* (G) Polyester.

*Use/Production.* (G) Used as an additive in plastics. Prod. range: Confidential.

**Y 94–49**

*Manufacturer.* Confidential.

*Chemical.* (G) Polyester.

*Use/Production.* (G) Used as an additive in plastics. Prod. range: Confidential.

### List of Subjects

Environmental protection, Premanufacture notification.

Dated: March 4, 1994.

**Frank V. Caesar,**

*Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.*

[FR Doc. 94–6171 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

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**[OPPTS–59976; FRL–4762–8]**

## Certain Chemicals; Premanufacture Notices

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

**ACTION:** Notice.

**SUMMARY:** Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within

21 days of receipt. This notice announces receipt of 23 such PMN(s) and provides a summary of each.

**DATES:** Close of review periods:

*Y 94–15, 94–16, 94–17, 94–18, 94–19, 94–20, 94–21, 94–22, 94–23, 94–24,* December 28, 1993.

*Y 94–25,* December 28, 1993.

*Y 94–26,* December 29, 1993.

*Y 94–27,* January 1, 1994.

*Y 94–28,* January 2, 1994.

*Y 94–29,* January 3, 1994.

*Y 94–30,* January 5, 1994.

*Y 94–31,* January 5, 1994.

*Y 94–32,* January 11, 1994.

*Y 94–33,* January 23, 1994.

*Y 94–34,* January 24, 1994.

*Y 94–35,* January 25, 1994.

*Y 94–36,* January 25, 1994.

*Y 94–37,* February 3, 1994.

**FOR FURTHER INFORMATION CONTACT:** Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC, 20460 (202) 554–1404, TDD (202) 554–0551.

**SUPPLEMENTARY INFORMATION:** The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Nonconfidential Information Center (NCIC), ETG–102 at the above address between 12 noon and 4 p.m., Monday through Friday, excluding legal holidays.

**Y 94–15**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–16**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–17**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–18**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–19**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–20**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–21**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–22**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–23**

*Manufacturer.* Hoechst Celanese Corporation.

*Chemical.* (G) Modified polyester.

*Use/Production.* (G) Structural material. Prod. range: Confidential.

**Y 94–24**

*Manufacturer.* Confidential.

*Chemical.* (G) Saturated polyester.

*Use/Production.* (G) Printing ink. Prod. range: Confidential.

**Y 94–25**

*Manufacturer.* Confidential.

*Chemical.* (G) Polyester resin.

*Use/Production.* (G) Electrostatic power coatings. Prod. range: Confidential.

**Y 94–26**

*Importer.* Lenzing AG.

*Chemical.* (G) Polyamide.

*Use/Import.* (S) Wire coating, grinding wheels reinforcement polymer, membranes and moulding parts. Import range: Confidential.

**Y 94–27**

*Importer.* DSM Copolymer, Inc.

*Chemical.* (S) (Biscyclo(2,2,1)-hept-2-ene, 5-ethylidene-,)(4,7-methano-1*H*-indene, 3a,4,7a,-tetrahydro) polymer with ethene and 1-propene.

*Use/Import.* (S) Adhesive for general purpose glue, energy absorbing material, hoses, belts, and sporting good items. Import range: 2,727,272–2,836,363 kg/yr.

**Y 94–28**

*Importer.* Lenzing AG.

*Chemical.* (G) Polyamideimide.

*Use/Import.* (S) Molding parts. Import range: Confidential.

**Y 94–29**

*Importer.* Confidential.

*Chemical.* (G) Polymeric modified rosin ester.

*Use/Import.* (G) An open, non-dispersive use. Import range: Confidential.

**Y 94–30**

*Manufacturer.* Eastman Kodak Company.

*Chemical.* (G) Substituted polyvinyl acetal.

*Use/Import.* (G) Contained use in an article. Prod. range: 1,500–4,000 kg/yr.

**Y 94–31**

*Manufacturer.* Owens-Corning Fiberglas Corporation.

*Chemical.* (G) Unsaturated polyester resin.

*Use/Import.* (S) Molding resin. Prod. range: Confidential.

**Y 94–32**

*Manufacturer.* Surface Coatings, Inc.

*Chemical.* (G) Aliphatic polyether urethane.

*Use/Production.* (G) Used in coatings for textiles applied by industrial manufacturers. Prod. range: Confidential.

**Y 94–33**

*Manufacturer.* Inx International Ink Company.

*Chemical.* (G) Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-, polymer with 5-amino-1,3,-trimethylcycloxhexamethane, trimethylhexamethylenediamine, alkanediol, hexanedioic acid, dimethylalkanediol and polypropyleneglycol.

*Use/Import.* (G) Open, non-dispersive use. Prod. range: Confidential.

**Y 94–34**

*Importer.* Confidential

*Chemical.* (G) Substituted pyridine polymer.

*Use/Import.* (G) Component of consumer products. Confidential.

**Y 94–35**

*Importer.* Confidential.

*Chemical.* (G) Substituted pyridine polymer.

*Use/Import.* (G) Component of consumer products. Confidential.

**Y 94–36**

*Importer.* Confidential.

*Chemical.* (G) Saturated copolyester resin.

*Use/Import.* (G) Binder resin. Import range: Confidential.

Y 94–37

*Importer.* EniChem America, Inc.

*Chemical.* (S) Carbonic acid, dimethyl ester, polymer with 1,6-hexanediol.

*Use/Import.* (S) Component for polyurethane manufacture. Import range: 20,000–100,00 kg/yr.

**List of Subjects**

Environmental protection, Premanufacture notification.

Dated: March 4, 1994.

**Frank V. Caesar,**

*Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.*

[FR Doc. 94–6172 Filed 3–16–94; 8:45 am]

BILLING CODE 6560–50–F

## FEDERAL COMMUNICATIONS COMMISSION

**[FCC 94–27]**

## EEO Policy Statement

**AGENCY:** Federal Communications Commission (FCC).

**ACTION:** Policy statement.

**SUMMARY:** This Policy Statement establishes non-binding guidelines for assessing forfeitures for violations of the Federal Communications Commission's (FCC's) broadcast Equal Employment Opportunity (EEO) rule. The EEO rule prohibits discrimination and requires affirmative action by broadcast stations in hiring. The new guidelines provide greater guidance to stations and the public about what sanction may result from different types of EEO violations.

**EFFECTIVE DATE:** January 31, 1994.

**FOR FURTHER INFORMATION CONTACT:** Roderick K. Porter at 202–632–6460.

**SUPPLEMENTARY INFORMATION:**

Adopted: January 31, 1994; Released: February 1, 1994.

By the Commission: Commissioner Quello issuing a statement.

### I. Introduction

1. In this Policy Statement, we establish non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast Equal Employment Opportunity (EEO) rules.[1]

2. The Commission's broadcast EEO rules and other policies which promote participation by minorities and women in the broadcast industry are vitally important. They further the Commission's goals of promoting diversity of programming on broadcast stations. See *NAACP* v. *FPC*, 425 U.S. 662, 670 n. 7 (1975); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990) (*Metro*). And, as the Supreme Court has noted, "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is * * * an integral component of the FCC's mission." *Metro*, 497 U.S. at 548. We reaffirm our commitment to this bedrock goal underlying our broadcast EEO rules and believe that the Policy Statement we adopt here will further achievement of that goal.

3. In addition to promoting program diversity, our broadcast EEO rules enhance access by minorities and women to increased employment opportunities. Increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership.[2] Those who have access to employment opportunities are able to develop experience and expertise that can be put to beneficial use in a variety of communications enterprises, in a variety of ways. Thus, by combating discrimination and other arbitrary barriers to employment, we contribute to the development of the broadcast industry and ultimately promote the further development of the broader communications infrastructure.[3]

### II. Background

4. In 1989, Congress amended the Communications Act of 1934 to increase substantially the maximum dollar amounts of forfeitures the Commission could impose on broadcasters under Section 503(b) of the Act.[4] The Commission's forfeiture rule has been amended to reflect the higher forfeiture amounts. 47 CFR 1.80(b)(1).

5. On August 1, 1991, in order to assist both the Commission and licensees in adjusting to the statutory increases, the Commission released its Policy Statement, Standards for Assessing Forfeitures (1991 Policy Statement).[5] The 1991 Policy Statement provided general, non-binding guidance regarding the assessment of forfeitures. It established base forfeiture amounts for a wide range of violations. For violations of broadcast EEO rules, the Commission set a base amount of $12,500. The 1991 Policy Statement also provided that the base forfeiture amount for any violation could be increased or decreased by applying adjustments to the base amount as relevant to the facts in any particular case. On August 12, 1993, the Commission released its most recent forfeiture guidelines.[6] Among other actions, the 1993 Policy Statement deleted the broadcast EEO violation category and indicated that the Commission would issue a further policy statement on broadcast EEO forfeiture matters at a later date.[7]

### III. Discussion

6. The Policy Statement we adopt here, as set forth in the Appendix, re-establishes the base forfeiture amount for violations of the broadcast EEO rules at $12,500. It also provides guidance on what situations may generally lead to such a forfeiture. In addition, it describes upward and downward adjustment criteria that may be used to adjust the forfeiture in particular cases. The adjustment guidelines reflect the factors set forth in Section 503(b) of the Act, § 1.80 of our rules and case precedent. See 47 U.S.C. 503(b)(2)(D); 47 CFR 1.80(b)(4). All of these factors will not necessarily be relevant in each individual case and other adjustments may also be made as appropriate in particular cases. The Appendix also provides guidance regarding when short-term renewals may be appropriate in particular cases. We believe that these guidelines will assist the Commission and its staff in determining broadcast EEO forfeitures in a generally consistent manner that furthers the public interest while nevertheless ensuring that the Commission and the staff retain the discretion to decide each case based on the specific facts and circumstances at issue. At the same time, we believe these guidelines will

[1] See 47 C.F.R. 73.2080.

[2] The Commission seeks to promote minority ownership of broadcasting facilities. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978).

[3] We note, in this regard, that Section 309(j)(4)(C) of the Communications Act of 1934, as amended, directs the Commission to promote economic opportunity in competitive bidding among applicants proposing to use the spectrum "by disseminating licenses among a wide variety of applicants * * * including businesses owned by members of minority groups and women."

[4] Pub. L. No. 239, 101st Cong., lst Sess. 103 Stat. 2131 (1989) (amending, among other sections, 47 U.S.C. 503(b)). Amended Section 503(b) provides the Commission with authority to assess forfeitures of up to $25,000 for each violation or each day of a continuing violation against broadcasters, with a limit on forfeitures for continuing violations involving a single act or failure to act of $250,000 for broadcasters.

[5] 6 FCC Rcd 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA* v. *FCC*, No. 92–1321 (DC Cir. filed July 30, 1992).

[6] 8 FCC Rcd 6215 (1993) *petition for review pending sub nom. USTA* v. *FCC*, No. 93–1526 (DC Cir. filed August 23, 1993) (*1993 Policy Statement*).

[7] *Id.* at n.1. The forfeiture amount for violations of the Commission's cable EEO rules is set at $500 per day by section 634 of the Act and is addressed in the 1993 Policy Statement.

give licensees and the public greater guidance regarding which types of forfeitures may result from particular types of EEO violations.

7. Finally, we stress that we do not intend this Policy Statement to limit our flexibility. In particular cases, forfeitures that are higher or lower than those reflected by the guidelines may be imposed. In this regard, what we have said in connection with our prior forfeiture policy statements applies here as well:

[T]he Policy Statement simply describes the general approach the Commission may take in forfeiture cases and is not binding on any licensees or the Commission. The Policy Statement does not impose any obligations on [licensees] or require the Commission to issue a forfeiture of any particular magnitude—or any forfeiture at all * * *.

* * * * *

[W]e reiterate that while the Policy Statement may guide us and the staff in particular cases, we do not intend for the Commission or the staff to be bound by it. In addition, both the Commission and the staff intend to apply these guidelines flexibly. In particular, we and the staff remain committed to deciding every forfeiture case on the basis of the specific facts and equities presented in the record of that case.

7 FCC Rcd at 5339 (internal citations omitted).

## IV. Conclusion

8. Accordingly, *it is ordered that* this Policy Statement is adopted, to the effective upon adoption.

9. The notice and comment and effective date provisions of the Administrative Procedure Act do not apply to this Policy Statement. 5 U.S.C. 553(b)(A), (d)(2).

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

**Appendix**

| | |
|---|---|
| Failure to recruit so as to attract an adequate pool of minority/female applicants or hires for at least 66% of all vacancies during the license term being reviewed (Evidence of this violation will include (1) inadequate record-keeping and/or (2) inadequate self-assessment throughout the license term). | $12,500 base forfeiture (accompanied by reporting conditions) |
| **UPWARD ADJUSTMENT CRITERIA** | |
| I. Egregious Misconduct | |
| A. Failure to recruit so as to attract an adequate pool of minority/female applicants or hires for at least 33% of all vacancies reported for the license term being reviewed. Efforts are evaluated both for the station's staff overall and for upper four job categories. | $6,250 upward adjustment. |
| (EEO programs achieving only this level of compliance will warrant a short-term renewal, irrespective of whether other upward adjustments for "egregiousness" factors are present, if the percentage of vacancies for which the licensee failed to recruit, or the percentage of pools containing minorities, falls below 33% and other factors—e.g., use and productivity of recruiting sources, use and productivity of minority-specific sources; evidence of self-assessment—are absent or particularly inadequate) | |
| B. Large number of hiring opportunities that did not translate into an adequate pool of minority/female applicants or employees hired. | |
| —"Large number" means hiring opportunities equal to at least the average number of employees on the full-time staff, with a minimum of 25 hiring opportunities | $6,250 upward adjustment (Base plus 50%) |
| —"Substantial number" means hiring opportunities equal to three times the number of full-time staff, with a minimum of 25 hiring opportunities. | Additional upward adjustment of 50-90% of base. |
| C. Large pool of minorities/women in the relevant labor force did not translate into an adequate pool of applicants minority/women or employees hired | |
| Analysis will focus on (1) the overall percentage of minorities in the relevant labor force and (2) the presence of a single minority group constituting a significant percentage of that labor force. | |
| —If a licensee has a relevant labor pool of at least 20 percent minorities or a single minority group constitutes at least 10 percent of the labor force. | $6,250 to $11,250 upward adjustment (base plus 50-90%) |

**SHORT TERM RENEWALS:** Short term renewals will be assessed if (A), (B) or (C) are applied in any combination of two or more upward adjustments. In addition, short term renewals also will be warranted where the specific criteria set forth in (A) above are present. The presence of the mitigating factors described in Section II below are grounds for not issuing short term renewals.

| | |
|---|---|
| D. Prior EEO violations that resulted in previous sanction or remedy | —If reporting conditions were previously imposed, the licensee receives reporting conditions and the base forfeiture plus a 90% upward adjustment in addition to any other upward adjustments warranted by these guidelines (including short-term renewal)<br>—If reporting conditions plus a forfeiture were previously imposed, the licensee receives reporting conditions, the base forfeiture plus a 90% upward adjustment, any other upward adjustments warranted by these guidelines, and a short-term renewal. |

| | |
|---|---|
| | —If previous sanction and remedies included a short-term renewal, the renewal will be designated for hearing and possible forfeiture of $250,000. |
| E. EEO violations with respect to both minorities and women | $11,250 upward adjustment and a short-term renewal. |
| **DOWNWARD ADJUSTMENT CRITERIA** | |
| II. Actual Hiring Experience | |
| A. Minority hiring represents 50% of the minority profile of the relevant labor force *for both overall employment and upper four employment* or | $6,250 downward adjustment. |
| B. Minority hiring represents 100% of the minority profile of the relevant labor force *for both overall employment and upper four employment.* | $6,250 downward adjustment and presumptive removal of short-term renewal. Evidence indicating the substantial absence of an EEO program will rebut the presumption of removal. |
| III. Employment Profile | |
| C. Minority employment represents 50% of the minority profile of the relevant labor force *for both overall employment and upper four employment* or | $6,250 downward adjustment. |
| D. Minority employment represents 100% of the minority profile of the relevant labor force *for both overall employment and upper four employment.* | $6,250 downward adjustment and presumptive non-issuance of short-term renewal. Evidence indicating the complete absence of an EEO program will rebut the presumption of removal. |
| III(C) and III(D) apply if the employment profile meets the guidelines in 4 of 5 years for a television renewal and 6 of 7 years for a radio renewal. Where less than a full term exists, the employment profile must meet the guidelines for a majority of the years reported | |
| IV. Employment Profile *and* Hiring Experience | If II(B) *and* III(D) apply, a short-term renewal would not be imposed. |
| V. Few Hiring Opportunities | |
| A. 5 or fewer hiring opportunities across the entire license term | $6,250 downward adjustment. |
| B. 10 or fewer hiring opportunities across the entire license term if the average full-time staff during the entire term exceeds 50 employees. | $6,250 downward adjustment (Either (A) or (B) will apply, but not both) |
| VI. Low Percentage of Minorities in Relevant Population | |
| Minorities constitute less than 6% of the relevant labor force | $6,250 downward adjustment and possible non-issuance of short-term renewal depending upon staff balancing of factors (number and productivity of sources contacted, number and productivity of minority-specific sources, extent to which licensee demonstrated severe shortfall in recruitment). |
| VII. Inability to Pay (if raised and demonstrated by the licensee) | Varies. |
| VIII. Stand-alone station in markets 200 and above as reflected in the annual Abitron population rankings. | $6,250 downward adjustment. |

**Separate Statement of Commissioner James H. Quello**

*In the Matter of Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*

The Commission today has voted an item that will prove to be a turning point in the enforcement of our EEO rules. This *Policy Statement* sets forth guidelines for assessing forfeitures for violations of the Commission's EEO rules. 47 CFR 73.2080. As reflected in the statement, the base amount for a forfeiture will be $12,500, an amount that can be increased or decreased depending on the facts of a given case. These higher forfeitures are a direct result of the increases in forfeiture amounts imposed by Congress. The guidelines are designed to ensure that these new, higher forfeitures are assessed in a reasoned, consistent manner. For this reason, and because I strongly support vigorous enforcement of our EEO rules, I have voted in favor of this item.

However, at the same time, I am concerned that the Commission may be entering the era of the telecommunications superhighway wielding a club, rather than offering a hand, to broadcasters making their way down the road. At the dawn of this new era, we are imposing fines against 22 of 24 radio stations whose EEO records were reviewed, in amounts ranging from $18,750 to $37,500. Short term renewals are assessed against 21 of the 22 stations receiving forfeitures. Radio broadcasters will be "contributing" a total of $325,000 to the Federal Treasury as a result of our actions today. I am troubled by the amount of these forfeitures and the increased use of the short term renewal as a sanction. Yet, I recognize that, at least with respect to the increased forfeiture amounts, Congress increased our forfeiture authority.

I would have much preferred an approach that would have served three compelling goals: (1) Ensuring compliance with our EEO rules by imposing meaningful sanctions; (2) imposing these sanctions in such a way so as not to cripple broadcasters in their travels along the information superhighway; and (3) directly furthering the underlying public interest purpose of the EEO rule—the increased hiring and promotion of minorities and women in the broadcast industry. Specifically, if we had the legal authority to do so, I would have voted for a program that would have allowed monies received as a result of violations or alleged violations of our EEO or other rules to be placed into a fund and not into the Federal Treasury. Funds received for EEO violations would be used for training, educating, and providing placement services for minorities and women interested in a career in broadcast. What better use for the $325,000 in forfeitures imposed for violations of the EEO rules today than for the very purpose underlying the rule?

[FR Doc. 94–6228 Filed 3–16–94; 8:45 am]
BILLING CODE 6712–01–M

## FEDERAL RESERVE SYSTEM

### Banc One Corporation, Columbus, Ohio; Request for an Exemption From Tying Provisions

Banc One Corporation, Columbus, Ohio (Banc One), has requested, pursuant to section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971 *et seq.*) (Section 106(b)), that the Board grant an exemption to permit Banc One's subsidiary banks to vary the consideration on a loan, deposit, discount, or trust service ("traditional banking products") for customers that receive first lien mortgage loans on 1-4

family residential real estate (mortgage loans) from Banc One's mortgage subsidiary, Banc One Mortgage Corporation, Indianapolis, Indiana (BOMC). Banc One also has requested an exemption to permit BOMC to vary the consideration on mortgage loans for customers who have obtained or will obtain a traditional banking product from any of Banc One's subsidiary banks. BOMC originates and refinances mortgage loans, primarily for sale into the secondary market.

In 1994, Banc One intends to reorganize BOMC as an operating subsidiary of Bank One, Indianapolis, N.A., Indianapolis, Indiana. In this connection, Banc One also has requested an exemption to permit its banks and BOMC to continue to offer customers the price reductions described above after the reorganization.

Section 106(b) permits a bank to fix or vary the consideration for extending credit or furnishing services on condition that a customer also obtain a traditional banking product from that bank. However, Section 106(b) prohibits a bank from engaging in these same activities on condition that the customer obtain any additional credit or services from any affiliate. The Board may grant an exception that is not contrary to the purposes of this provision.[1]

Banc One contends that its proposal is consistent with the purposes of Section 106(b) because the proposal is not anticompetitive. Banc One argues that the market for mortgage loans and for traditional banking products is highly competitive, and that BOMC does not have sufficient market share on a local, nationwide, or other basis to adversely affect competition. Banc One also argues that the proposal will promote competition and will not limit the availability of products to consumers because the traditional banking products offered by Banc One's subsidiary banks and mortgage loans from BOMC will be separately available to customers.

Notice of Banc One's request is published solely in order to seek the views of interested persons on the issues presented by the request and does not represent a determination by the Board that the request meets or is likely to meet the standards of Section 106(b). The request may be inspected at the offices of the Board of Governors.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than April 15, 1994.

[1] *See, e.g.*, 12 U.S.C. 1972(1).

Board of Governors of the Federal Reserve System, March 11, 1994.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 94–6219 Filed 3–16–94; 8:45 am]

BILLING CODE 6210–01–F

## GOVERNMENT PRINTING OFFICE

### Depository Library Council To the Public Printer; Meeting

The Depository Library Council to the Public Printer (DCL) will hold its Spring 1994 meeting on Monday, April 25, 1994, through Wednesday, April 27, 1994, in Arlington, Virginia. The meeting sessions will take place from 8:30 a.m. until 5 p.m. on Monday and Tuesday and from 8:30 a.m. until 12 p.m. on Wednesday. The sessions will be held at the Rosslyn Westpark Hotel, 1900 North Fort Myer Drive, Arlington, Virginia 22209. The purpose of this meeting is to discuss the Federal Depository Library Program. The meeting is open to the public.

A limited number of hotel rooms have been reserved at the Rosslyn Westpark for anyone needing hotel accommodations. Telephone: 800–368–3408 or 703–527–4814; fax: 703–522–8864. Please specify the Depository Library Council when you contact the hotel. Room cost per night is $82.

**Michael F. DiMario,**

*Public Printer.*

[FR Doc. 94–6250 Filed 3–16–94; 8:45 am]

BILLING CODE 1505–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration on Aging

### White House Conference on Aging; Recognition of Activities

**AGENCY:** White House Conference on Aging, AoA, HHS.

**ACTION:** Notice.

**SUMMARY:** The 1995 White House Conference on Aging (WHCOA) intends to recognize local and regional activities, events and programs developed by outside organizations during 1994. Recognition implies the WHCOA's acknowledgement of the relevancy of the activity to the goals of the WHCOA. Interested organizations must adhere to the guidelines listed below to have an event officially recognized by the White House Conference on Aging.

**ADDRESSES:** Forms should be sent to the WHCOA, 501 School St. SW., 8th Floor, Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Judy Satine, White House Conference on Aging, 202–245–7826. See address above.

**SUPPLEMENTARY INFORMATION:** A White House Conference on Aging is intended to produce policy recommendations to guide national aging policy over the next decade. In Public Law 102–375, the Older Americans Act Amendments of 1992, Congress specifically identified six primary purposes for the White House Conference on Aging. They are:

(1) To increase public awareness of the interdependence of generations and the essential contributions of older individuals to society for the well-being of all generations;

(2) To identify the problems facing older individuals and the commonalities of the problems with problems of younger generations;

(3) To examine the well-being of older individuals, including the impact the wellness of older individuals has on our aging society;

(4) To develop such specific and comprehensive recommendations for executive and legislative action as may be appropriate for maintaining and improving the well-being of the aging;

(5) To develop recommendations for the coordination of Federal policy with State and local needs and the implementation of such recommendations; and

(6) To review the status and multigenerational value of recommendations adopted at previous White House Conferences on Aging.

It should be noted that particular emphasis should be directed to purposes 1 and 5 listed above.

#### Guidelines

In order for the White House Conference on Aging to consider recognizing a local activity, event or program, it must meet the following basic criteria:

(A) It must be a policy-oriented event; the focus must be on one or more Federal policy issues affecting the elderly or the near-elderly;

(B) It must guarantee the participation of older persons;

(C) It must produce a written report within 30–45 days summarizing major issues discussed and recommendations proposed that can be utilized by the White House Conference on Aging;

(D) It must not be a profit-making or fundraising event although it is permissible to charge a fee to recover the costs of the event; and

(E) It must be approved by the Executive Director. If the White House Conference on Aging agrees to recognize the event, an official letter will be provided that could be presented at the activity, event or program. In certain limited instances, the White House Conference on Aging may also be able to participate. A White House Conference on Aging recognition allows the activity, event or program to publicize that it has been recognized by the WHCOA and that it will be listed in the final report of the Conference. However, recognition does not imply that the WHCOA endorses the recommendations.

Interested organizations should respond to the questions set out in the appended form and send the information to the above address as soon as possible. It will be reviewed and a response sent as expeditiously as possible.

**Fernando M. Torres-Gil,**

*Assistant Secretary for Aging.*

## Appendix—Form

Request for WHCOA Project Recognition

Name of Organization _____
Address _____
City _____
State _____
ZIP _____
FOR PROFIT ( ) NON-PROFIT ( )
Title of Proposed Activity _____
Date/s _____
Location _____
City/ies 1. _____
2. _____
3. _____
4. _____
Please briefly describe your proposed activity, event, or program.
_____
_____
_____
_____

What specific Federal aging policy issue do you intend to address: Please describe:
_____
_____

Will older people be invited to and be involved in your proposed activity, event, or program? Can you indicate the size of the target audience and what percentage might be seniors?
_____
_____

Can you provide to the WHCOA within 30 to 45 days of your activity, event, or program, a written summary report on issues discussed and recommendations proposed?
YES ( ) NO ( )
Do you plan to charge a fee for your activity?
YES ( ) NO ( )
Contact Person _____
Telephone _____
Date of Request _____

[FR Doc. 94–6165 filed 3–16–94; 8:45 am]

BILLING CODE 4130–02–M

## Administration for Children and Families

### Agency Information Collection Under OMB Review

Under the provisions of the Federal Paperwork Reduction Act (44 U.S.C. Chapter 35), the National Center on Child Abuse and Neglect (NCCAN) of the Administration for Children and Families (ACF) is requesting clearance from the Office of Management and Budget (OMB) for instruments to be used for the Site Visit Interview Component of the National Evaluation of Emergency Child Abuse and Neglect Prevention Services Demonstration Projects. The Emergency Services Demonstration projects were designed to address services to families experiencing the coexisting problems of substance abuse and child maltreatment.

**ADDRESSES:** Copies of the information collection may be obtained from Edward E. Saunders of the Office of Information Systems Management, ACF, by calling (202) 205–7921.

Written comments and questions regarding this information collection should be sent directly to:

Laura Oliven, OMB Desk Officer for ACF, OMB Reports Management Branch, New Executive Office Building, room 3002, 725 17th Street, NW., Washington, DC 20503, (202) 395–7316.

### Information on Document

*Title:* Evaluation of the Emergency Child Abuse and Neglect Prevention Services Demonstration.

*OMB No.:* New Request.

*Description:* The Emergency Child Abuse and Neglect Prevention Services Demonstration projects, funded by the National Center on Child Abuse and Neglect of the Administration for Children and Families (ACF), were designed to address services to families experiencing the coexisting problems of substance abuse and child maltreatment.

The national evaluation is comprised of two primary components—the Site Visit Interview Component and the Document Review Component. The site visit data, in conjunction with information obtained from reviews of program reports and third-party evaluation documents (obtained from the Document Review component) will be used to assess the extent to which demonstration programs have met the goals of (1) developing emergency service delivery models to provide crisis intervention for children and adolescents at risk for maltreatment from substance-abusing family members; and (2) removing barriers to treatment for substance-abusing parents or family members in order to prevent maltreatment of children in these at-risk households. The Site Visit Interview Component will be conducted through visits to 49 projects and interviews with key members at the project site. The information obtained by the Site Visit Interview Component will be used by NCCAN in decision-making regarding policy and programs pertaining to services to children and families experiencing the coexisting problems of substance abuse and child maltreatment. The information also will provide the fields of substance abuse and child abuse prevention and intervention with new models for working together and for serving families from a holistic perspective.

*Annual Number of Respondents:* 188.

*Frequency:* 1.

*Average Burden Hours Per Response:* 2.02.

*Total Burden Hours:* 379.75.

Dated: March 10, 1994.

**Larry Guerrero,**

*Deputy Director, Office of Information Systems Management.*

[FR Doc. 94–6204 Filed 3–16–94; 8:45 am]

BILLING CODE 4184–01–M

## Health Care Financing Administration

[OIS–024–N]

### Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions—Fourth Quarter 1993

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice lists HCFA manual instructions, substantive and interpretive regulations and other **Federal Register** notices, and statements of policy that were published during October, November, and December of 1993 that relate to the Medicare and Medicaid programs. Section 1871(c) of the Social Security Act requires that we publish a list of Medicare issuances in the **Federal Register** at least every 3 months. Although we are not mandated to do so by statute, for the sake of completeness of the listing, we are including all Medicaid issuances and Medicare and Medicaid substantive and interpretive regulations (proposed and final) published during this timeframe.

We are also providing the content of revisions to the Medicare Coverage Issues Manual published between October 1 and December 31, 1993. On

August 21, 1989 (54 FR 34555), we published the content of the Manual and indicated that we will publish quarterly any updates. Adding to this listing the complete text of the changes to the Medicare Coverage Issues Manual allows us to fulfill this requirement in a manner that facilitates identification of coverage and other changes in our manuals.

FOR FURTHER INFORMATION CONTACT:

Margaret Cotton, (410) 966–5260 (For Medicare instruction information)

Walter Rutemueller, (410) 966–5395 (For Medicare coverage information)

Pat Prete, (410) 965–3246 (For Medicaid instruction information)

Jacqueline Kidd, (410) 966–4682 (For all other information)

SUPPLEMENTARY INFORMATION:

## I. Program Issuances

The Health Care Financing Administration (HCFA) is responsible for administering the Medicare and Medicaid programs, which pay for health care and related services for 36 million Medicare beneficiaries and 33 million Medicaid recipients. Administration of these programs involves (1) Providing information to Medicare beneficiaries and Medicaid recipients, health care providers, and the public; and (2) effective communications with regional offices, State governments, State Medicaid Agencies, State Survey Agencies, various providers of health care, fiscal intermediaries and carriers who process claims and pay bills, and others. To implement the various statutes on which the programs are based, we issue regulations under authority granted the Secretary under sections 1102, 1871, and 1902 and related provisions of the Social Security Act (the Act) and also issue various manuals, memoranda, and statements necessary to administer the programs efficiently.

Section 1871(c)(1) of the Act requires that we publish in the **Federal Register** at least every 3 months a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations. We published our first notice June 9, 1988 (53 FR 21730). Although we are not mandated to do so by statute, for the sake of completeness of the listing of operational and policy statements, we are continuing our practice of including Medicare substantive and interpretive regulations (proposed and final) published during the 3-month timeframe. Since the publication of our quarterly listing on June 12, 1992 (57 FR 24797), we decided to add Medicaid issuances to our quarterly listings. Accordingly, we are listing in this notice Medicaid issuances and Medicaid substantive and interpretive regulations published from October 1 through December 30, 1993.

## II. Medicare Coverage Issues

We receive numerous inquiries from the general public about whether specific items or services are covered under Medicare. Providers, carriers, and intermediaries have copies of the Medicare Coverage Issues Manual, which identifies those medical items, services, technologies, or treatment procedures that can be paid for under Medicare. On August 21, 1989, we published a notice in the **Federal Register** (54 FR 34555) that contained all the Medicare coverage decisions issued in that manual.

In that notice, we indicated that revisions to the Coverage Issues Manual will be published at least quarterly in the **Federal Register**. We also sometimes issue proposed or final national coverage decision changes in separate **Federal Register** notices. Readers should find this an easy way to identify both issuance changes to all our manuals and the text of changes to the Coverage Issues Manual.

Revisions to the Coverage Issues Manual are not published on a regular basis but on an as-needed basis. We publish revisions as a result of technological changes, medical practice changes, responses to inquiries we receive seeking clarifications, or the resolution of coverage issues under Medicare. If no Coverage Issues Manual revisions were published during a particular quarter, our listing will reflect that fact.

Not all revisions to the Coverage Issues Manual contain major changes. As with any instruction, sometimes minor clarifications or revisions are made within the text. We have reprinted manual revisions as transmitted to manual holders. The new text is shown in italics. We will not reprint the table of contents, since the table of contents serves primarily as a finding aid for the user of the manual and does not identify items as covered or not.

## III. How To Use the Addenda

This notice is organized so that a reader may review the subjects of all manual issuances, memoranda, substantive and interpretive regulations, or coverage decisions published during the timeframe to determine whether any are of particular interest. We expect it to be used in concert with previously published notices. Most notably, those unfamiliar with a description of our Medicare manuals may wish to review Table I of our first three notices (53 FR 21730, 53 FR 36891, and 53 FR 50577) and the notice published March 31, 1993 (58 FR 16837), and those desiring information on the Medicare Coverage Issues Manual may wish to review the August 21, 1989, publication.

To aid the reader, we have organized and divided this current listing into five addenda. Addendum I identifies updates that changed the Coverage Issues Manual. We published notices in the **Federal Register** that included the text of changes to the Coverage Issues Manual. These updates, when added to material from the manual published on August 21, 1989, constitute a complete manual as of March 31, 1993. Parties interested in obtaining a copy of the manual and revisions should follow the instructions in section IV of this notice.

Addendum II identifies previous **Federal Register** documents that contain a description of all previously published HCFA Medicare and Medicaid manuals and memoranda.

Addendum III of this notice lists, for each of our manuals or Program Memoranda, a HCFA transmittal number unique to that instruction and its subject matter. A transmittal may consist of a single instruction or many. Often it is necessary to use information in a transmittal in conjunction with information currently in the manuals.

Addendum IV lists all substantive and interpretive Medicare and Medicaid regulations and general notices published in the **Federal Register** during the quarter covered by this notice. For each item, we list the date published, the **Federal Register** citation, the title of the regulation, and the Parts of the Code of Federal Regulations (CFR) which have changed.

Addendum V sets forth the revisions to the Medicare Coverage Issues Manual that were published during the quarter covered by this notice. For the revisions, we give a brief synopsis of the revisions as they appear on the transmittal sheet, the manual section number, and the title of the section. We present a complete copy of the revised material, no matter how minor the revision, and identify the revisions by printing in italics the text that was changed. If the transmittal includes material unrelated to the revised section, for example, when the addition of revised material causes other sections to be repaginated, we do not reprint the unrelated material.

## IV. How To Obtain Listed Material

### *A. Manuals*

An individual or organization interested in routinely receiving any

manual and revisions to it may purchase a subscription to that manual. Those wishing to subscribe should contact either the Government Printing Office (GPO) or the National Technical Information Service (NTIS) at the following addresses:

Superintendent of Documents, Government Printing Office, ATTN: New Order, P.O. Box 371954, Pittsburgh, PA 15250–7954, Telephone (202) 783–3238, Fax number (202) 512–2250 (for credit card orders); or

National Technical Information Service, Department of Commerce, 5825 Port Royal Road, Springfield, VA 22161, Telephone (703) 487–4630.

In addition, individual manual transmittals and Program Memoranda listed in this notice can be purchased from NTIS. Interested parties should identify the transmittal(s) they want. GPO or NTIS can give complete details on how to obtain the publications they sell.

*B. Regulations and Notices*

Regulations and notices are published in the daily **Federal Register**. Interested individuals may purchase individual copies or subscribe to the **Federal Register** by contacting the GPO at the address indicated above. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

*C. Rulings*

Rulings are published on an infrequent basis by HCFA. Interested individuals can obtain copies from the nearest HCFA Regional Office or review them at the nearest regional depository library. We also sometimes publish Rulings in the **Federal Register**.

*D. HCFA's Compact Disk-Read Only Memory (CD–ROM)*

HCFA's laws, regulations, and manuals are now available on CD–ROM, which may be purchased from GPO or NTIS on a subscription or single copy basis. The Superintendent of Documents list ID is HCLRM, and the stock number is 717–139–00000–3. The following material is contained on the CD–ROM disk:

- Titles XI, XVIII, and XIX of the Act.
- HCFA-related regulations.
- HCFA manuals and monthly revisions.
- HCFA program memoranda.

The titles are current as of the September 1, 1992, update of the Compilation of the Social Security Laws and the regulations are those in effect as of October 1, 1993.

The CD–ROM disk does not contain Appendices M (Interpretative Guidelines for Hospices) and R (Resident Assessment for Long Term Care Facilities) of the State Operations Manual. Copies of these appendices may be reviewed at a Federal Depository Library (FDL).

Any cost report forms incorporated in the manuals are included on the CD-ROM disk as LOTUS files. LOTUS software is needed to view the reports once the files have been copied to a personal computer disk.

**V. How To Review Listed Material**

Transmittals or Program Memoranda can be reviewed at a local FDL. Under the FDL program, government publications are sent to approximately 1400 designated libraries throughout the United States. Interested parties may examine the documents at any one of the FDLs. Some may have arrangements to transfer material to a local library not designated as an FDL. To locate the nearest FDL, individuals should contact any library.

In addition, individuals may contact regional depository libraries, which receive and retain at least one copy of most Federal government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library.

Superintendent of Documents numbers for each HCFA publication are shown in Addendum III, along with the HCFA publication and transmittal numbers. To help FDLs locate the instruction, use the Superintendent of Documents number, plus the HCFA transmittal number. For example, to find the Carriers Manual, Part 2—Program Administration (HCFA–Pub. 14–2) transmittal entitled "The Contractor Performance Evaluation Program—FY 1993," use the Superintendent of Documents No. HE 22.8/7–3, and the HCFA transmittal number 123.

**VI. General Information**

It is possible that an interested party may have a specific information need and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing information contact persons to answer general questions concerning these items. Copies are not available through the contact persons. Copies can be purchased or reviewed as noted above.

Questions concerning Medicare items in Addenda III may be addressed to Margaret Cotton, Office of Issuances, Health Care Financing Administration, Room 688 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–5260.

Questions concerning Medicaid items in Addenda III may be addressed to Pat Prete, Medicaid Bureau, Office of Medicaid Policy, Health Care Financing Administration, Room 233 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 965–3246.

Questions concerning items in Addenda V may be addressed to Walter Rutemueller, Office of Coverage and Eligibility Policy, Health Care Financing Administration, Room 401 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–5395.

Questions concerning all other information may be addressed to Jacqueline Kidd, Regulations Staff, Health Care Financing Administration, Room 132 East High Rise, 6325 Security Blvd., Baltimore, MD 21207, Telephone (410) 966–4682.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program)

Dated: March 7, 1994.

**Bruce C. Vladeck,**

*Administrator, Health Care Financing Administration.*

Addendum I

This addendum lists the publication dates of the quarterly listing of program issuances and coverage decision updates to the Coverage Issues Manual.

March 20, 1990 (55 FR 10290)
February 6, 1991 (56 FR 4830)
July 5, 1991 (56 FR 30752)
November 22, 1991 (56 FR 58913)
January 22, 1992 (57 FR 2558)
March 16, 1992 (57 FR 9127)
June 11, 1992 (57 FR 24797)
October 16, 1992 (57 FR 47468)
January 7, 1993 (58 FR 3028)
March 31, 1993 (58 FR 16837)
July 9, 1993 (58 FR 36967)
September 1, 1993 (58 FR 46200)
December 22, 1993 (58 FR 67796)

Addendum II—Description of Manuals, Memoranda, and HCFA Rulings

An extensive descriptive listing of Medicare manuals and memoranda was published on June 9, 1988, at 53 FR 21730 and supplemented on September 22, 1988, at 53 FR 36891 and December 16, 1988, at 53 FR 50577. Also, a complete description of the Medicare Coverage Issues Manual was published on August 21, 1989, at 54 FR 34555. A

brief description of the various Medicaid manuals and memoranda that we maintain was published on October 16, 1992, at 57 FR 47468.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993

| Trans. No. | Manual/subject/publication number |
|---|---|
| Intermediary Manual, Part 2 - Audits, Reimbursement Program Administration (HCFA-Pub. 13–2) (Superintendent of Documents No. HE 22.8/6–2) | |
| 394 | ° Completion of the Form HCFA–1885A. |
| | The Contractor Performance Evaluation Program—FY 1993. |
| | Bill Processing and Service Criterion. |
| | Payment Safeguards Criterion. |
| | Service Criterion. |
| | The RHHI Performance Evaluation Program - FY 1993. |
| | Regional Home Health Intermediary Criterion. |
| Intermediary Manual, Part 3 - Claims Process (HCFA-Pub. 13–3) (Superintendent of Documents No. HE 22.8/6) | |
| 1606 | ° Electronic Media Claims. |
| | File Specifications, Record Specifications, and Data Element Definitions for EMC Bills. |
| | National Standard Electronic Remittance Advice. |
| | Medicare Standard Electronic PC-Print Software. |
| 1607 | ° Bill Review for Partial Hospitalization Services Provided in Community Mental Health Centers. |
| | Hospital Outpatient Partial Hospitalization Services. |
| | Provider Electronic Billing File and Record Formats HCFA–485 Home Health Certification and Plan of Treatment. |
| 1608 | ° PPS PRICER Program. |
| 1609 | ° Review of Form HCFA–1450 for Inpatient and Outpatient Bills. |
| | Billing Procedures for Where Medicare Benefits are Secondary to Group Health Plans for Employed Beneficiaries/Spouses and the Disabled. |
| | Coding Structures. |
| | MSP Outpatient Claims Involving Lab Charges Paid By Fee Schedule. |
| 1610 | ° Rules Governing Charges to Beneficiaries. |
| | The Intermediary Workload Report, Form HCFA–1566. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| 1611 | ° Claims Processing Timeliness. |
| Intermediary Manual, Part 4 - Audit Procedures (HCFA-Pub. 13–3) (Superintendent of Documents No. HE 22.8/6–4) | |
| 31 | ° Introduction to the Home Health Agency Uniform Desk Review. |
| | Instructions for Performing Desk Reviews. |
| 32 | ° General. |
| | Revised Medicare Audit Process. |
| Carriers Manual, Part 2 - Program Administration (HCFA-Pub. 14–2) (Superintendent of Documents No. HE 22.8/7–3) | |
| 123 | ° The Contractor Performance Evaluation Program - FY 1993. |
| | Claims Processing Criterion. |
| | Payment Safeguards Criterion. |
| | Service Criterion. |
| | CWF Host Performance Evaluation Program - FY 1993. |
| 124 | ° Functional Standards for Claims Processing Operations. |
| Carriers Manual, Part 3 - Claims Process (HCFA-Pub. 14–3) (Superintendent of Documents No. HE 22.8/7) | |
| 1465 | ° List of Covered Surgical Procedures. |
| 1466 | ° Requirement for Processing Electronic Media Claims. |
| | The System for Processing Electronic Media Claims. |
| | EMC Testing and Verification. |
| | Technical Requirements. |
| | Data Sets and Formats for Electronic Media Claims and Electronic Remittance Advice. |
| 1467 | ° Bills Involving Medical Assistance Recipients. |
| | Processing Claims for Services of Participating Physicians or Suppliers. |
| | Physician and Supplier Billing Requirements for Services Furnished on or After September 1, 1990. |
| | Participation Program. |
| 1468 | ° Psychological Tests. |
| 1469 | ° The Carrier Performance Report, HCFA–1565. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| 1470 | ° Nonparticipating Physicians to Provide Notices for Elective Surgery. |
| | Handling Beneficiary Complaints. |
| 1471 | ° Technical Specifications of the EOMB. |
| 1472 | ° Epoetin Furnished to ESRD Home Patients. |
| 1473 | ° Introduction. |
| | Definition of a Global Surgical Package. |
| | Billing Requirements for Global Surgeries. |
| | Claims Review for Global Surgeries. |
| | Adjudication of Claims for Global Surgeries. |
| | Postpayment Issues. |
| | Claims for Multiple Surgeries. |
| | Claims for Bilateral Surgeries. |
| | Procedures Billed With Two or More Surgical Modifiers. |
| | Claims for Anesthesia Services Performed On or After January 1, 1992. |
| | Billing for Portable X-Ray Set-Up Services. |
| | Claims Processing System Requirements. |
| 1474 | ° Routine Services and Appliances. |
| | Foot Care and Supportive Devices for the Feet. |
| Program Memorandum, Intermediaries (HCFA-Pub. 60A) (Superintendent of Documents No. HE 22.8/6–5) | |
| A–93–4 | ° Change in Hospice Payment Rates. |
| A–93–5 | ° Health Care Financing Administration's Audit and Cost Report Settlement Expectations. |
| A–93–6 | ° FY 1994 Prospective Payment System and Other Bill Processing Changes. |
| Program Memorandum, Carriers (HCFA-Pub. 60B) (Superintendent of Documents No. HE 22.8/6–5) | |
| B–93–5 | ° 1994 Physician, Practitioner and Supplier Participation Enrollment and Fee Schedule Disclosure. |
| Program Memorandum, Intermediaries/Carriers (HCFA-Pub. 60 A/B) (Superintendent of Documents No. HE 22.8/6–5) | |
| AB–93–5 | ° Q Code for New Chemotherapy Drug, Paclitaxel. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| AB–93–6 | ° Current Status of Medicare Program Memorandums and Letters Issued Before Calendar Year 1993. |
| AB–93–7 | ° Use of New Code, G0001, for Billing of Routine Venipuncture. |
| Program Memorandum, Medicaid State Agencies (HCFA-Pub. 7) (Superintendent of Documents No. HE 22.8/6–5) | |
| 93–7 | ° Current Status of Medicaid Program Memorandums and Action Transmittals Issued Before Calendar Year 1993. |
| 93–8 | ° Title XIX, Social Security Act, Medicaid Coverage and Payment. |
| State Operations Manual, Provider Certification (HCFA-Pub. 7) (Superintendent of Documents No. HE 22.8/12) | |
| 261 | ° Life Safety Code Surveys.<br>Conducting Initial Surveys and Scheduled Resurveys. |
| Hospital Manual, (HCFA-Pub. 10) (Superintendent of Documents No. HE 22.8/2) | |
| 655 | ° Billing for Hospital Outpatient Partial Hospitalization Services.<br>Coding Structures.<br>Completion of Form HCFA–1450 for Inpatient and/or Outpatient Billing. |
| 656 | ° Focused Medical Review.<br>Billing for Part B Outpatient Physical Therapy Services.<br>Completion of Form HCFA–1450 for Inpatient and/or Outpatient Billing.<br>Medicare Benefits and Secondary to EGHPs for Employed Beneficiaries/Spouses and the Disabled.<br>Coding Structures.<br>MSP Outpatient Claims Involving Lab Charges Paid by Fee Schedule. |
| 657 | ° Claims Processing Timeliness. |
| Home Health Agency Manual (HCFA-Pub. 11) (Superintendent of Documents No. HE 22.8/5) | |
| 263 | ° Billing for Part B Outpatient Physical Therapy Services.<br>Focused Medical Review. |
| 264 | ° Claims Processing Timeliness. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| Skilled Nursing Facility Manual (HCFA-Pub. 12) (Superintendent of Documents No. HE 22.8/3) | |
| 323 | ° Focused Medical Review.<br>Billing for Part B Intermediary OPT Bills. |
| 324 | ° Rules Governing Charges to Beneficiaries. |
| 325 | ° Claims Processing Timeliness. |
| Rural Health Clinic and Federally Qualified Health Center Manual (HCFA-Pub. 27) (Superintendent of Documents No. HE 22.8/19:985) | |
| 8 | ° Claims Processing Timeliness. |
| Renal Dialysis Facility Manual (Non-Hospital Operated) (HCFA-Pub. 29) (Superintendent of Documents No. HE 22.8/13) | |
| 63 | ° Claims Processing Timeliness. |
| Hospice Manual (HCFA-Pub. 21) (Superintendent of Documents No. HE 22.8/18) | |
| 38 | ° Focused Medical Review. |
| 39 | ° Claims Processing Timeliness. |
| Outpatient Physical Therapy and Comprehensive Outpatient Rehabilitation Facility Manual (HCFA-Pub. 9) (Superintendent of Documents No. HE 22.8/9) | |
| 112 | ° Focused Medical Review.<br>Medical Review of Part B OPT Intermediary Bills. |
| 113 | ° Claims Processing Timeliness. |
| Coverage Issues Manual (HCFA-Pub. 6) (Superintendent of Documents No. HE 22.8/14) | |
| 65 | ° Artificial Hearts and Related Devices. |
| 66 | ° Medical Documentation.<br>Laboratory Evidence. |
| Provider Reimbursement Manual, Part 1 (HCFA-Pub. 15–1) (Superintendent of Documents No. HE 22.8/4) | |
| 373 | ° Regional Medicare Swing-Bed SNF Rates. |
| 374 | ° Elimination of Payment for Return of Equity. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| 375 | ° Costs Not Related to Patient Care.<br>Political Contribution and Lobbying Activities.<br>Purpose. |
| Provider Reimbursement Manual, Part 1 - Chapter 27 Reimbursement for ESRD and Transplant Services (HCFA-Pub. 15–1–27) (Superintendent of Documents No. HE 22.8/4) | |
| 24 | ° Items and Services Furnished to Direct Dealing Home Dialysis Beneficiaries. |
| 25 | ° Epoetin.<br>Infacility Patients.<br>Home Patients. |
| Provider Reimbursement Manual, Part II - Provider Cost Reporting Forms and Instructions (Chapter 1) (HCFA-Pub. 15–II) (Superintendent of Documents No. HE 22.8/4) | |
| 16 | ° Submission of Cost Report. |
| Provider Reimbursement Manual, Part II - Provider Cost Reporting Forms and Instructions (Chapter 28) (HCFA-Pub. 15–II-AB) (Superintendent of Documents No. HE 22.8/4) | |
| 3 | ° Form HCFA–2552–92 Worksheets.<br>Electronic Reporting Specifications for Form HCFA 2552–92.<br>Cost Center Coding. |
| Peer Review Organization Manual (HCFA-Pub. 19) (Superintendent of Documents No. HE 8/8–15) | |
| 25 | ° Health Care Financing Administration's Role.<br>Health Care Quality Improvement Initiative.<br>Generic Quality Screens - Outpatient Surgery.<br>Rereview of Quality Concerns.<br>Scope of PRO Fraud and Abuse Review Activities.<br>Review Responsibility.<br>Evaluation Report.<br>Availability of Expert Witness.<br>Reopening of Cases. |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| 26 | ° Citations and Authority.<br>Issuances of Hospital Notices of Noncoverage.<br>Content of Hospital-Issued Notice of Noncoverage.<br>Beneficiary Request for PRO Review.<br>Solicitation of Views.<br>Monitoring Hospital-Issued Notices of Noncoverage.<br>Beneficiary Liability.<br>Right to a Reconsideration.<br>Model Notices of Noncoverage.<br>Model Hospital Notice Issued to Beneficiary of Pro Review of Need for Continued Hospitalization. |
| 27 | ° Monthly Files.<br>Review for Approval of Use of an Assistant at Cataract Surgery. |
| 28 | ° Background.<br>Purpose.<br>Report of Findings.<br>Performance Improvement Plan. |
| State Medicaid Manual, Part 2 - State Organization and General Administration (HCFA-Pub. 45–2) (Superintendent of Documents No. HE 22.8/10) | |
| 84 | ° Early and Periodic Screening, Diagnostic and Treatment Report (Form HCFA–416) |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| State Medicaid Manual, Part 4 - Services (HCFA-Pub. 45–4) (Superintendent of Documents No. HE 22.8/10) | |
| 63 | ° Authority to Grant Life Safety Code Waivers for Medicaid Only Certified NFs. |
| State Medicaid Manual, Part 5 - Early and Periodic Screening, Diagnosis, and Treatment (HCFA-Pub. 45–5) (Superintendent of Documents No. HE 22.8/10) | |
| 6 | ° Screening Service Content. |
| 7 | ° Records or Information on Services and Recipients Annual Participation Goals. |
| State Medicaid Manual, Part 6 - Payment for Services (HCFA-Pub. 45–6) (Superintendent of Documents No. HE 22.8/10) | |
| 24 | ° Federal Upper Limit Payments for Multiple Source Drugs. |
| State Medicaid Manual, Part 7 - Quality Control (HCFA-Pub. 45–7) (Superintendent of Documents No. HE 22.8/10) | |

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS OCTOBER THROUGH DECEMBER 1993—Continued

| Trans. No. | Manual/subject/publication number |
|---|---|
| 49 | ° Definitions of Key Terms.<br>Medicaid Eligibility Quality Control Review.<br>MEQC State and Regional Cycles.<br>Cases Which Are Not Reviewed.<br>Review of AFDC Cash Cases/Individuals.<br>In-Person Interview.<br>Mandatory Use of IEVS Information.<br>Verification Standards.<br>Verification Guide.<br>Administrative Period.<br>Technical Errors.<br>Review Month Income Projected Forward Throughout Spenddown Period. |
| Medicare/Medicaid, Sanction—Reinstatement Report (HCFA-Pub. 69) | |
| 93–10 | ° Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated. |
| 93–11 | ° Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated. |
| 93–12 | ° Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated. |
| 93–13 | ° Report of Physicians/Practitioners, Providers and/or Other Health Care Suppliers Excluded/Reinstated. |

ADDENDUM IV.—REGULATIONS AND NOTICES PUBLISHED JULY THROUGH SEPTEMBER 1993

| Publication date/citation | 42 CFR part | Title |
|---|---|---|
| | | Final Rules |
| 10/01/93 (58 FR 51408) | 435, 436, 440 | Medicaid Program; Eligibility and Coverage Requirements. |
| 10/20/93 (58 FR 54045) | 403 | Medicare Program; Demonstration Project to Develop a Uniform Cost Reporting System for Hospitals. |
| 11/02/93 (58 FR 58502) | 405, 406, 409, 410, 411, 412, 413, 418, 489 | Medicare Program; Self-Implementing Coverage and Payments Provisions: 1990 Legislation (Confirmation of Final Rule). |
| 11/18/93 (58 FR 60789) | 421 | Medicare Program; Carrier Jurisdiction for Claims for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS). |
| 11/23/93 (58 FR 61816) | 401, 488, 489 | Medicare Program; Granting and Withdrawal of Deeming Authority to National Accreditation Organizations. |
| 12/02/93 (58 FR 63533) | 491 | Medicare Program Required Laboratory Procedures for Rural Health Clinics. |
| 12/02/93 (58 FR 63626) | 405, 414 | Medicare Program; Revisions to Payment Policies and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1994. |
| 12/13/93 (58 FR 65126) | 424 | Medicare Program; Intermediary and Carrier Checks That are Lost, Stolen, Defaced, Mutilated, Destroyed or Paid on Forged Endorsements. |

ADDENDUM IV.—REGULATIONS AND NOTICES PUBLISHED JULY THROUGH SEPTEMBER 1993—Continued

| Publication date/citation | 42 CFR part | Title |
|---|---|---|
| | | Proposed Rules |
| 10/01/93 (58 FR 51288) | 440, 441 | Medicaid Program; Early and Periodic Screening, Diagnosis, and Treatment Services Defined. |
| 10/15/93 (58 FR 53481) | 431, 440, 441, 447 | Medicaid Program; Case Management. |
| 11/26/93 (58 FR 62312) | 410, 411 | Medicare Program; Medicare Coverage of Screening Pap Smears for Early Detection of Cervical Cancer. |
| 12/13/93 (58 FR 65150) | 413 | Medicare Program; Reporting of Interest From Zero Coupon Bonds. |
| 12/14/93 (58 FR 65312) | 435, 436, 440, 447 | Medicaid Program; Extended Medicaid for Certain Families Who Lose AFDC Eligibility Because of Earned Income; Work Supplementation Participants; Residency of Minor Parents and Pregnant Individuals. |
| 12/27/93 (58 FR 68366) | 417 | Medicare Program; Retroactive Enrollment and Disenrollment in Risk Health Maintenance Organizations and Competitive Medical Plans. |
| 12/29/93 (58 FR 68829) | 410, 417, 424 | Medicare Program; Medicare Coverage and Payment of Clinical Psychologist, Other Psychologist, and Clinical Social Worker Services. |

NOTICES

| Publication date/citation | Title |
|---|---|
| 10/01/93 (58 FR 51355) | Medicare Program; Payment for Extracorporeal Shock Wave Lithotripsy Services Furnished by Ambulatory Surgical Centers. |
| 10/04/93 (58 FR 51632) | HMOs; Exclusion of Gamete Intrafallopian Transfer and Zygote Intrafallopian Transfer as Basic Health Services |
| 10/05/93 (58 FR 51827) | Medicare Program; Data, Standards and Methodology Used to Establish Fiscal Year 1994 Budgets for Fiscal Intermediaries and Carriers. |
| 10/05/93 (58 FR 51833) | HMOs; Qualification Determinations and Compliance Actions During the Period April 1, 1993, through June 30, 1993. |
| 10/06/93 (58 FR 52112) | Medicare, Medicaid, and CLIA Programs; Clinical Laboratory Improvement Amendments of 1988 Licensed by the State of Washington. |
| 11/02/93 (58 FR 58553) | Medicare Programs; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 1994. |
| 11/02/93 (58 FR 58555) | Medicare Program; Part A Premium for 1994 for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement. |
| 11/08/93 (58 FR 59271) | Medicare Program; Monthly Actuarial Rates and Monthly Supplementary Medical Insurance Premium Rates Beginning January 1, 1994. |
| 11/16/93 (58 FR 60458) | Medicare Program; Withdrawal of the Provider Reimbursement Review Board Hearing Manual. |
| 11/22/93 (58 FR 61692) | Medicaid Program; Revised Medicaid Management Information Systems (MMIS) Functional Requirements. |
| 11/24/93 (58 FR 62128) | Medicare Program; Payment for Extracorporeal Shock Wave Lithotripsy Services Furnished by Ambulatory Surgical Centers (extension of comment period). |
| 11/26/93 (58 FR 62357) | Medicare Program; Meeting of the Practicing Physicians Advisory Council. |
| 12/02/93 (58 FR 63856) | Physician Performance Standard Rates of Increase for Federal Fiscal Year 1994 and Physician Fee Schedule Update for Calendar Year 1994. |
| 12/13/93 (58 FR 65186) | Medicare Program; Peer Review Organization, General Criteria and Standards for Evaluating Performance of Contract Obligations. |
| 12/14/93 (58 FR 65357) | Medicare Program; Proposed Additions to and Deletions From the Current List of Covered Procedures for Ambulatory Surgical Centers. |
| 12/21/93 (58 FR 67350) | Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1994 Rates; (Correction). |
| 12/22/93 (58 FR 67796) | Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions—Third Quarter 1993. |
| 12/23/93 (58 FR 68148) | Approval of the Commission on Office Laboratory Accreditation. |

**Addendum V—Medicare Coverage Issues Manual**

(For the reader's convenience, new material and changes to previously published material are in italics. If any part of a sentence in the manual instruction has changed, the entire line is shown in italics. The transmittal includes material unrelated to revised sections. We are not reprinting the unrelated material.)

Transmittal No. 65; section 65–15, Artificial Hearts and Related Devices—Not Covered. CHANGED IMPLEMENTING INSTRUCTIONS—EFFECTIVE DATE; Services Furnished on or After 10/18/93.

Section 65–15, Artificial Hearts and Related Devices, is revised to provide coverage of the FDA-approved ventricular assist device (known as the BVS 5000) when used only in patients suffering from postcardiotomy ventricular dysfunction. The device is intended for short term use and is not covered when used as a bridge to cardiac transplantation.

65–15 ARTIFICIAL HEARTS AND RELATED DEVICES—NOT COVERED

There are several devices either in use or under development which replace all or part of the human heart or assist the heart in performing its pumping function. Artificial hearts are considered investigational and not covered under Medicare either when used as a

permanent replacement for a human heart or when used as temporary life-support systems (i.e., until a human heart becomes available for transplant).

*The FDA-approved ventricular assist device (known as the BVS 5000) is covered when it is used in accordance with its FDA-approved labeled uses for postcardiotomy ventricular dysfunction. The device is intended for short term use and is not covered when used as a bridge to cardiac transplantation. Other ventricular assist devices used as temporary life-support systems are still considered investigational and not covered under the Medicare program.*

Transmittal No. 66; section 60–4.B, Medical Documentation. CHANGED PROCEDURES—EFFECTIVE DATE: Services furnished on or after 01/01/9.

Section 60–4.B, Medical Documentation, is revised to reflect changes mandated by § 4152 of OBRA 1990, effective for services rendered on or after January 1, 1991. Implementing changes were published in the Medicare Carriers Manual in July 1991 (transmittal 1399). Transmittal No. 66; section 60–4.C, Laboratory Evidence. CHANGED PROCEDURES—EFFECTIVE DATE: 10/27/93.

Section 60–4.C, Laboratory Evidence, is revised to indicate that in situations where the arterial blood gas and the oximetry studies are both used to document the need for oxygen therapy and the results are conflicting, the arterial blood gas study is the preferred service of documenting medical need because the results of such studies are considered the best evidence of hypoxemia. In addition, these instructions also clarify that the prohibition against the use of results of tests performed by a durable medical equipment (DME) supplier to qualify patients for home oxygen service *does not extend* to the results of an arterial blood gas text by a hospital certified to conduct such tests.

60–4 HOME USE OF OXYGEN

B. *Medical Documentation.—Initial* claims for oxygen services must include a completed Form HCFA–484 (Attending Physician's Certification of Medical Necessity for Home Oxygen Therapy) to establish whether coverage criteria are met and to ensure that the oxygen services provided are consistent with the physician's prescription or other medical documentation. The attending physician's prescription or other medical documentation must indicate that the other forms of treatment (e.g., medical and physical therapy directed at secretions, bronchospasm and infection) have been tried, have not been sufficiently successful, and oxygen therapy is still required. While there is no substitute for oxygen therapy, each patient must receive optimum therapy before long-term home oxygen therapy is ordered. Use Form HCFA–484 for recertifications. (See Medicare Carriers Manual § 3312 for completion of Form HCFA–484.)

*The medical and prescription information on Form HCFA–484 can be completed only by the attending physician or entered on the form from information in the patient's records by an employee of the physician for the physician's review and signature. Although hospital discharge coordinators, nurses, and medical social workers may assist in arranging for physician-prescribed home oxygen, they have no authority to prescribe the services or to enter medical or prescription information in items 1 through 6 of Form HCFA–484. Suppliers may not enter this information either.*

*Unlike other types of DME, a physician's certification of medical necessity for oxygen equipment must include the results of specific testing before coverage can be determined.*

*Initial claims for oxygen must also be supported by medical documentation. Separate documentation is used with electronic billing. (See Medicare Carriers Manual, Part 3, § 4105.6.)* This documentation may be in the form of a prescription written by the patient's attending physician who has recently examined the patient (normally within a month of the start of therapy) and must specify:

- A diagnosis of the disease requiring home use of oxygen;
- The oxygen flow rate; and
- An estimate of the frequency, duration of use (e.g., 2 liters per minute, 10 minutes per hour, 12 hours per day), and duration of need (e.g., 6 months or lifetime).

**Note:** A prescription for "Oxygen PRN" or "Oxygen as needed" does not meet this last requirement. Neither provides any basis for determining if the amount of oxygen is reasonable and necessary for the patient.

All claims with oxygen flow rates of more than 2 liters per minute must be reviewed by a carrier's medical staff before payment can be made. The attending physician may also specify the type of oxygen delivery system to be used (i.e., gas, liquid, or concentrator). If the type of system is specified, then the medical reasons for selecting that system over the alternative systems must also be specified.

New medical documentation written by the patient's attending physician must be submitted to the carrier in support of revised oxygen requirements when there has been a change in the patient's condition and need for oxygen therapy.

Carriers are required to conduct periodic, continuing medical necessity reviews on patients whose conditions warrant these reviews and on patients with indefinite or extended periods of necessity as described in Medicare Carriers Manual, Part 3, § 4105.6.C. When indicated, carriers may also request documentation of the results of a repeat arterial blood gas or oximetry study.

**Note:** *Section 4152 of OBRA 1990 requires earlier recertification and retesting of oxygen patients who begin coverage with an arterial blood gas result at or above a partial pressure of 55 or an arterial oxygen saturation percentage at or above 89. (See Medicare Carriers Manual § 4105.6 for certifications and retesting schedules.)*

C. Laboratory Evidence.—Initial claims for oxygen therapy must also include the results of a blood gas study that has been ordered and evaluated by the attending physician. This is usually in the form of a measurement of the partial pressure of oxygen (PO2) in arterial blood. (See Medicare Carriers Manual, Part 3, § 2070.1 for instructions on clinical laboratory tests.) A measurement of arterial oxygen saturation obtained by ear or pulse oximetry, however, is also acceptable when ordered and evaluated by the attending physician and performed under his or her supervision or when performed by a qualified provider or supplier of laboratory services. *In situations when the arterial blood gas and the oximetry studies are both used to document the need for home oxygen therapy and the results are conflicting, the arterial blood gas study is the preferred source of documenting medical need. A DME supplier is not considered a qualified provider or supplier of laboratory services for purposes of these guidelines. This prohibition does not extend to the results of an arterial blood gas test conducted by a hospital certified to do such tests.* The conditions under which the laboratory tests are performed must be specified in writing and submitted with the initial claim, i.e., at rest, while sleeping, while exercising, on room air, or if while on oxygen, the amount, body position during testing, and similar information necessary for interpreting the evidence as specified by the carrier.

The preferred sources of laboratory evidence are existing physician and/or hospital records that reflect the patient's medical condition. Since it is expected that virtually all patients who qualify for home oxygen coverage for the first

time under these guidelines have recently been discharged from a hospital where they submitted to arterial blood gas tests, the carrier needs to request that such test results be submitted in support of their initial claims for home oxygen. If more than one arterial blood gas test is performed during the patient's hospital stay, the test result obtained closest to the hospital discharge date is the best evidence of the need for home oxygen therapy.

Carriers may accept an attending physician's statement of recent hospital test results for a particular patient, when appropriate, in lieu of copies of actual hospital records. Subsequent blood gas tests that appear to duplicate the hospital test (e.g., when there is no reason to believe the patient's condition may have changed) are denied as not medically reasonable and necessary.

A repeat arterial blood gas or oximetry study is normally necessary only when evidence indicates that an oxygen recipient has undergone a major change relevant to home use of oxygen. For example, if the carrier has reason to believe that there has been a major change in the patient's physical condition (e.g., when there has been a significant increase in the amount of oxygen billed on a monthly basis), it may ask for documentation of the results of another blood gas or oximetry study

[FR Doc. 94–6153 Filed 3–16–94; 8:45 am]
BILLING CODE 4120–01–P

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## Health Resources and Services Administration

## Final Strategic Directions for Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS) Regional Education and Training Centers Program for Fiscal Year 1994

The Health Resources and Services Administration (HRSA), announces the final strategic directions to continue the development of the AIDS Regional Education and Training Centers (AETCs) program for one year. This program is authorized under Section 776(a), (previously section 788A), title VII of the Public Health Service Act (the Act), as amended by the Health Professions Education Extension Amendments of 1992, Public Law 102–408, dated October 13, 1992.

### Eligibility and Purpose

Awards are made to accredited public and nonprofit private entities and schools and academic health science centers in meeting the costs of projects—

1. To train the faculty of schools and graduate departments or programs of, medicine, nursing, osteopathic medicine, dentistry, public health, mental health practice (clinical psychology, clinical social work and marriage and family therapy), and allied health, to teach health professions students to provide for the health care needs of individuals with HIV disease;

2. To train practitioners to provide for the health care needs of such individuals;

3. With respect to improving clinical skills in the diagnosis, treatment, and prevention of such disease, to educate and train the health professionals and clinical staff of schools of medicine, osteopathic medicine, and dentistry; and

4. To develop and disseminate curricula and resource materials relating to the care and treatment of individuals with such disease and the prevention of the disease among individuals who are at risk of contracting the disease.

### Project Requirements

The following project requirements, which were published in the **Federal Register** in FY 1989, after public comment dated September 8, 1989, 54 FR 37378, will be continued in FY 1994.

The project requirements are designed to direct Federal resources where the greatest needs exist. Each project must define a geographic region and identify the types of providers to be targeted for training within that region. Thus, the focus in FY 1994 will continue to be on clinical education of primary care providers in high HIV/AIDS prevalence areas. Consistent with this emphasis is the requirement that a minimum of two-thirds of the Federal funds provided must be expended to provide education to primary care providers (i.e., physicians, nurses, dentists, physician assistants, nurse practitioners, and dental hygienists). In addition, at least 50 percent of project funds must be expended for training activities in high AIDS incidence Metropolitan Statistical Areas identified prior to the competitive awards of high AIDS incidence MSAs identified for funding through the "Ryan White" CARE ACT program.

Each ETC must provide or perform the following:

- Clinical training of primary care physicians, nurses, dentists, physician assistants, nurse practitioners, and dental hygienists;
- Training of other health professionals such as mental health care providers and case managers;
- An updated needs-assessment of the education and training needs of the primary care providers within the proposed service area which is linked to the allocation of Federal funds;
- Training in risk assessment, prevention, early intervention, and treatment;
- Development of primary/tertiary care linkages and networking;
- Outreach to minorities, including involvement of minority providers, minority professional organizations, and minority health care delivery systems;
- Linkages to "Ryan White" CARE ACT, titles I, II, III, and IV funded health services programs and the Hemophilia and Pediatric/Family HIV Health Care Demonstration Programs;
- Linkage to PHS funded migrant (Sec. 329(a)(1)) and community health (Sec. 330(a)) centers, health care for the homeless programs (Sec. 340) State and local health agencies and health care facilities involved in providing care for HIV infected individuals;
- Linkage with substance abuse programs;
- Collaboration with health professions organizations in the proposed region;
- Networking with other community agencies to concentrate on filling the gaps in training;
- Dissemination of state-of-the-art information and educational materials in concert with other PHS agencies, using mechanisms such as hotlines;
- Program assessment and data collection on program and trainees which can be used for regional and national evaluative purposes; and
- Plan for future non-Federal funding of project.

### Collaboration

The AETCs must operate in collaboration with health professions schools, community hospitals, health departments, PHS funded Area Health Education Centers, "Ryan White" CARE ACT funded health services programs, the Hemophilia and Pediatric/Family HIV Health Care Demonstration Programs, Health Care for the Homeless programs, community and migrant health centers, and with substance abuse programs, community-based organizations, and other organizations involved in the provision of care to people with HIV/AIDS related conditions.

AETC projects also are encouraged to collaborate with the national network of AIDS Clinical Trial Units (ACTUs) and the Community Programs for Clinical Research on AIDS funded by the National Institute of Allergy and Infectious Diseases of the National Institutes of Health, and with other community based clinical trials sponsored by foundations such as the

Robert Wood Johnson Foundation or the American Foundation for AIDS Research. It is also suggested that projects collaborate with the NIAID Pediatric Clinical Trials Centers.

**Degree of Federal Involvement Agreement**

Substantial involvement will occur in the following areas:

- The design or direction of activities to develop a clinically-oriented training delivery model, with special emphasis for minority providers and providers who serve minority populations;
- The approval of key AETC project staff with particular emphasis on recruitment of minority faculty;
- The review of major contracts and agreements with subcontractors;
- The dissemination of state-of-the-art diagnostic and therapeutic clinical guidelines and algorithms, with a particular emphasis on early intervention strategies, which will include antiretroviral therapy, prophylaxis for opportunistic infections, and immunizations for viral and bacterial pathogens.

**Review Criteria**

The review criteria stated below, which were established in the **Federal Register** in FY 1989, dated September 8, 1989, 54 FR 37378, after public comment, will be continued in FY 1994.

Applications will be reviewed and rated according to the applicant's ability to meet the following:

1. The potential effectiveness of the project in carrying out the purposes of the program;
2. The degree to which the project plan adequately provides for meeting the project requirements;
3. The capability of the applicant to conduct the proposed activities in a cost efficient manner;
4. The soundness of the fiscal plan for assuring effective utilization of funds; and
5. The potential of the project to continue on a self-sustaining basis after the period of support.

**Final Strategic Directions for AETC Program**

The AIDS Education Training Centers program was initially designed to provide information on the prevalence of AIDS and identification of groups at increased risk of HIV infection. As the HIV/AIDS epidemic matured, it became apparent that the AETCs had to shift their priorities from HIV/AIDS information transfer to more intensive clinical training. This shift was necessitated by the introduction of new therapeutic interventions, such as antiretroviral therapies, which offered the promise of delaying the onset of opportunistic infections associated with AIDS. The mission of the AETCs is to address the ever increasing issues surfacing because of the changes in the HIV epidemic by constantly adding new priorities to address new issues. The Bureau of Health Professions and the Division of Medicine have developed new strategic directions which will have to be more fully incorporated into the priorities of the AETC program. These strategic directions were published for public comment in the **Federal Register** on November 18, 1993, 58 FR 60860. No comments were received during the 30-day comment period. These strategic directions will include an emphasis on generalism, a continued emphasis on minorities and the underserved and an emphasis on interdisciplinary training. The AETCs will continue to provide multidisciplinary training for primary health care personnel in the care of people with Acquired Immunodeficiency Syndrome (AIDS) and other conditions related to infection with the Human Immunodeficiency Virus (HIV).

**Additional Information**

Requests for technical or programmatic information should be directed to: Elaine Daniels, M.D.,Ph.D, Chief, Health Professions HIV Education Branch, AIDS Regional Education and Training, Centers Program, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, room 4C–03, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–6364.

This program is listed at 93.145 in the Catalog of Federal Domestic Assistance and is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

This program is not subject to the Public Health System Reporting Requirements.

Dated: March 11, 1994.

**Ciro V. Sumaya,**

*Administrator.*

[FR Doc. 94–6226 Filed 3–16–94; 8:45 am]

BILLING CODE 4160–15–P

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## National Institutes of Health

### Special Meeting of the Acquired Immunodeficiency Syndrome Program Advisory Committee (APAC)

Pursuant to Public Law 92–463, notice is hereby given of a special meeting of the Acquired Immunodeficiency Syndrome (AIDS) Program Advisory Committee on March 31, 1994, at the National Institutes of Health (NIH), Bethesda, Maryland. The meeting will take place from 10 a.m. until 3 p.m. in Building 31, C Wing, Conference Room 9 to review human subjects protections under parallel track proposals. The meeting will be open to the public from 10 a.m. until 10:30 a.m. for a staff orientation on the parallel track initiative and the review of human subjects protections. Attendance by the public will be limited to space available. Please contact Rita Gant in the Office of AIDS Research at 301–496–0358, if you are planning to attend or if you need special assistance, such as sign language interpretation or other reasonable accommodations.

In accordance with the provisions set forth in section 552b(c)(4), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public from 10:30 a.m. until adjournment for the mandated annual review, discussion, and evaluation of an individual proposal for expanded availability of an investigational new AIDS drug through the parallel track mechanism. This proposal and subsequent discussion could reveal confidential trade secrets or commercial property such as patentable material.

Linda Reck, Senior Program Analyst, Office of AIDS Research, National Institutes of Health, Building 31, room 5C02, 9000 Rockville Pike, Bethesda, MD 20892, (301) 496–0358, will provide a summary of the meeting, a roster of committee members, and substantive program information upon request.

This notice is being published less than 15 days prior to the meeting due to the difficulty of coordinating the attendance of members because of conflicting schedules.

Dated: March 10, 1994.

**Susan K. Feldman**

*Committee Management Officer, NIH.*

[FR Doc. 94–6252 Filed 3–16–94; 8:45 am]

BILLING CODE 4140–01–M

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### National Cancer Institute; Meeting of Subcommittee A of the Cancer Biology-Immunology Contracts Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of Subcommittee A of the Cancer Biology-Immunology Contracts Review Committee, National Cancer Institute, National Institutes of Health, on May 12–13, 1994, at the Executive Plaza North Building, Conference Room C and D, 6130 Executive Boulevard, Rockville, Maryland 20892.

This meeting will be open to the public on May 12 from 8:30 am to 9:30 am to discuss administrative details. Attendance by the public will be limited to space available.

In accordance with provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on May 12 from 9:30 a.m. to recess and on May 13 from 8:30 a.m. to adjournment for the review, discussion, and evaluation of individual contract proposals. These proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the proposals, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Carole Frank, Committee Management Officer, National Cancer Institute, Executive Plaza North, room 630E, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892–9003, (301) 496–5708, will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Lalita D. Palekar, Scientific Review Administrator, Cancer Biology-Immunology Contracts Review Committee, National Cancer Institute, Executive Plaza North, room 609, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892–9003, (301) 496–7575, will furnish substantive program information.

Individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations, should contact Ms. Alma O. Carter, (301) 496–7523 in advance of the meeting.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control.)

Dated: March 10, 1994.

**Susan K. Feldman,**

*Committee Management Officer, NIH.*

[FR Doc. 94–6253; Filed 3–16–94; 8:45 am]

BILLING CODE 4140–01–M

## National Cancer Institute; Notice of Meeting of the Biometry and Epidemiology Contract Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Biometry and Epidemiology Contract Review Committee, National Cancer Institute, National Institutes of Health, April 7–8, 1994, at the Executive Plaza North Building, Conference Room G, 6130 Executive Boulevard, Rockville, Maryland 20852.

This meeting will be open to the public from 9 a.m. to 10 a.m. on April 7 to discuss administrative details. Attendance by the public will be limited to space available.

In accordance with provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on April 7 from 10 a.m. to recess and on April 8 from 9 a.m. to adjournment for the review, discussion, and evaluation of individual contract proposals. These proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the proposals, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Committee Management Officer, National Cancer Institute, Executive Plaza North, room 630E, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892–9903, Tel. (301) 496–5708, will provide a summary of the meeting and a roster of the committee members upon request.

Dr. Harvey P. Stein, Scientific Review Administrator, Contracts Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, Executive Plaza North, room 601C, 9000 Rockville Pike, Bethesda, Maryland 20892–9903, Tel. (301) 496–7030, will furnish substantive program information.

Individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations should contact Ms. Alma O. Carter on (301) 496–7523 in advance of the meeting.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control.)

Dated: March 10, 1994.

**Susan K. Feldman,**

*Committee Management Officer, NIH.*

[FR Doc. 94–6254 Filed 3–16–94; 8:45 am]

BILLING CODE 4140–01–M

## National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meetings of the following Heart, Lung, and Blood Special Emphasis Panels.

These meetings will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications, contract proposals, and/or cooperative agreements. These applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Panel:* NHLBI SEP on Clinical Centers and Clinical Coordinating Center for a Clinical Network for the Treatment of Adult Respiratory Distress Syndrome (ARDS).

*Dates of Meeting:* April 6–8, 1994.

*Time of Meeting:* 8 p.m.

*Place of Meeting:* Holiday Inn, Bethesda, Maryland.

*Agenda:* To evaluate and review contract proposals.

*Contact Person:* Dr. Lynn M. Amende, 5333 Westbard Avenue, room 648, Bethesda, Maryland 20892, (301) 594–7485.

*Name of Panel:* NHLBI SEP on HIV and Cellular Infiltrative Disease in the Lung.

*Dates of Meeting:* April 25–26, 1994.

*Time of Meeting:* 8 p.m.

*Place of Meeting:* Holiday Inn, Chevy Chase, Maryland.

*Agenda:* To evaluate and review grant applications.

*Contact Person:* Mrs. Betty H. Masket, 5333 Westbard Avenue, room 5A10, Bethesda, Maryland 20892, (301) 594–7480.

(Catalog of Federal Domestic Assistance Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.839, Blood Diseases and Resources Research, National Institutes of Health.)

Dated: March 11, 1994.

**Susan K. Feldman,**

*Committee Management Officer, NIH.*

[FR Doc. 94–6255 Filed 3–16–94; 8:45 am]

BILLING CODE 4140–01–M

## Division of Research Grants; Meeting

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Division of Research Grants Behavioral and Neurosciences Special Emphasis Panel.

The meeting will be closed in accordance with the provisions set forth

in section 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications in the various areas and disciplines related to behavior and neuroscience. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Office of Committee Management, Division of Research Grants, Westwood Building, National Institutes of Health, Bethesda, Maryland 20892, telephone 301–594–7265, will furnish summaries of the meeting and roster of panel members.

*Meeting To Review Individual Grant Applications:*

Scientific Review Administrator: Dr. Herman Teitelbaum (301) 594–7245.

Date of Meeting: March 16, 1994.

Place of Meeting: Ramada Inn, Rockville, MD.

Time of Meeting: 8:30 am.

This notice is being published less than 15 days prior to the meeting due to the difficulty of coordinating the attendance of members because of conflicting schedules.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 10, 1994.

**Susan K. Feldman,**

*Committee Management Officer, NIH.*

[FR Doc. 94–6256 Filed 3–16–94; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT–787347

Applicant: Deborah Kalenak, Saginaw, MI 48609

The applicant request a permit to import two pair of captive-hatched Cabot's tragopan (*Tragopan caboti*) from Glen Howe, Aylmer, Ontario, Canada, for breeding to enhance the propagation and survival of the species.

PRT–787716

Applicant: Scott Tremor, Santee, CA 92071

The applicant request a permit to take Pacific little pocket mouse (*Perognathus longimembris pacificus*) for presence and absence surveys in San Diego county, California, to enhance the survival of the species.

PRT–787041

Applicant: Phillip Brylski, Irvine, CA 92715

The applicant requests a permit to live-trap/release the Pacific little pocket mouse for presence and absence surveys (*Perognathus longimembris pacificus*) in Los Angeles and San Diego counties, California, to enhance the survival of the species.

PRT–785959

Applicant: Jack Donaldson, Findlay, OH 45840

The applicant requests a permit to import one captive-hatched female Blyth's tragopan (*Tragopan blythii*) from Glenn Howe, Aylmer, Ontario, Canada, for breeding to enhance the propagation and survival of the species.

PRT–785960

Applicant: Jack Donaldson, Findlay, OH 45840

The applicant requests a permit to import one captive-hatched male Blyth's tragopan (*Tragopan blythii*) from H.J. Hardy, South View Aviaries, Burnaby, British Columbia, Canada, for breeding to enhance the propagation and survival of the species.

PRT–786058

Applicant: Fort Worth Zoological Park, Fort Worth, TX 76110

The applicant requests a permit to import 5.5 captive-hatched Manchurian cranes (*Grus japonensis*) from the Shenyang Zoo, Shenyang, Liaoning, China, for breeding to enhance the propagation and survival of the species.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 420(c), Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: March 11, 1994.

**Susan Jacobsen,**

*Acting Chief, Branch of Permits, Office of Management Authority.*

[FR Doc. 94–6177 Filed 3–16–94; 8:45 am]

BILLING CODE 4310–55–P

### Notice of Availability of a Draft Recovery Plan for the Alamosa and Socorro Springsnails for Review and Comment

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of document availability and public comment period.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a draft recovery plan for the Alamosa springsnail (*Tryonia alamosae*) and the Socorro springsnail (*Pyrgulopsis noemexicana*) which the Service listed as endangered species on September 30, 1991 (56 FR 43649). These two species occur in slow-velocity water near thermal springheads and/or associated springruns in Socorro County, New Mexico. The Service solicits review and comment from the public on this draft plan.

**DATES:** Comments on the draft recovery plan must be received on or before May 16, 1994 to receive consideration by the Service.

**ADDRESSES:** Persons wishing to review the draft recovery plan may obtain a copy by contacting the State Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services State Office, 3530 Pan American Highway NE., suite D, Albuquerque, New Mexico 87107. Written comments and materials regarding the plan should be addressed to the State Supervisor at the above address. Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Gerald L. Burton, U.S. Fish and Wildlife Service Biologist; telephone (505) 883–7877 or at the above address.

**SUPPLEMENTARY INFORMATION:**

#### Background

Restoring an endangered or threatened plant or animal to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the U.S. Fish and Wildlife Service's endangered species

program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe site specific management actions considered necessary for conservation and survival of the species, establish objective, measurable criteria for the recovery levels for downlisting or delisting species, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service and other Federal agencies will also take these comments into account in the course of implementing approved recovery plans.

The Alamosa springsnail and Socorro springsnail were listed as endangered on October 30, 1991. The draft recovery plan includes new scientific information about the two species gathered since 1991 and provides management procedures for protecting their habitat and expanding their range and abundance to the extent that no natural or human-caused disturbance will result in irrevocable losses.

**Public Comments Solicited**

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to the approval of the plan.

**Authority**

The Authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: March 10, 1994.

**John G. Rogers,**

*Regional Director.*

[FR Doc. 94–6212 Filed 3–16–94; 8:45 am]

BILLING CODE 4310–55–M

## National Park Service

### Notice and Public Comment on Sample Prospectus and Related Guidelines

**AGENCY:** National Park Service, Interior.

**SUMMARY:** Notice is hereby given that Chapters 6, 7, 8 and 11 of NPS–48 ("The Concessions Guideline") have been rescinded effective as of the date of this publication. In addition, any portions of NPS–48 or other NPS policies which are inconsistent with recently amended National Park Service regulations for concession contracting and its new standard language concession contract are hereby rescinded. Matters previously addressed by Chapters 6, 7, 8 and 11 of NPS–48 are now addressed to the extent necessary by a new National Park Service internal staff manual entitled "Sample Prospectus and Related Guidelines" effective as of the date of this publication. The Sample Prospectus and Related Guidelines is incorporated by reference in this public notice. The document includes, among other matters, a sample prospectus for solicitation of offers for National Park Service concession contracts and permits, related evaluation guidelines, and application information and criteria. It is noted, however, that notwithstanding these actions, any solicitations for concession contracts and permits issued before the date of this publication will continue to be processed in accordance with applicable provisions of NPS–48.

As an internal staff manual, notice of the Sample Prospectus and Related Guidelines is not required to be published in the **Federal Register** nor is public comment on it required to be sought. However, in order to assure that the views of all interested parties are considered, the National Park Service is seeking public comment on its Sample Prospectus and Related Guidelines document and will consider all comments received and amend the document appropriately if public comments so warrant. Delaying the effective date of this document until after consideration of public comments is not in the public interest as there exists a large backlog of NPS concession contract renewals which are necessary to complete to allow the commencement of major renovation and construction programs in areas of the national park system, including improvements necessary to protect the health and safety of park visitors and NPS and concessioner employees. In addition, many concessioners are now operating under the terms of expired contracts and are, accordingly, in need of contract renewal actions as soon as possible to permit business planning, actions and investments which require the existence of a new contract for implementation. It is also noted that the Sample Prospectus and Related Guidelines document is intended to provide guidance to NPS personnel concerning possible means to implement new policies and procedures adopted in the new NPS concession contracting regulations and new standard language concession contract, both of which were adopted after extensive public comment periods and consideration by NPS of all comments received. Further public comment in advance of implementation of this internal staff manual is therefore not considered necessary and is impracticable if the contract renewal process is to commence in a timely manner.

The Sample Prospectus and Related Guidelines document is intended to be only a sample document. It is not meant to be a document which must be used as written in every instance. It may be modified as appropriate to fit the needs of individual situations. Further, this document is expected to be modified and refined over time as experience indicates that changes are needed and to meet the changing needs of the concession contracting program.

**DATES:** Comments on the Sample Prospectus and Related Guidelines must be submitted on or before the sixtieth day following publication of this notice.

**ADDRESSES:** Copies of the Sample Prospectus and Related Guidelines may be obtained by writing the Director, National Park Service, Washington, DC 20240 and written comments should be sent to this same address.

**FOR FURTHER INFORMATION CONTACT:** Wendy Mann of the National Park Service Concessions Division at the address given above; telephone (202) 343–1561.

Dated: March 1, 1994.

**Don H. Castleberry,**

*Acting Associate Director, Operations, National Park Service.*

[FR Doc. 94–6272 Filed 3–16–94; 8:45 am]

BILLING CODE 4310–70–M

## INTERSTATE COMMERCE COMMISSION

**[Docket No. AB–3 (Sub–No. 112)]**

### Missouri Pacific Railroad Company; Abandonment; In Woodson County, KS (Piqua Industrial Lead)

The Commission has issued a certificate authorizing the Missouri Pacific Railroad Company to abandon its 8.5-mile rail line known as the Piqua Industrial Lead, from milepost 382.5 near Durand to the end of the track at milepost 374.0 near Piqua, in Woodson County, KS. The abandonment certificate will be effective April 16, 1994, unless the Commission also finds that: (1) A financially responsible person has offered financial assistance (through subsidy or purchase) to enable

rail service to continue; and (2) it is likely that the assistance would fully compensate the railroad.

Requests for public use conditions must be filed with the Commission and the applicant by March 28, 1994.

Any financial assistance offer must be filed with the Commission and applicant no later than March 27, 1994. The following notation shall be typed in bold face on the lower left-hand corner of the envelope containing the offer: "Office of Proceedings, AB–OFA". Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27. Requests for public use conditions must conform with 49 CFR 1152.28(a)(2).

Decided: March 10, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin.

**Sidney L. Strickland, Jr.,**

*Secretary.*

[FR Doc. 94–6235 Filed 3–16–94; 8:45 am]

BILLING CODE 7035–01–P

## JAMES MADISON MEMORIAL FELLOWSHIP FOUNDATION

### Faculty Representative Appointment Information Collection

**AGENCY:** James Madison Memorial Fellowship Foundation.

**ACTION:** Request for information.

**SUMMARY:** The information sought on these proposed forms will help implement the James Madison Memorial Fellowship Act of 1986. The information gathered will enable the Foundation to distribute fellowship application forms and other information to those individuals who are appointed as Faculty Representatives on individual college and university campuses throughout the country.

**DATES:** Comments must be submitted in writing on or before March 31, 1994 in the **Federal Register.**

**ADDRESSES:** Send written comments to: James Madison Memorial Fellowship Foundation, 2000 K Street, NW., suite 303, Washington, DC 20006.

**FOR FURTHER INFORMATION CONTACT:** James M. Banner, Jr., (202) 653–8700.

**SUPPLEMENTARY INFORMATION:** As required by the Paperwork Reduction Act of 1980, the James Madison Memorial Fellowship Foundation has submitted a copy of the proposed forms to the Office of Management and Budget for its review (40 U.S.C. 3540(h)). Organizations and individuals desiring to submit comments on these information collection requirements should direct them to the Office of Information and Regulatory Affairs, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. The annual public reporting burden for this collection of information is estimated to average 5 minutes per response for an anticipated 1,000 Faculty Representatives.

For the reasons set forth in the preamble and under authority of 20 U.S.C. 4501 et seq., the following information will be solicited on forms from Faculty Representatives of the James Madison Memorial Fellowship Program: Questions requiring factual information only:

Faculty Representative's Legal Name
Faculty Representative's Title
Faculty Representative's Institution
Faculty Representative's Address
Faculty Representative's City, State, and Zip Code
Faculty Representative's Telephone Number and Extension
Faculty Representative's Fax Number
Faculty Representative's Internet or Bitnet E-Mail Address
Name of authorizing official appointing/reappointing Faculty Representative
Title of authorizing official appointing/reappointing Faculty Representative
Date of Appointment

**Paul A. Yost, Jr.,**

*President.*

[FR Doc. 94–6388 Filed 3–16–94; 8:45 am]

BILLING CODE 6820–05–M

### Fellowship

**AGENCY:** James Madison Memorial Fellowship Foundation.

**ACTION:** Request for information.

**SUMMARY:** The information sought on these proposed forms will help implement the James Madison Memorial Fellowship Act of 1986. The information gathered will enable the Foundation to select James Madison Fellows from among applicants in an annual national competition for fellowships. The information provided by applicants on application forms, by those whom they ask to evaluate their candidacies on evaluation forms, and by educational institutions on transcript request forms will be used by an independent review committee to select those candidates whom the committee will recommend for fellowships to the Foundation. The forms (except the voluntary survey form) will be used for no other purposes; the voluntary survey form will be used for statistical analysis only and will not be seen by the independent review committee nor used for selecting fellows.

**DATES:** Comments must be submitted in writing on or before March 31, 1994 in the **Federal Register.**

**ADDRESS:** Send written comments to: James Madison Memorial Fellowship Foundation, 2000 K Street, NW., suite 303, Washington, DC 20006.

**FOR FURTHER INFORMATION CONTACT:** James M. Banner, Jr., (202) 653–8700.

**SUPPLEMENTARY INFORMATION:** As required by the Paperwork Reduction Act of 1980, the James Madison Memorial Fellowship Foundation has submitted a copy of the proposed forms to the Office of Management and Budget for its review (40 U.S.C. 3540(h)). Organizations and individuals desiring to submit comments on these information collection requirements should direct them to the Office of Information and Regulatory Affairs, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. The annual public reporting burden for this collection of information is estimated to average 6 hours per response for an anticipated 1,000 applicants.

For the reasons set forth in the preamble and under authority of 20 U.S.C. 4501 et seq., the following information will be solicited annually on application and related forms from fellowship applicants to the James Madison Memorial Fellowship Program. Applicants will be both experienced high school teachers of American history, American government, and social studies (senior fellow applicants) and graduating college seniors and recent college graduates who wish to become secondary school teachers of the same subjects (junior fellow applicants). To avoid duplication in the text below, unless otherwise indicated, the information is solicited from both senior and junior fellows. That information solicited only from applicants for senior fellowships is preceded by "SR:" (SR: thus); that information solicited only from applicants for junior fellowships is preceded by "JR:" (JR: thus).

Application Forms:

**Questions Requiring Factual Information Only**

Affirmation of wish to be considered for a James Madison Fellowship and agreement to abide by Foundation regulations governing a fellowship: signature and date;

Type of fellowship for which you are applying;

Legal name and residence;
Home telephone number;
Work or campus telephone number;
Current [JR: campus] address;
How legal residence is established: place of registration to vote, in-state tuition eligibility, other;
Congressional district of legal residence;
Whether or not applicant is a U.S. citizen or U.S. national Yes or No;
Date of birth;
Sex;
Social Security Number (optional);
SR: School name;
SR: Name of school principal or head;
SR: School address;
SR: School type (check one): public, private, parochial;
SR: School location (check one): urban, suburban, rural;
JR: Name of the institution from which you will receive or did receive your baccalaureate degree;
JR: Institution president's name;
JR: Institution address;
JR: College type (check one): public, private;
JR: College type (check one): college, university;
JR: Cumulative grade point average as of January or upon graduation;
JR: Date degree expected or received (month/year);
Name of baccalaureate degree sought or held.

**Questions Requiring Factual and Explanatory Information**

Beginning with secondary school from which you graduated, list in chronological order all secondary schools and colleges you attended, including academic summer or special schools and courses. If more than four months elapsed between any phase of your education or between your education and your initial full-time teaching position, indicate your main activities during that period.

If you are a teacher, beginning with your first full-time teaching position, list in chronological order all full-time teaching positions you have held, including summer or special positions. List your current position and responsibilities. If more than three months elapsed between any phase of your professional career, explain the reasons for those breaks.

Why did you choose to become a secondary school teacher of American history, American government, or social studies? What do you hope to achieve as a secondary school teacher? How does secondary school teaching fit into your long-term career plans?

List and briefly describe the school, college, and community activities in which you have participated without compensation that may have influenced your decision to become a teacher, that may have contributed to your preparation for teaching, or that may relate to your responsibilities as a teacher. Indicate the dates, and degree of your involvement and explain the significance of these activities to your personal and professional aspirations.

List any awards, scholarships, fellowships, and appointments you have received in recognition of your achievements, activities, and leadership.

If you are a teacher, briefly describe and provide examples of your methods and approaches to classroom instruction. Be specific.

If you are a teacher, briefly describe your school and/or school district. Explain any particular circumstances about your school or district that affect your teaching.

What strengths of character, intelligence, personality, and ability do you have that contribute toward your success as a secondary school teacher of American history, American government, or social studies?

What limitations of character, intelligence, personality, and ability must you work to overcome in order to perform successfully as a secondary school teacher of American history, American government, or social studies?

Describe the course of graduate study you will pursue. Indicate the university you plan to attend, the specific degree you will seek, the subject of the degree, and the school of the university in which you will be enrolled. Include a list of courses related to the history, principles, and interpretation of the Constitution you plan to take; additional electives that you may be permitted to take; and which electives you plan to take. Place an asterisk next to those courses you will take during your first year of study. The Foundation expects that your graduate education will closely approximate the course of study you describe here and that you will notify the Foundation and explain changes in this course of study that may be necessary or desirable.

Describe how the educational plans outlined above will enhance your career as a teacher of American history, American government, or social studies and how they relate to your professional plans.

Briefly describe one or two books that you have read in the last year that have most affected you and explain why. These books do not need to be related to the Constitution or to your professional plans.

What interesting, unusual, or significant information about you, your family, your beliefs, or your interests do you wish to bring to the attention of the fellowship review committee?

*Applicant's Essay Form*

In an essay of no more than 600 words, present and justify your views about the importance of the study of the Constitution to young students and to their future lives and communities, to your own career aspirations, to your contributions to public and professional service, and to citizenship in a constitutional republic.

**Applicant's Signature and Date**

*Request for Evaluation Form*

Applicant's name:

I hereby _____ waive _____ do not waive my right of future access to the contents of this evaluation: signature and date.

Applicant's Signature and Date

This evaluator is (check one):

SR: A school superintendent, principal/head, department chair, or other supervisor who can evaluate the applicant's qualities as a teacher of American history, American government, or social studies and attest to the applicant's potential for graduate study;

SR: A colleague or supervisor who can attest to the applicant's depth of interest in those subjects;

SR: A person other than a supervisor or colleague who can attest to the applicant's commitment to civic, professional, and collegial activities;

JR: A dean, faculty member, or other college official who can attest to the applicant's potential for and commitment to a career of teaching American history, American government, or social studies in the secondary schools, and the applicant's potential for graduate studies;

JR: A faculty member who has taught the applicant in his or her major field of undergraduate study who can attest to the applicant's preparation and depth of interest in these studies and to the applicant's quality as a student;

JR: A person other than a dean, faculty member, or other college official who can evaluate the applicant's personal strengths and personal limitations (i.e., of character, intelligence, personality, and ability) and the applicant's commitment to civic activities and public service.

Evaluator should discuss the applicant's strengths and weaknesses, as well as knowledge of and efforts to overcome those weaknesses, in the following areas: intellect, character, and vision; academic abilities and completion of a graduate school

program; abilities and commitment as a secondary school teacher of American history, American government, or social studies; ability to work with others.

How long and in what capacity have you known the applicant?

Please rate the applicant in relation to other individuals you have known under similar circumstances (approximately ____ individuals over approximately ____ years) on the following grounds—historical knowledge, intellectual curiosity, independence of thought, involvement in civic activities, oral and written communication skills, motivation and energy, interpersonal skills—and on the following scale: outstanding (top 5%), unusual (top 10%), very good (top 25%), above average (top 40%), average (middle 20%), below average (lowest 40%), no knowledge.

Evaluator's name, title, affiliation, address, signature and date:

*Voluntary Survey Form*

Check one box beside the category providing descriptions of the race or national origin with which you most closely identify yourself: America Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; Hispanic; White, not of Hispanic origin; other (please specify).

Source(s) from which you learned about the James Madison Memorial Fellowship Program (check one): Faculty Representative; Career Counseling Office; Financial Aid Office; Department Chair in History, Political Science, or Education; School Social Studies Coordinator; a James Madison Fellow; colleague; periodical or newsletter; campus newspaper advertisements; other (please specify).

Fellowship applied for (check one): Senior, Junior.

Name:

**Paul A. Yost, Jr.,**

*President.*

[FR Doc. 94–6387 Filed 3–16–93; 8:45 am]

BILLING CODE 6820–05–M

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

### Advisory Council on Employee Welfare and Pension Benefits Plan; Notice of Meeting

Pursuant to the authority contained in section 512 of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting of the Working Group on Defined Contribution Plans of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held from 9:30 a.m. until 12 noon, Friday, April 8, 1994, in suite N–3437 AB, U.S. Department of Labor Building, third and Constitution Avenue NW., Washington, DC 20210.

This work group was formed by the Advisory Council to study issues relating to defined contribution plans covered by ERISA.

The purpose of the April 8 meeting is to take testimony regarding five areas of defined contribution plans, i.e., the role of the trend toward participant self-directed investments in determining benefit levels; the impact of the current regulatory scheme on benefit levels for defined contribution plans in general and 401(k) plans in particular; from a retirement policy perspective, the level of benefits provided by defined contribution plans in general and 401(k) plans in particular; mandatory employer contributions to defined contribution plans as a possible source of increase in the overall retirement income for most employees; the impact of increased educational efforts on benefit levels; and the impact of increased disclosure on benefit levels. The work group will also take testimony and or submissions from employee representatives, employer representatives and other interested individuals and groups regarding the subject matter.

Individuals or representatives of organizations wishing to address the work group should submit a written request on or before April 4, 1994 to William E. Morrow, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, suite N–5677, 200 Constitution Avenue NW., Washington, DC 20210. Oral presentations will be limited to ten (10) minutes, but witnesses may submit an extended statement for the record.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statement should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before April 4, 1994.

Signed at Washington, DC, this 11th day of March, 1994.

**Olena Berg,**

*Assistant Secretary, Pension and Welfare Benefits Administration.*

[FR Doc. 94–6160 Filed 3–16–94; 8:45 am]

BILLING CODE 4510–29–M

### Advisory Council on Employee Welfare and Pension Benefits Plan; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting of the Working Group on Healthcare Reform of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held from 9:30 a.m. until 12 noon, Thursday, April 7, 1994, in suite N–3437 AB, U.S. Department of Labor Building, Third and Constitution Avenue NW., Washington, DC 20210.

This work group was formed by the Advisory Council to study issues relating to healthcare reform for employee benefit plans covered by ERISA.

The purpose of the April 7 meeting is to receive testimony from interested persons on the impact of proposed federal healthcare reform legislation on self-insured, ERISA-covered employee welfare benefit plans as well as participating employees and their families. The work group will also take testimony and or submissions from employee representatives, employer representatives and other interested individuals and groups regarding the subject matter.

Individuals or representatives of organizations wishing to address the work group should submit a written request on or before April 4, 1994 to William E. Morrow, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, suite N–5677, 200 Constitution Avenue, NW., Washington, DC 20210. Oral presentations will be limited to ten (10) minutes, but witnesses may submit an extended statement for the record.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statement should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before April 4, 1994.

Signed at Washington, DC, this 11th day of March, 1994.

**Olena Berg,**

*Assistant Secretary, Pension and Welfare Benefits Administration.*

[FR Doc. 94–6161 Filed 3–16–94; 8:45 am]

BILLING CODE 4510–29–M

## Advisory Council on Employee Welfare and Pension Benefits Plan; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting of the Working Group on Reporting and Disclosure of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held from 1 p.m. until 3:30 p.m., Thursday, April 7, 1994, in suite N-3437 AB, U.S. Department of Labor Building, Third and Constitution Avenue, NW., Washington, DC 20210.

This work group was formed by the Advisory Council to study issues relating to reporting and disclosure for employee benefit plans covered by ERISA.

The purpose of the April 7 meeting is to hear testimony on the disclosure of plan information to participants and beneficiaries as identified in the Department of Labor's Disclosure Request For Information which appeared in the Monday, December 27, 1993 edition of the **Federal Register**, page 68339. The principal sources of information for such disclosure include summary plan descriptions, summary annual reports and individual benefit statements. The work group is interested in identifying statements. The work group is interested in identifying information that is useful to and used by participants as well as the costs and benefits of any proposed changes. The work group will also take testimony and or submissions from employee representatives, employer representatives and other interested individuals and groups regarding the subject matter.

Individuals or representatives of organizations wishing to address the working group should submit a written request on or before April 4, 1994 to William E. Morrow, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, suite N-5677, 200 Constitution Avenue, NW., Washington, DC 20210. Oral presentations will be limited to ten (10) minutes, but witnesses may submit an extended statement for the record.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statement should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before April 4, 1994.

Signed at Washington, DC this 11th day of March, 1994.

**Olena Berg,**

*Assistant Secretary, Pension and Welfare Benefits Administration.*

[FR Doc. 94-6162 Filed 3-16-94; 8:45 am]

BILLING CODE 4510-29-M

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## NUCLEAR REGULATORY COMMISSION

## Proposed Availability of FY 94 Funds for Financial Assistance (Grants) To Support Research at Educational Institutions and the Exchange of Information

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Nuclear Regulatory Commission (NRC), Office of Nuclear Regulatory Research, announces proposed availability of Fiscal Year (FY) 94 funds to support a limited number of research grants to educational institutions. These funds may also be used to support professional meetings and conferences for the exchange and transfer of research concepts and findings related to the safety of nuclear power production.

The FY 94 ceiling for research grants to educational institutions is approximately $1,218,000.00. Of this amount, approximately $817,000.00 will be available for new grants. Because of this limitation, proposed grant budgets should be restricted to about $50,000.00 per year, with total project funding not exceeding $100,000.00 over a two-year period. Proposals for new FY 94 research grants should be submitted between the date of this Notice and May 20, 1994. Proposals received after May 20, 1994 will be considered for FY 94 funding to the extent practicable.

**ADDRESSES:** Nuclear Regulatory Commission, ATTN: Grants Officer, Mail Stop P-841, Division of Contracts and Property Management, Office of Administration, Washington, DC 20555.

**FOR FURTHER INFORMATION CONTACT:** Leslie Mills or Dennis Tarner on (301) 492-7054.

**SUPPLEMENTARY INFORMATION:**

### Background

On November 27, 1993, the Nuclear Regulatory Commission (NRC) published in the **Federal Register** a notice that announced the proposed availability of FY 93 funds for the NRC Grant Program. The NRC is revising that notice to provide information on their grant program for FY 94.

### Scope and Purpose of This Announcement

Pursuant to Section 31.a and 141.b. of the Atomic Energy Act of 1954, as amended, the NRC's Office of Nuclear Regulatory Research proposes to support educational institutions, nonprofit entities, state and local governments, and professional societies through providing funds for expansion, exchange and transfer of knowledge, ideas, and concepts directed toward the NRC safety research program. The program includes, but is not limited to, support of professional meetings and conferences. In addition, the NRC has a limited amount for research grants to educational institutions (see topics below). The FY 94 ceiling for these grants is approximately $1,218,000.00 with approximately $871,000.00 of this amount available for new grants.

The purpose of this program is to stimulate research to provide a technological base for the safety assessment of system and subsystem technologies used in nuclear power applications. The results of this program will be to increase public understanding relating to nuclear safety, to pool the funds of theoretical and practical knowledge and technical information, and ultimately to enhance the protection of the public health and safety. In addition, each grant to an educational institution should contain elements which will potentially benefit the graduate research program of the institution, e.g., graduate student training.

The NRC encourages educational institutions to submit research grant proposals in the following areas:

1. Experiments and predictive modeling for thermal stratification, thermal stripping and flow-induced vibration in plant fluid systems.
2. Evaluation and modeling of phenomena associated with the addition of cooling water to a degraded core during various stages of a severe accident.
3. Modeling and experimentation on two-phase flow, interfacial relations, and heat transfer in reactor coolant systems. Experiments in modeling of passive heat transfer in natural circulation systems.
4. Development of condensation models for thermal-hydraulic systems codes with and without condensible gases.
5. Conduct experimentation and model development of the boron in reactor coolant systems under natural circulation conditions.
6. Development and validation of a standard model of human performance

in (a) nuclear power plant operations and maintenance, (b) medical uses of by-product materials, and (c) industrial uses of by-product materials.

7. Develop and codify pragmatic, statistically valid methods for updating severe accident frequency and consequence analysis to reflect results of new operational, experimental and calculation data.

8. Develop methods and comparison of probabilistic risk assessment (PRA) results with operational data and experience.

9. Studies of corrosion processes that lead to degradation of materials in light-water reactor components such as piping, reactor internals, and steam generators.

10. Development of nondestructive testing methods for in-situ evaluation of material properties and property degradation due to aging, such as fracture toughness, fatigue, residual life, and radiation effects.

11. Development of and/or validation of models to predict the propagation of seismic ground motion in Central and Eastern United States including the effects of ground motions on the response of NPPs and their site characteristics.

12. Development and/or validation of models to explain the quaternary tectonics and seismicity of the Central and Eastern United States (East of 105 degrees W).

13. Development of techniques and QA and QC procedures necessary for rapid bioassay analysis in the event of accidental internal exposure.

14. Studies of volcanism or other disruptive processes or events in the Basin and Range.

15. Development of improved instrumentation or techniques for measuring activity, radiation dose, and dose rates, especially from small radioactive particles.

16. Research on the metabolism of radionuclides and their compounds relative to the calculation of internal dose.

17. Investigation of radiation induced effects at the cellular/molecular levels and repairs thereof emphasizing the reduction of uncertainties in risk of deleterious health effects from low-level radiation.

18. Validation of approaches to quantitatively assess human health effects of radiation, including new approaches to analyses of human epidemiological studies and experimental animal studies.

19. Analysis of the effectiveness of decontamination technologies for land, structures, recycled materials and equipment and estimation of individual comparative costs.

20. Investigations, including natural analogue studies for long-term analyses, of coupling between hydrologic, thermal, chemical, and/or mechanical processes as they affect the simulation of high-level waste repository performance.

21. Development of methods to apply safety goal philosophy, including risk-based regulation.

**Eligible Applicants**

Educational institutions, nonprofit entities, State and Local governments, and professional societies are eligible to apply for a grant under this announcement.

**Factors Generally Indicating Support Through Grants**

The NRC's benefit from the results of grants should be no greater than for other interested parties, i.e., the public must be the primary beneficiary of the work performed. Surveys, studies, or research which provide specific information or data necessary for the NRC to exercise its regulatory or research mission responsibilities will not be funded by a grant. Applicants requesting support for work which has a direct regulatory application should submit their requests as an unsolicited proposal for consideration as a contract rather than a grant.

1. The primary purpose of NRC grants is to support the development of knowledge or understanding of the subject or phenomena under study.

2. The exact course of the work and its outcome are usually not defined precisely, and specific points in time for achievement of significant results need not be specified.

3. The NRC desires that the nature of the proposed investigation be such that the recipient will bear prime responsibility for the conduct of the research and exercise judgment and original thought toward attaining the scientific goals within broad parameters of the proposed research areas and the resources provided.

4. Meaningful technical reports (as distinguished from Semi-Annual Status Reports) can be prepared only as new findings are made, rather than on a predetermined time schedule.

5. Simplicity and economy in execution and administration are mutually desirable.

**Proposal Format**

Proposals should be concise and provide a thorough understanding of the proposed project. Neither unduly elaborate applications nor voluminous supporting documentation is desired.

State and local governments shall submit proposals utilizing the standard forms specified in Office of Management and Budget (OMB) Circular A–102 (Revised), Paragraph 6.c). Nonprofit organizations, universities, and professional societies shall submit proposals utilizing the standard forms stipulated in OMB Circular A-110, (Attachment M).

The format used for project proposals should give a clear presentation of the proposed project and its relation to the specific objectives contained in this notice. Each proposal should follow the format outlined below unless the NRC specifically authorizes exception.

1. *Cover Page.* the Cover Page should be typed according to the following format (submit separate cover pages if the proposal is multi-institutional):

*Title of proposal.* - To include the term "research," "study," "conference," "symposium," "workshop," or other similar designation to assist in the identification of the project;

Location and Dates for Conferences, Symposium, Workshop, etc.;

Names of Principal Researchers or Participants;

Total cost of Proposal; (Identify Cost by fiscal Year)

Period of Proposal;

Organization or Institution and Department;

Required Signatures:

Principal Participants

Name: _____

Date: _____

Address: _____

_____

Telephone No.: _____

Required Organization Approval

Name: _____

Date: _____

Address: _____

_____

Telephone No.: _____

Organization Financial Officer

Name: _____

Date: _____

Address: _____

_____

Telephone No.: _____

2. *Project Description.* Each proposal shall provide, in ten pages or less, a complete and accurate description of the proposed project. This section should provide the basic information to be used in evaluating the proposal to determine its priority for funding. Applicants must identify other possible sources of financial support for a particular project, and list those sources from which financial support has been or will be requested.

The information provided in this section must be brief and specific. Detailed background information may be included as supporting documentation to the proposal.

The following format shall be used for the project description:

(a) *Project Goals and Objectives.* The project's objectives must be clearly and unambiguously stated. The proposal should justify the project including the problems it intends to clarify and the development it may stimulate.

(b) *Project Outline.* The proposal should show the project format and agenda, including a list of principal areas or topics to be addressed.

(c) *Project Benefits.* The proposal should indicate the direct and indirect benefits that the project seeks to achieve and to whom these benefits will accrue.

(d) *Project Management.* The proposal should describe the physical facilities required for the conduct of project. Further, the proposal should include brief biographical sketches of individuals responsible for planning the project.

(e) *Project Costs.* Nonprofit organization shall adhere to the cost principles set forth in OMB Circular A–122. Educational institutions shall adhere to the cost principles set forth in OMB Circular A–21, and state and local government shall adhere to the cost principles set forth in OMB Circular A–87.

The proposal must provide a detailed schedule of project costs, identifying in particular—

(1) *Salaries*—in proportion to the time or effort directly related to the project;

(2) Equipment (rental only);

(3) Travel and Per Diem/Subsistence in relation to the project;

(4) Publication Costs;

(5) Other Direct Costs (specify)—e.g., supplies or registration fees;

Note—Dues to organizations, federations or societies, exclusive of registration fees, are not allowed as a charge.

(6) Indirect Costs (attached negotiated agreement/cost allocation plan); and

(7) *Supporting Documentation.* The supporting documentation should contain any additional information that will strengthen the proposal.

**Proposal Submission and Deadline**

This notice is valid for Federal Government Fiscal Year 94 (October 1, 1998 to September 30, 1994). Potential grantees are advised, however, that due to the limited funding available for new research grants to educational institutions, such proposals received after May 20, 1994, will be considered for FY94 funding to the extent practicable.

**Funds**

For Fiscal Year 94, the U.S. Nuclear Regulatory Commission, Office of Nuclear Regulatory Research, anticipates making a total of approximately $1,218,000.00 available for funding research grants to educational institutions. Of this amount, approximately $817,000.00 will be available for new research grants in FY94. Because of this limitation, proposed grant budgets should be restricted to about $50,000.00 per year, with total project funding not exceeding $100,000.00 over a period of two years.

**Evaluation Process**

All proposals received as a result of this announcement will be evaluated by an NRC review panel.

**Evaluation Criteria**

The award of NRC grants is discretionary. Generally, projects are supported in order of merit to the extent permitted by available funds.

Evaluation of proposals for research projects will employ the following criteria. No level of importance is implied by the order in which these criteria are listed.

1. Adequacy of the research design,
2. Scientific significance of proposal.
3. Technical adequacy of the investigators and their institutional base.
4. Relevance to a research area(s) described above.
5. Reasonableness of estimated cost in relation to the work to be performed and anticipated result.
6. Potential benefit of the project to the overall benefit of the institution's graduate research program.

Evaluation of proposals for professional meetings, conferences, symposia, etc., will employ the following criteria:

1. Potential usefulness of the proposed project for the advancement of scientific knowledge.
2. Clarity of statement of objectives, methods, and anticipated results.
3. Range of issues covered by the meeting agenda.
4. Qualifications and experience of project speakers.
5. Reasonableness of estimated cost in relation to anticipated results.

**Disposition of Proposals**

Notification of award will be made by the Grants Officer, and organizations whose proposals are unsuccessful will be so advised.

**Proposal Instructions and Forms**

Questions concerning the preceding information, copies of application forms, and applicable regulations shall be obtained from or submitted to (Grant application packages, Standard Form 424, must be requested in writing): U.S. Nuclear Regulatory Commission, ATTN: Grants Officer, Division of Contracts and Property Management, Mail Stop P–841, Office of Administration, Washington, DC 20555.

The address for hand-carried applications is: U.S. Nuclear Regulatory Commission, ATTN: Grants Officer, Division of Contracts and Property Management, Office of Administration, Mail Stop P–841, 7920 Norfolk Avenue, Bethesda, MD 20814.

**Note:** Upon delivery of the application to the NRC guard desk (at the above address), the guard should be requested to telephone the Division of Contracts and Property Management (Extension 27054) for pick-up of the application.

Nothing in this solicitation should be construed as committing the NRC to dividing available funds among all qualified applicants.

Dated at Bethesda, MD this 11th day of March, 1994.

For the U.S. Nuclear Regulatory Commission.

**Dennis Tarner,**

*Grants Officer, Division of Contracts and Property Management, Office of Administration.*

[FR Doc. 94–6267 Filed 3–16–94; 8:45 am]

BILLING CODE 7590–01–M

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**[Docket No. 40–8905]**

## Quivira Mining Co.; Ambrosia Lake Mill

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Notice of intent to amend Source Material License SUA–1473 to modify the erosion protection design of the plan for reclamation of the Ambrosia Lake Mill disposal area, and Notice of Opportunity to request a hearing.

**1. Proposed Action**

By letter dated January 7, 1994, Quivira Mining Company (QMC), holder of Source Material License SUA–1473 for the Ambrosia Lake Mill, requested an amendment to License Condition No. 37 to; (1) Eliminate having to open a new rock quarry and its related surface disturbance; (2) improve the erosion protection for the tailings impoundments; and (3) reduce the volume of waste rock generated at the crusher and thereby reduce the disturbance in that area.

**2. Reason for Request To Amend License**

License Condition No. 37 describes requirements that the licensee must comply with in reclaiming the site. As discussed, below, QMC is requesting modifications to this license condition.

The Nuclear Regulatory Commission (NRC) requires that rock used for erosion protection have the ability to withstand the forces of weathering for long periods of time. In accordance with this requirement, in the approved reclamation plan, QMC provided evidence that rock from an area known as La Chuchilla Ridge would meet the NRC criteria. To assure that this rock source is actually used to obtain rock for erosion protection, License Condition No. 37(J) specifically mentions that erosion protection materials must be obtained from La Chuchilla Ridge. QMC is requesting that License Condition 37(J) be revised to allow them to obtain rock from an existing quarry near the Homestake Mill in order to prevent having to disturb the La Chuchilla Ridge area. The durability of rock at the Homestake Quarry has been shown to be equivalent to the rock from La Chuchilla Ridge.

License Condition No. 37(K) specifies the gradation and sizing requirements of the rock to be used for erosion protection. For the outslopes of Ponds 1 and 2, four sizes of rock are required depending on where the rock is to be placed. In order not to have to process four different gradation sizes, QMC proposes to use larger rock than required in two areas of the outslopes. This would not only improve the erosion protection design, but would also reduce the disturbance in the area.

The approved reclamation plans does not require rock for erosion protection of the top surfaces of Ponds 1 and 2 as the surfaces are sufficiently flat to be stable under extreme flood conditions. QMC proposes to be allowed to place rock on the top surfaces of the two ponds if they so desire. This request would also improve the erosion protection design.

Paragraph 10 CFR 51.22 (c)(11), categorically excludes the requirement for an environmental assessment for this licensing action. That paragraph states that the categorical exclusion applies to the issuance of amendments to licenses for uranium mills provided that (1) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite, (2) there is no significant increase in individual or cumulative occupational radiation exposure, (3) there is no significant construction impact, and (4) there is no significant increase in the potential for or consequences from radiological accidents.

The licensing action discussed in this memorandum meets these criteria as the proposed amendment involves only changes in the erosion protection design. The proposed changes will provide larger rock than required in some areas, and will eliminate disturbing a new area for obtaining rock by using an existing quarry. Neither of these changes will result in adverse environmental impacts. An environmental report is not required from the licensee since the amendment does not meet the criteria of 10 CFR 51.60 (b)(2).

**3. Notice of Opportunity To Request Hearing**

In accordance with title 10, Code of Federal Regulations, part 2 (10 CFR part 2), paragraph 2.1205(c)(1), interested parties are hereby notified that they may request a hearing pursuant to the procedures set forth in 10 CFR 2.1205 within thirty (30) days of the publication of this notice.

Signed in Denver, Colorado this 4th day of March 1994.

**Raymond O. Gonzales,**

*Acting Director, Uranium Recovery Field Office, Region IV.*

[FR Doc. 94–6265 Filed 3–16–94; 8:45 am]

BILLING CODE 7579–01–M

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[Docket No. 50–139]

## The University of Washington; Consideration of Application for Renewal of Facility License

The U.S. Nuclear Regulatory Commission (the Commission) is considering renewal of Facility License No. R–73, as a possession only license from the present operating license, issued to the University of Washington for the Argonaut reactor located on the campus of the University in Seattle, Washington.

The renewal would extend the expiration date of Facility License No. R–73 to February 14, 1999, in accordance with the licensee's timely application for renewal as a possession only license by letter dated August 3, 23 and 31, 1989 and as modified on February 14, 1994. The operating license was modified by Amendment No. 15 to the license on May 7, 1990, to not permit possession of fuel on the site since all fuel had been removed from the facility and returned to its owner, the Department of Energy. The licensee is developing a plan to decommission the facility, and it is anticipated that the term of renewal will be sufficient to complete decommissioning and terminate the license.

Prior to a decision to renew the license as a possession only license, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

By April 18, 1994, the licensee may file a request for a hearing with respect to renewal of the subject facility license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and petition for leave to intervene. Requests for hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary of the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended

petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, at 2120 L Street, NW., Washington, DC by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 325–6000 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Seymour H. Weiss: petitioner's name and telephone number; date petition was mailed; The University of Washington; and publication date and page number of this **Federal Register** notice. A copy of that petition should also be sent to the Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555 and to Ms. Christine Hughes, Division Chief and Special Assistant to the Attorney General, University of Washington, 101 Administration, MS: AF–50, Seattle, Washington 98195, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the application for renewal dated August 3, 23 and 31, 1989, and as modified on February 14, 1994, which is available for public inspection at the Commission's Public Document Room at 2120 L Street, NW., Washington, DC 20555.

Dated at Rockville, Maryland, this 11th day of March 1994.

For the Nuclear Regulatory Commission.

**Seymour H. Weiss,**

*Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Operating Reactor Support, Office of Nuclear Reactor Regulation.*

[FR Doc. 94–6266 Filed 3–16–94; 8:45 am]

BILLING CODE 7590–01–M

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–33752; File No. SR–NSCC–94–01]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Fee Structure for the Mutual Fund Networking Service

March 10, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on January 26, 1994, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments from interested persons on the proposed rule change.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to establish a revised fee for providing the Mutual Fund Services Networking position files. The proposed fee change will provide for a more equitable allocation of fees among members of NSCC.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

In mid 1993, NSCC determined that the initially established fee structure for providing Mutual Fund Services Networking position files was no longer appropriate. On August 18, 1993, NSCC filed a rule change[2] which consisted of a waiver of $99 of the $100 fee charged to members for excess Networking position files. That filing indicated that the waiver would continue while NSCC determined a more appropriate fee. The purpose of the proposed rule change is to establish a revised fee for the Networking position records. The new fee structure is based on the number of records received by a participating broker and the number of subaccounts the broker maintains on the system. Effective January 1, 1994, for billing in February 1994, the new fee is $1.50 per thousand records received by a broker in excess of the number of subaccounts the broker maintains on Networking. NSCC will not assess a charge when the difference between these numbers is 5000 records or less in a month.

The proposed fee change will provide for a more equitable allocation of fees among members, so the proposed rule change is consistent with the requirements of Section 17A of the

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] Securities Exchange Act Release No. 32912 (September 16, 1993), 58 FR 49536 [File No. SR–NSCC–93–12].

Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NSCC does not believe that the proposed rule change will impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[3] and subparagraph (e) of Rule 19b–4 thereunder[4] because it involves the changing of a due, fee, or other charge imposed by the self-regulatory organization. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-referenced self-regulatory organization.

[3] 15 U.S.C. 78s(b)(3)(A) (1988).

[4] 17 CFR 240.19b–4(e) (1993).

All submissions should refer to File No. SR–NSCC–94–01 and should be submitted by April 7, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–6173 Filed 3–16–94; 8:45 am]

BILLING CODE 8010–01–M

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**[Release No. 34–33751; File No. SR–PSE–93–36]**

## Self-Regulatory Organizations; Pacific Stock Exchange; Notice of Proposed Rule Change Relating to Chinese Wall Procedures for Specialists and Specialist Firms

March 10, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 29, 1993, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The PSE is proposing to adopt a set of Chinese Wall procedures relating to Exchange specialists and specialist firms. The test of the proposed rule change is as follows:

Rule 4.19(a). A functional separation must be established (1) between a specialist firm and any associated approved person; and (2) between a specialist and any associated integrated member organization. The approved person or integrated member organization (collectively referred to as an "affiliated upstairs firm") must establish functional separation (a "Chinese Wall") as appropriate to its operation and further establish, maintain and enforce written procedures reasonably designed to prevent the misuse of material, non-public information, which includes review of employee and proprietary trading, memorization and documentation of procedures, substantive supervision of interdepartmental communications by the Exchange specialist firm's Compliance Department and procedures concerning proprietary trading when the firm is in possession of material, non-public information. The Exchange specialist firm or associated integrated member organization must obtain the prior written approval of the Exchange that it has complied with the requirements above in establishing functional separation as appropriate to the operation and that it has established proper compliance and audit procedures to ensure the maintenance of the functional separation. A copy of these Chinese Wall procedures, and any amendments thereto, must be filed with the Exchange's Financial Compliance Department.

(b) The following are the minimum procedural and maintenance requirements:

(1) The specialist's book must be kept confidential in accordance with Rule 5.29(d).

(2) The affiliated upstairs firm can have no influence on specific specialist trading decisions.

(3) Material, non-public corporate or market information obtained by the affiliated upstairs firm from the issuer may not be made available to the specialist.

(4) Clearing and margin financing information regarding the specialist may be routed only to employees engaged in such work and managerial employees engaged in overseeing operations of the affiliated upstairs firm and specialist entities.

(c) Information that may be made available to others.

(1) A broker associated with an affiliated upstairs firm may make available to the specialist only the market information that he or she would make available to an unaffiliated specialist in the normal course of his or her trading and "market probing" activity.

(2) A specialist may make known to a broker associated with an affiliated upstairs firm only has the information about market conditions in specialty stocks that he or she would make available in the normal course of specializing to any other broker and in the same manner as it would make such information available to any other broker. The specialist may make such market information available only upon request of the broker of the affiliated upstairs firm and may not provide such information on its own initiative.

(3) An affiliated upstairs firm can popularize a specialty stock provided it makes adequate disclosure about the existence of possible conflicts of interest.

(d) A specialist who becomes privy to material, non-public information must communicate that fact promptly to his or her firm's compliance officer or other designated official. The specialist shall seek guidance from the compliance officer or other designated official as to what procedures the specialist should follow after receipt of such information or such other action that should be taken. Appropriate records shall be maintained by the compliance officer or other designated official. The record should include a summary of the information received by the specialist and a description of the action taken by the compliance officer or other designated official. If the "book" is given up to another member of the specialist firm who is not in possession of the information or an independent specialist firm, the book must be transferred in a neutral fashion to ensure that the transfer itself does not disclose the material, non-

[5] 17 CFR 200.30–3(a)(12) (1993).

public information and the Exchange must be immediately informed and a record kept of the time the specialist reacquired the book reflecting acknowledgement by the compliance officer that the reacquisition was appropriate.

(e) The Exchange has established the following procedures to monitor compliance with this rule:

(1) Examination of the Chinese Wall procedures established by Exchange specialist firms.

(2) Surveillance of proprietary trades effected by an affiliated upstairs firm and its affiliated specialist or specialist firm.

Accordingly, the Exchange will conduct periodic examinations of the specialist firm's Chinese Wall procedures to ensure that a functional separation between the affiliated upstairs firm and the specialist or specialist firm has been created and thereafter maintained. The Exchange will also monitor the trading activities of affiliated upstairs firms and affiliated specialists in the firms' specialty stock in order to monitor the possible trading while in possession of material, non-public information through the periodic review of trade and comparison reports generated by the Exchange.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth is Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to require approved persons or integrated member organizations to establish functional separation as appropriate to their operations and further establish, maintain and enforce written procedures reasonably designed to prevent the misuse of material, non-public information. The proposed rule further requires that a copy of such procedures be provided to the Exchange for review and approval, and sets forth specific guidelines for member firms to follow in adopting, maintaining and enforcing Chinese Wall procedures.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act, in general, and Section 6(b)(5), in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments on the proposed rule change were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR–PSE–93–36 and should be submitted by April 7, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–6245 Filed 3–16–94; 8:45 am]

BILLING CODE 8010–01–M

## SMALL BUSINESS ADMINISTRATION

### Little Rock District Advisory Council; Public Meeting

The U.S. Small Business Administration Little Rock District Advisory Council will hold a public meeting at 9 a.m. on Monday, April 25, 1994, at the U.S. Small Business Administration, 2120 Riverfront Drive, suite 100, Little Rock, Arkansas, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Joseph T. Foglia, District Director, U.S. Small Business Administration, 2120 Riverfront Drive, suite 100, Little Rock, Arkansas 72202, (501) 324–5871.

Dated: March 10, 1994.

**Dorothy A. Overal,**

*Acting Assistant Administrator, Office of Advisory Councils.*

[FR Doc. 94–6208 Filed 3–16–94; 8:45 am]

BILLING CODE 8025–01–M

### Buffalo District Advisory Council; Public Meeting

The U.S. Small Business Administration Buffalo District Advisory Council will hold a public meeting at 10 a.m. on Thursday, April 28, 1994 at the Marine Midland Bank, One Marine Midland Plaza, 20th floor board room, Rochester, New York, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Franklin J. Sciortino, District Director, U.S. Small Business Administration, room 1311, 111 West Huron Street, Buffalo, New York 14202, (716) 846–4301.

Dated: March 10, 1994.

**Dorothy A. Overal,**

*Acting Assistant Administrator, Office of Advisory Councils.*

[FR Doc. 94–6201 Filed 3–16–94; 8:45 am]

BILLING CODE 8025–01–M

## Regulatory Reform Project

**AGENCY:** Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** The Small Business Administration (SBA) and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget have commenced a project to identify, recommend and help implement specific reforms of the regulatory process in order to ease the impact of government regulations on small businesses. Six Federal agencies are participating in the initial phase of the project: The Department of Labor, the Department of Justice, the Department of Transportation, the Environmental Protection Agency, the Internal Revenue Service, and the Food and Drug Administration. The project will begin with a Small Business Forum on Regulatory Reform to be held on March 17, 1994 in Washington, DC. This Forum will consist of a panel of senior representatives from the six agencies, chaired by Erskine B. Bowles, Administrator of the SBA, and Sally Katzen, Administrator of OIRA. They will listen to oral presentations from several members of the small business community and from SBA's Acting Chief Counsel for Advocacy. They also will be reviewing written statements submitted by other business owners who were unable to present their remarks to the Forum panel in person.

The Forum will be followed by an examination of the cumulative impact of regulations on five designated industries, representatives from various Federal regulatory agencies, with specific direction from those agencies participating on the Forum panel. By this Notice, SBA and OIRA announce that they are seeking written comments from interested members of the public to assist in successful completion of this project. These written comments will be considered by the five industry working groups in preparing reports to be presented at a second Small Business Forum, to be held in late June 1994.

**DATES:** Written comments must be received by May 2, 1994. The second Forum will be held in late June 1994.

**ADDRESSES:** Written comments should be mailed to Doris Freedman, Acting Chief Counsel for Advocacy, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Doris Freedman, 202/205–6533.

**SUPPLEMENTARY INFORMATION:** Executive Order 12866, issued on September 30, 1993, announces a government-wide commitment to regulatory reform and meaningful public participation in the regulatory process and directs the development of "streamlined regulatory approaches for small businesses and other entities." To this end, SBA and OIRA have initiated a project to bring together representatives of six Federal agencies for the purpose of identifying burdens imposed by present regulatory procedures and the means by which the regulatory process can be altered to facilitate participation by small businesses.

Initially, the regulatory impact on small business of six Federal agencies will be examined: The Department of Labor, the Department of Justice, the Department of Transportation, the Environmental Protection Agency, the Internal Revenue Service, and the Food and Drug Administration. The burden of compliance with each agency's regulations will be evaluated in terms of their individual and cumulative impact on small businesses in five discrete industry groups: (1) Processing of food and related products; (2) trucking and transportation; (3) restaurants; (4) environmental recycling and waste disposal; and (5) chemicals and metals.

A working group will be established for each of the five industry groups, composed of representatives from the six participating agencies, as well as representatives from SBA, OIRA and other Federal agencies. Each working group will meet over a ten-week period and will solicit the input and meaningful participation of small business owners, small business trade associations, State and local governments, and other interested parties, via oral presentations and written comments received during the initial 45 days of the ten-week period. Each working group will prepare a report with specific recommendations for improvements in the regulatory process and in any specific regulations which appear to affect the particular industry in an unduly burdensome way.

Extensive public participation is essential to this evaluative process. This participation will occur at the public Forum on March 17, 1994, and the second Forum in June of 1994. Each Forum will hear from representatives selected from various sectors of the small business community and will be attended by senior representatives from the six participating agencies. These agencies have stated publicly their commitment to working with each other and with members of the small business community toward the goal of regulatory reform.

Broader public participation in the form of written comments is also essential to this process and is being solicited through this Notice. Comments received by May 2, 1994 will be considered by the five industry working groups in preparing the reports which then will be presented by SBA at the second Forum. Public comments should be as specific as possible and should focus on possible constructive solutions to any problems presented. Each submission should identify the industry affected, so as to facilitate a referral to the appropriate industry working group. SBA, OIRA and the participating agencies are particularly interested in comments concerning the following:

—Specific ways in which existing regulatory programs and the regulatory process can be made more "user-friendly" to small businesses.

—Constructive suggestions for reducing forms and paperwork, particularly where they are duplicative, overly complicated or otherwise burdensome for small businesses.

—Effective ways to communicate with small business owners and to assist them in their understanding and implementation of complex regulations.

—Non-punitive methods for ensuring compliance with regulatory objectives or requirements, including preinspection programs, advisory services, greater reliance on communication and dissemination of information, and industry self-regulation.

—More effective ways to elicit participation from the private sector in efforts to simplify and clarify regulations so that they are not overly complex or unduly difficult to interpret or implement.

—Systematic ways to identify proposed regulations which are inconsistent with or duplicative of other regulations of the issuing agency or other Federal agencies.

—Suggestions for involving small business owners and their representatives in the rulemaking process in a more meaningful way.

Written comments must be received no later than May 2, 1994, in order to be incorporated into the industry working group reports to be presented at the second Small Business Forum on Regulatory Reform to be held in late June 1994. Comments which are received thereafter will be reviewed by SBA's Office of Advocacy and, to the extent feasible, will be transmitted to the affected agencies for their review as well.

Dated: March 10, 1994.

**Erskine B. Bowles,**

*Administrator.*

[FR Doc. 94–6198 Filed 3–16–94; 8:45 am]

BILLING CODE 8025–01–M

## Pacific Capital, L.P.; Notice of Filing of an Application for a License To Operate as a Small Business Investment Company

**[Application No. 99000104]**

Notice is hereby given of the filing of an application with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1990)) by Pacific Capital, L.P., 109 Westpark Drive, suite 260, Brentwood, Tennessee 37027, for a license to operate as a small business investment company (SBIC) under the Small Business Investment Act of 1958, as amended, (15 U.S.C. *et seq.*), and the Rules and Regulations promulgated thereunder.

The proposed officers, directors and partners of the Applicant will be as follows:

| Name | Title or position | Percent of ownership |
|---|---|---|
| General Partner: | | |
| Pacific Corporation, 109 Westpark Drive, Suite 260, Brentwood, TN 37027. | General Partner | 1.00 |
| Stephen F. Wood, 6001 Sherwood Drive, Nashville, TN 37215. | President/Director of Corporate General Partner | 00.00 |
| Siji Suzuki, 6 Dunsinane Lane, Bannockburn, IL 60015 | Chairman of the Board, Executive Vice President and sole shareholder of the Corporate General Partner. | 100.00 |
| James L. Williams, 6011 Hillsboro Pike, Nashville, TN 37215. | Vice President/Secretary and Treasurer of the Corporate General Partner. | 00.00 |
| Oliver Huang, 4/F, 6, Alley Z, Lane 120, Shiang-Yang Road, Nankang District, Taipei, Taiwan, R.O.C. | Director | 00.00 |
| Limited Partner: | | |
| Jung-Sheng Cheng, 4 Fl. 198 Nanking E. Road, Sec 5., Taipei, Taiwan, R.O.C. | Limited Partner | 99.00 |

Jung-Sheng Cheng, will own 100 percent of the Limited Partnership interest.

The Applicant, a Tennessee limited partnership, is expected to begin operations with $10,000,000 of private capital and will be an exclusive source (100 percent portfolio concentration) of equity capital and long-term loan funds for individual owner/operators of qualified nursing homes, that meet the criteria as small business concerns. The Applicant intends to conduct its business activities primarily in the Southeast and Midwestern sections of the United States.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the existing company under their management including profitability and financial soundness in accordance with the Small Business Investment Act and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Associate Administrator for Investment, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

A copy of the Notice shall be published in a newspaper of general circulation in the State of Tennessee.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: March 9, 1994.

**Robert D. Stillman,**

*Associate Administrator for Investment.*

[FR Doc. 94–6200 Filed 3–16–94; 8:45 am]

BILLING CODE 8025–01–M

# DEPARTMENT OF TRANSPORTATION

## Coast Guard

**[CGD 94–014]**

## Marine Safety Issues Related to Uninspected Towing Vessels

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of meeting.

**SUMMARY:** On March 2, 1994, the Coast Guard published, under this docket number, a notice of meeting and of availability of a study on the safety of towing vessels. Now the Coast Guard has added topics to the agenda of that meeting: (1) Radar-observer training for operators of uninspected towing vessels; (2) Coast Guard inspection of towing vessels; (3) manning of towing vessels; (4) pilotage requirement for operators of towing vessels; (5) and evaluation of regulations on retesting mariners. The Coast Guard is seeking public comment on the new topics as well as on the original agenda.

**DATES:** (1) The meeting will still take place on Monday, April 4, 1994, from 9 a.m. to 5 p.m. (2) Public comments on the agenda as enlarged will still be accepted until May 4, 1994.

**ADDRESSES:** (1) The meeting will be held at the Coast Guard Headquarters Building, room 2415, 2100 Second Street SW., Washington, DC. (2) Two copies of public comments should be forwarded to: Executive Secretary, Marine Safety Council, CGD 94–014, U.S. Coast Guard Headquarters (G–LRA. 3406), 2100 Second Street SW., Washington, DC 20593–0001.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stewart Walker, Project Manager, G–MVP–5, (202) 267–2705, Division of Merchant Vessel Personnel, Office of Marine Safety, Security, and Environmental Protection, U.S. Coast Guard. Headquarters, 2100 Second Street SW., Washington, DC 20593–0001.

**SUPPLEMENTARY INFORMATION:** The Coast Guard will hold a public meeting on April 4, 1994, to consider the study, "Review of Marine Safety Issues Related to Uninspected Towing Vessels" conducted by the Coast Guard, and will seek public comment on the recommendations identified in the study. The Coast Guard may use the study, along with public comment, to develop rules. Of particular interest, and likely to be the subject of expedited rulemaking, are measures that could

provide the necessary means to, and improve the navigational ability of, the operator; these measures include requiring the carriage of charts, publications, and radar, and requiring the operator to be qualified as a radar observer.

The Coast Guard recognizes that there are insufficient facilities for radar-observer training immediately available to accommodate all currently licensed operators of uninspected towing vessels (OUTVs). Therefore, the Coast Guard is contemplating for these OUTVs: (a) An interim, short-term, training program, required soon, followed by (b) a more extensive program leading to an endorsement as radar observer, required on or before the scheduled license renewal. The Coast Guard is contemplating for new applicants, only the more extensive program.

Comments on the practicality and utility of these requirements, their costs, the content of both interim and extensive courses, the length of time appropriate for implementation, and the administrative burden would be especially helpful.

Four of the topics that the Coast Guard has added—inspection, manning, pilotage of towing vessels, and evaluation of retesting regulations—it added because of Congressional interest. This arose during the Secretary of Transportation's testimony before the Subcommittee on Coast Guard and Navigation, House of Representatives, on March 3, 1994.

The Coast Guard encourages interested persons to submit written data, views, or arguments. Persons submitting comments should provide two copies, include their names and addresses, identify the study by docket number CGD 94–014, and give the reason for each comment. Each person wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

Dated: March 10, 1994.

**J.F. McGowan,**

*Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.*

[FR Doc. 94–6270 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–14–M

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## National Highway Traffic Safety Administration

**[Docket No. 94–3; Notice 2]**

## Ford Motor Company; Grant of Petition for Determination of Inconsequential Noncompliance

Ford Motor Company (Ford) of Dearborn, MI, determined that some of its replacement windshields failed to comply with the labeling requirements of 49 CFR 571.205, Motor Vehicle Safety Standard No. 205, "Glazing Materials," and filed an appropriate report pursuant to 49 CFR part 573, "Defect and Noncompliance Reports." Ford also petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) on the basis that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published on January 13, 1994, and an opportunity afforded for comment (59 FR 1989).

Standard No. 205, which incorporates, by reference, the American National Standards Institute's "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways" Z–26.1–1977, January 26, 1977, as supplemented by Z26.1a, July 3, 1980 (ANS Z26.1), specifies that, with certain exceptions, glazing materials for use in motor vehicles shall conform with Paragraphs S5, "Requirements," S6, "Certification and Marking," and ANS Z26.1.6, "Marking of Safety Glazing Materials." Specifically, section 6 of ANSI Z26.1 states "[G]lazing materials, which in a single sheet of material are intentionally made with an area having a luminous transmittance of not less than 70 percent (Test No. 2), adjoining an area that has less than 70 percent luminous transmittance, shall be permanently marked at the edge of the sheet to show the limits of the area that is intended to comply with Test No. 2. The markings shall be A↓S1 or A↑S2 etc. * * *"

Approximately 98,000 W1099V windshields manufactured from June 1992 through October 1993 and 14,800 W911V windshields manufactured from August 1992 to June 1993 are missing the A↓S1 marking at the bottom edge of the shade band. The subject windshields are manufactured as replacements for windshields in 1980 through 1994 model year Ford F-Series and Bronco vehicles.

Ford supported its petition for inconsequential noncompliance with the following:

The affected windshields were produced by a Ford supplier without A↓S1 markings at the bottom edge of the shade band, but meet all other marking and performance requirements of Standard No. 205 and ANSI Z26.1 including the appropriate AS1 marking in the area of the trademark identifying the type of construction of the glazing material.

[Ford believes that t]he omission of the marking presents no risk of accident or injury. Consequently in Ford's judgment, the omission is inconsequential as it relates to motor vehicle safety. The stated purposes of [Federal Motor Vehicle Safety Standard] FMVSS No. 205 are to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions. As previously noted, the affected windshields fully comply with the performance requirements of FMVSS No. 205 and although missing the A↓S1 marking at the bottom of the shade band, they do have the correct AS1 marking to indicate the type of construction of the glazing material. Because all performance requirements are met, the omission of the marking at the shade band has no effect upon the ability of the glazing to perform in the manner intended by the standard. Ford is not aware of any complaints, accidents, or injuries related to this condition.

No comments were received on the petition.

The noncompliance reported does not affect the performance characteristics of the glazing, and, hence, the noncompliance has no direct effect upon motor vehicle safety. Although the markings have been omitted in one area of the windshield, the correct designation, AS1, appears in the area of the trademark identifying the type of construction of the glazing material. Thus, the omission at the shade band will not prevent correct identification of the glazing by personnel conducting periodic motor vehicle inspections, or when it is necessary to replace the windshield. There is no need in either instance for knowledge of where the area of 70 percent or greater light transmittance begins.

In consideration of the foregoing, it is hereby found that petitioner has met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is granted.

(15 U.S.C. 1417; delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on: March 11, 1994.

**Barry Felrice,**

*Associate Administrator for Rulemaking.*

[FR Doc. 94–6163 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–59–M

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**[Docket No. 94–16; Notice 1]**

## Notice of Receipt of Petition for Determination That Nonconforming 1978 Through 1981 Bristol VRT Buses Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Request for comments on petition for determination that

nonconforming 1978 through 1981 Bristol VRT buses are eligible for importation.

**SUMMARY:** This notice requests comments on a petition submitted to the National Highway Traffic Safety Administration (NHTSA) for a determination that 1978 through 1981 Bristol VRT buses that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they have safety features that comply with, or are capable of being modified to comply with, all such standards.

**DATES:** The closing date for comments on the petition is April 18, 1994.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9:30 am to 4 pm.]

**FOR FURTHER INFORMATION CONTACT:** Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).)

**SUPPLEMENTARY INFORMATION:**

## Background

Under section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397 (c)(3)(A)(i)(I), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards. Where there is no substantially similar U.S.-certified motor vehicle, section 108(c)(3)(A)(i)(II) of the Act, 15 U.S.C. 1397 (c)(3)(A)(i)(II), permits a nonconforming motor vehicle to be admitted into the United States if its safety features comply with, or are capable of being modified to comply with, all applicable Federal motor vehicle safety standards based on destructive test data or such other evidence as NHTSA determines to be adequate.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register**.

Double Decker Bus Company of Denver, Colorado (Registered Importer No. R–93–015) has petitioned NHTSA to determine whether 1978 through 1981 Bristol VRT buses are eligible for importation into the United States. The petitioner contends that these vehicles are eligible for importation under section 108(c)(3)(A)(i)(II) of the Act, 15 US.C. 1397(c)(3)(A)(i)(II), because they have safety features that comply with, or are capable of being modified to comply with, all applicable Federal motor vehicle safety standards.

Specifically, the petitioner claims that 1978 through 1981 Bristol VRT buses have safety features that comply with Standard Nos. 102 *Transmission Shift Lever Sequence . . . .* (based on schematic diagram indicating starter interlock protection and photograph showing shift lever positions), 103 *Defrosting and Defogging Systems* (based on schematic diagram indicative starter interlock protection and photograph showing shift lever positions), 103 *Defrosting and Defogging Systems* (based on statement and photograph indicating that system incorporates electrically heated elements and heated air blowers), 104 *Windshield Wiping and Washing Systems* (based on statement and photographs indicating that system is pneumatically driven and offers full coverage of windshield at two set speeds and intermittently), 107 *Reflecting Surfaces* (based on statement and photographs indicating that reflective glare is kept to a minimum in the driver's cab through the use of matt black paint on the windshield wipers, the rearview mirror frame, the dash, and the cab walls), 120 *Tire Selection and Rims for Motor Vehicles other than Passenger cars* (based on statement and photographs showing certification markings on tires supplied by vehicle purchaser and rims selected by petitioner, and describing contents of tire information placard), 121 *Air Brake Systems* (based on statement, photographs, and specifications indicating that vehicles are equipped with an air compressors and associated equipment that provides greater cut-in pressure than 85 p.s.i.), 124 *Accelerator Control Systems* (based on statement and photographs indicating that throttle return is provided by pneumatic valve, supplemented by a spring loaded foot pedal and photographs showing pneumatic accelerator resetting is less than one second), 205 *Glazing Materials* (based on statement and photographs showing that glazing materials bear DOT certification markings), 207 *Seating Systems*, (based on statement and photographs indicating that seats are securely mounted to vehicle floor and photographs showing forces applied to driver's seat), 217 *Bus Window Retention and Release* (based on statement describing window retention test results, calculations indicating size and distribution of emergency exits, and photographs showing emergency exit markings), and 302 *Flammability of Interior Materials* (based on statements and photographs indicating composition of upholstery, and test results).

The petitioner also contends that 1978 through 1981 Bristol VRT buses are capable of being modified to comply with the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Installation of a potentiometer wired in series to provide variation in panel lighting; (b) installation of dash-mounted high beam telltale; (c) installation of U.S.-model license plate lamp.

Standard No. 106 *Brake Hoses*: replacement of flexible brake hoses on front wheels with U.S.-model parts.

Standard No. 108 *Lamps, Reflective Devices, and Associated Equipment*: installation of the following equipment bearing DOT certification markings: (a) Two sealed beam headlamps, three amber identification lamp clusters, two amber clearance lamps, and two amber length and height markers at the front end of the vehicle; (b) two tail lamp assemblies, three red identification lamp clusters, two red clearance lamps, two red length and height markers, two red side marker/reflectors, and one license plate illumination lamp at the rear end of the vehicle; (c) two amber reflectors at the midsection of the vehicle's right side; (d) two amber reflectors at the midsection of the vehicle's left side.

Standard No. 111 *Rearview Mirrors*: replacement of the rearview mirrors with U.S.-model parts.

Standard No. 125 *Warning Devices:* procurement of three U.S.-model reflective warning triangles to be carried on vehicle.

Standard No. 208 *Occupant Crash Protection:* installation of a U.S.-model Type 2 seat belt at the driver's position.

Standard No. 209 *Seat Belt Assemblies:* installation of a U.S.-model Type 2 seat belt at the driver's position.

Standard No. 210 *Seat Belt Assembly Anchorages:* use of 16–20UNF–2A hardened bolts, flat washers, lock washers, and nuts as anchorage hardware.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 15 U.S.C. 1397(c)(3) (A)(i)(II) and (C)(iii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on March 10, 1994.

**William A. Boehly,**

*Associate Administrator for Enforcement.*

[FR Doc. 94–6164 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–59–M

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**[Docket No. 94–14; Notice 1]**

## Receipt of Petition for Determination That Nonconforming 1990 Mercedes-Benz 300SE Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for determination that nonconforming 1990 Mercedes-Benz 300SE passenger cars are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a determination that a 1990 Mercedes-Benz 300SE that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because: (1) It is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

**DATES:** The closing date for comments on the petition is April 18, 1994.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9:30 am to 4 pm).

**FOR FURTHER INFORMATION CONTACT:** Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

**SUPPLEMENTARY INFORMATION:**

### Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency than publishes this determination in the **Federal Register.**

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer No. R–90–007) has petitioned NHTSA to determine whether 1990 Mercedes-Benz 300SE (Model ID 126.024) passenger cars are eligible for importation into the United States. The vehicle which G&K believes is substantially similar is the 1990 Mercedes-Benz 300SE that Daimler Benz A.G. manufactured for importation into and sale in the United States, and certified as conforming to all applicable Federal motor vehicle safety standards.

The petitioner states that it carefully compared the non-U.S.-certified 300SE to its U.S.-certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that the non-U.S.-certified 300SE, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S.-certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified 1990 model 300SE is identical to the U.S.-certified 1990 model 300SE with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence . . .*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*,116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, and 219 *Windshield Zone Intrusion*.

Petitioner also contends that the non-U.S.-certified 1990 model 300SE is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp that displays the seat belt symbol; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror, which is convex but lacks the required warning statement.

Standard No. 114 *Theft Protection:* Installation of a buzzer microswitch in

the steering lock assembly, and a warning buzzer.

Standard No. 115 *Vehicle Identification Number:* Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power-Operated Window Systems:* Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 206 *Door Locks and Door Retention Components:* Modification of the rear door locks to conform to the standard.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of a seat belt warning buzzer; (b) replacement of the existing Type 1 rear seat belts with U.S.-model belts equipped with retractors; (c) installation of knee bolsters to augment the vehicle's airbag-based automatic restraint system.

Standards No. 214 *Side Door Strength:* Installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel and the evaporative emissions collection canister.

Standard No. 302 *Flammability of Interior Materials:* Treatment of interior materials with a fire retardant spray.

Additionally, the petitioner states that the bumpers on the non-U.S.-certified 1990 model 300SE must be reinforced to comply with the Bumper Standard found in 49 CFT part 581.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 15 U.S.C. 1397(c)(3)(A)(i)(I) and (c)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: February 23, 1994.

**William A. Boehly,**

*Associate Administrator for Enforcement.*

[FR Doc. 94–6175 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–59–M

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**[Docket No. 94–15; Notice 1]**

## Receipt of Petition for Determination That Nonconforming 1993 Mercedes-Benz 300SE Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for determination that nonconforming 1993 Mercedes-Benz 300SE passenger cars are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a determination that a 1993 Mercedes-Benz 300SE that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because; (1) It is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

**DATES:** The closing date for comments on the petition is April 18, 1994.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9:30 am to 4 pm)

**FOR FURTHER INFORMATION CONTACT:** Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

**SUPPLEMENTARY INFORMATION:**

### Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer No. R–90–007) has petitioned NHTSA to determine whether 1993 Mercedes-Benz 300SE (Model ID 140.032) passenger cars are eligible for importation into the United States. The vehicle which G&K believes is substantially similar is the 1993 Mercedes Benz 300SE that Daimler Benz A.G. manufactured for importation into and sale in the United States, and certified as conforming to all applicable Federal motor vehicle safety standards.

The petitioner states that it carefully compared the non-U.S.-certified 300SE to its U.S.-certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that the non-U.S.-certified 300SE, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S.-certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified 1993 model 300SE is identical to the U.S.-certified 1993 model 300SE with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence . . . .*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106, Brake Hoses, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201*Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*,

207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the non-U.S.-certified 1993 model 300SE is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp that displays the seat belt symbol; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp asemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror, which is convex but lacks the required warning statement.

Standard No. 114 *Theft Protection:* Installation of a buzzer microswitch in the steering lock assembly and a warning buzzer.

Standard No. 115 *Vehicle Identification Number:* Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power-Operated Window Systems:* Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 206 *Door Locks and Door Retention Components:* Modification of the rear door locks to comply with the standard.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of a seat belt warning buzzer; (b) replacement of the existing Type 1 rear seat belts with U.S.-model belts equipped with retractors; (c) replacement of the existing air bag with a U.S.-model component. The petitioner claims that the vehicle is equipped with knee bolsters as part of its existing automatic restraint system.

Standard No. 214 *Side Door Strength:* Installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the non-U.S.-certified 1993 model 300SE must be reinforced to comply with the Bumper Standard found in 49 CFR part 581.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 15 U.S.C. 1397 (c) (3) (A) (i) (I) and (C) (ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: February 23, 1994.

**William A. Boehly,**

*Associate Administrator for Enforcement.*

[FR Doc. 94–6174 Filed 3–16–94; 8:45 am]

BILLING CODE 4910–59–M

## DEPARTMENT OF THE TREASURY

### Public Information Collection Requirements Submitted to OMB for Review

March 10, 1994.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

**Office of Thrift Supervision**

*OMB Number:* 1550–0013.

*Form Number:* Thrift Bulletin 23–2.

*Type of Review:* Revision.

*Title:* Request of Service Corporation Activity.

*Description:* 12 CFR 545.74 requires federal associations to obtain approval or notify the OTS prior to engaging in activities through a service corporation that are not preapproved by regulation. The regulation also contains a recordkeeping requirement for securities brokerage services. These requirements allow the OTS to review service corporation activities and to ensure that they will not adversely affect an institution's safety and soundness.

*Respondents:* Businesses or other for-profit.

*Estimated Number of Respondents/Recordkeepers:* 152.

*Estimated Burden Hours Per Respondent/Recordkeeper:* 3 hours.

*Frequency of Response:* Other (submission required for all non-preapproved service corporation activity requests).

*Estimated Total Reporting/Recordkeeping Burden:* 469 hours.

*Clearance Officer:* Colleen Devine (202) 906–6025, Office of Thrift Supervision, 2nd Floor, 1700 G. Street, NW., Washington, DC 20552.

*OMB Reviewer:* Gary Waxman (202) 395–7340, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

**Lois K. Holland,**

*Departmental Reports, Management Officer.*

[FR Doc. 94–6230 Filed 3–16–94; 8:45 am]

BILLING CODE 4810–25–P

### Public Information Collection Requirements Submitted to OMB for Review

March 10, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

**Bureau of the Public Debt**

*OMB Number:* 1535–0089.

*Form Number:* None.

*Type of Review:* Extension.

*Title:* Implementing Regulations: Government Securities Act of 1986.

*Description:* The regulations require government securities brokers and

dealers to make and keep records concerning their business activities and their holdings of securities, to submit financial reports, and to make certain disclosures to investors. The regulations require depository institutions to keep records concerning non-fiduciary holdings of government securities. The goal is investor protection.

*Respondents:* Businesses or other for-profit.

*Estimated Number of Respondents/Recordkeepers:* 2,800.

*Estimated Burden Hours Per Response/Recordkeeper:* 210 hrs., 8 mins.

*Frequency of Response:* Monthly, Quarterly, Annually, Other (one-time filing).

*Estimated Total Reporting/Recordkeeping Burden:* 432,915 hours.

*Clearance Officer:* Vicki S. Ott (304) 480–6553, Bureau of the Public Debt, 200 Third Street, Parkersburg, West Virginia 26106–1328.

*OMB Reviewer:* Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

**Lois K. Holland,**

*Departmental Reports, Management Officer.*

[FR Doc. 94–6231 Filed 3–16–94; 8:45 am]

BILLING CODE 4810–40–P

## UNITED STATES INFORMATION AGENCY

### Enrichment Programs for Self-Sponsored International Students and U.S. Government-Sponsored International Grantees in the Washington, DC, Metropolitan Area

**ACTION:** Notice; request for proposals.

**SUMMARY:** The Bureau of Educational and Cultural Affairs of the United States Information Agency (USIA) seeks applications from non-profit organizations in the Washington, DC metropolitan area to coordinate and implement programs which enhance the experience of international students attending colleges and universities in the Washington, DC area. The recipient will develop programs which serve to familiarize international students with Washington's complex cultural, political, and ethnic structures and provide a bridge between the campus environment and the community. It will also provide off-campus services to international students visiting Washington, DC.

The recipient will also provide support for Fulbright enrichment programs for foreign grantees in the Washington, DC area. Enrichment programs should be designed primarily for Fulbright students, but may include teachers, senior scholars, and other participants in programs supported by USIA. USIA anticipates awarding up to $70,000 for the implementation and coordination of both these programs. This support is not intended to replace private efforts in this field but rather to supplement such efforts with financial assistance.

**ANNOUNCEMENT NAME AND NUMBER:** All communications with USIA concerning this announcement should refer to the above title and reference number E/ASA–94–01.

**DATES:** Deadline for proposals: All proposals must be received at the U.S. Information Agency by close of business (5 p.m., Eastern Standard Time) Friday, April 22, 1994. Faxed documents will not be accepted, nor will documents postmarked on April 22, 1994, but received at a later date.

**DURATION:** The duration of the grant should be from July 1, 1994 through June 30, 1995. Programs may begin no earlier than July 1, 1994. No funds may be expended until the grant agreement is signed.

**ADDRESSES:** A total of fifteen copies of the application should be submitted to the office below. Three copies (one a signed original) should include the completed application, including tabs A–U; the other 12 copies should include tabs A–D. U.S. Information Agency, Reference number: E/ASA–94–01, Grants Management Division, E/XE, 301 4th Street SW., room 336, Washington, DC 20547.

**FOR FURTHER INFORMATION CONTACT:** Interested U.S. organizations should contact Suzanne Dawkins at the U.S. Information Agency, 301 4th Street SW., Advising and Student Services Branch (E/ASA), room 349, Washington, DC 20547, 202–619–5594 or 202–619–5434 to request detailed application packets, which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life.

Overall authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87–256 (Fulbright Hays Act). The purpose of the Act is to "enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." Programs and projects must conform with all Agency requirements and guidelines and are subject to final review by the USIA contracting officer.

**Overview**

An ideal program would include the following elements: Direct services, community outreach programs, and workshops that provide international students with an opportunity to experience the United States—its history, culture, values, policies, and life-styles. Programs should support self-sponsored international students as well as Fulbright students, teachers, senior scholars, and other participants in programs supported by USIA.

**Guidelines**

*General/Organizational*

The recipient will provide programs which enhance the experiences of self-sponsored and U.S. Government-sponsored international students either attending colleges and universities in the Washington, D.C. area or visiting the area. Government-sponsored grantees include Fulbright students, teachers, seniors scholars, and other participants in programs supported by USIA.

Proposals should include a listing of names and titles of the executive officer(s) of the applicant and of the person(s) directly responsible for the project. Resumes or vitae of key personnel should be provided. USIA recommends the inclusion of brochures and general information concerning the applicant and evidence of previous experience with international students in the proposal package.

Applicants should demonstrate the ability to recruit and maintain the necessary cadre of volunteers required to participate in program events.

*Direct Services*

Proposals should demonstrate the applicant's ability to provide a variety of direct services to international students which may include: The operation and maintenance of a housing referral service; the publication of a newsletter; student orientation and re-entry programs; and the organization of social

and cultural events. Applicants should also demonstrate a willingness to provide services to traveling foreign students from outside the metropolitan area and show flexibility in accommodating their requests.

*Community Outreach*

USIA seeks to enhance the experiences of international students through contact with the greater community and to provide the residents of Washington at-large an opportunity to participate in a mutually enriching experience. The Agency encourages the inclusion of home hospitality and community education programs in proposals.

*Workshops*

Another goal of this project is the identification of international graduate students who have leadership potential and whose participation in specially tailored programs may make a substantial contribution to mutual understanding and communication between the U.S. and their home country in the future. International leadership workshops are considered integral to the accomplishment of this goal.

Therefore, proposals should include specifics concerning the design and implementation of workshops capable of accommodating at least twenty (20) international student participants each. Workshops should address such topics as: foreign policy, international trade and business, mass media, and other issues relevant to potential international leaders.

An outline of proposed workshop activities should be included in proposals. The outline should demonstrate the recipient's ability to enlist the participation of informed lecturers, keynote speakers, and/or presenters whose credentials and experience are evidence of in-depth knowledge of workshop topics. Invited speakers should provide international students with access to expertise and insights not otherwise available to them.

The recipient will also be responsible for soliciting nominations of workshop participants from colleges and universities in the Washington, DC metropolitan area.

**Proposed Budget**

Applicants must submit a comprehensive line-item budget for which specific details are available in the application packet. The budget award should not exceed $70,000: $20,000 for Fulbright enrichment programs and $50,000 for the activities of self-sponsored students. The applicant should submit separate line-item budges for (1) Fulbright enrichment (not to exceed $20,000); and (2) self-sponsored foreign grantees (not to exceed $50,000). Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000.

Cost-sharing is encouraged. Cost-sharing may be in the form of allowable direct or indirect costs. The recipient must maintain written records to support all allowable costs which are claimed as being its contribution to cost participation, as well as cost to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A110, Attachment E—Cost sharing and matching should be described in the proposal. In the event the recipient does not provide the minimum amount of cost-sharing as stipulated in the recipient's budget, the Agency's contribution will be reduced in proportion to the recipient's contribution.

The recipient's proposal shall include the cost of an audit that: (1) Complies with the requirements of OMB Circular No. A–133, Audits of Institutions of Higher Education and Other Nonprofit institutions; (2) complies with the requirements of American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) No. 92–9; and (3) includes review by the recipient's independent auditor of a recipient-prepared supplemental schedule of indirect cost rate computation, if such a rate is being proposed.

The audit costs shall be identified separately for: (1) Preparation of basic financial statements and other accounting services; and (2) preparation of the supplemental reports and schedules required by OMB Circular No. A–133, AICPA SOP 92–9, and the review of the supplemental schedule of indirect cost rate computation.

Applicants should refer to the application package for a list of allowable costs.

**Review Process**

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the appropriate geographic area office, and the budget and contracts offices. Proposals may also be reviewed by the Agency's Office of General Counsel. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

**Review Criteria**

Technically eligible applications will be competitively reviewed according to the following criteria:

*a. Quality of Program Plan*

Proposals should exhibit a through knowledge and understanding of the needs of students living in the Washington metropolitan area, and exhibit originality, substance, and rigor.

*b. Program Planning*

Proposals must include a detailed agenda and relevant workplan of program activities. The agenda should adhere to the program overview and guidelines described above.

*c. Ability To Achieve Program Objectives/Institutional Capacity*

Proposed personnel and institutional resources should be adequate and appropriate to achieve the program goals and adhere to the guidelines described above. The applicant should demonstrate an ability to recruit and maintain a volunteer cadre and a relationship with colleges and universities in the Washington metropolitan area to successfully accomplish the goals of the program.

*d. Multiplier Effect/Impact*

Program activities should be designed to foster long-term mutual understanding between citizens of the United States and other countries.

*e. Institution's Track Record/Ability*

Proposals should demonstrate a track record of successful programs, including responsible fiscal management and full compliance with all reporting requirements for Agency grants. The Agency will consider the past performance of prior grantees and the demonstrated potential of new applicants.

*f. Evaluation Plan:*

Proposals should provide a plan for evaluation by the grantee institution, including periodic progress reports.

*g. Cost-Effectiveness*

The overhead and administrative components of grants, as well as salaries and honoraria, should be kept as low as

possible. All other items should be necessary and appropriate.

*h. Cost-Sharing*

Proposals should maximize cost-sharing through other private sector support as well as institutional direct-funding contributions. Evidence of such cost sharing should be detailed in the proposal.

**Notice**

The terms and conditions published in the RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final awards cannot be made until funds have been fully appropriated by Congress, and allocated and committed through internal USIA procedures.

**Notification**

All applicants will be notified of the results of the review process on or about June 15, 1994. Funded proposals will be subject to periodic reporting and evaluation requirements.

Dated: March 12, 1994.

**Barry Fulton,**

*Associate Director, Acting Bureau of Educational and Cultural Affairs.*

[FR Doc. 94-6263 Filed 3-16-94; 8:45 am]

BILLING CODE 8230-01-M

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## American Institute at the Institute of Foreign Languages at Nizhniy Novgorod (IFLNN)

**AGENCY:** United States Information Agency.

**ACTION:** Notice; request for proposals.

**SUMMARY:** The Bureau of Educational and Cultural Affairs of the United States Information Agency announces a program of support for the establishment of an American Institute at the Institute of Foreign Languages in Nizhniy Novgorod (IFLNN) in Russia. The purpose of this program is to significantly improve the Russian Federation's teaching capabilities in English language and American business practices/culture. The IFLNN is a recognized leader throughout the New Independent States in producing language specialists and providing in-service teacher training for students and specialists from throughout the former Soviet Union. The IFLNN is working to develop interdisciplinary specialization in international business and American studies to train a cadre of language-qualified business professionals. The IFLNN seeks an American partner to assist them in this endeavor.

**DATES:** Deadline for proposals: Proposals must be received at the United States Information Agency by 5 p.m. Washington, DC time on May 6, 1994. Proposals received after this deadline will not be eligible for consideration. Faxed documents will not be accepted, nor will documents postmarked on May 6, 1994 but received at a later date. It is the responsibility of grant applicants to ensure that their proposal is received by the above deadline.

**ADDRESSES:** Three originals, containing Tabs A–U (see "Application Checklist" in program guidelines packet), and 12 copies, containing Tabs A–D of the proposal, are to be submitted by the deadline to: U.S. Information Agency, Ref.: USIA IFLNN Program, Office of Grants Management, E/XE, room 357, 301 4th Street SW, Washington, DC 20547.

**FOR FURTHER INFORMATION CONTACT:** For general information and requests for application packets, which include all necessary forms and guidelines for preparing budgets, interested institutions should contact Ms. Robin Kline or Ms. Deborah Trent at (202) 619–5289, or write to the following address: Specialized Programs Unit (E/ASU), Office of Academic Programs, rm. 349, U.S. Information Agency, 301 4th Street SW, Washington, DC 20547.

**SUPPLEMENTARY INFORMATION:** The IFLNN program is authorized by the Freedom Support Act of 1992 and funded under the Foreign Appropriations Bill of 1994.

Pursuant to the Bureau of Educational and Cultural Affairs' authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life.

**Overview**

The American Institute at the IFLNN will expand the pool of Russians qualified in English and familiar with Western business practices, finance, management, commercial transactions, and the American political and economic system as an environment for business. This program will provide up to $500,000 to support an institutional linkage with the IFLNN for three (3) years; start date for the program should be September, 1994, with faculty in place in Nizhniy Novgorod not later than October 1, 1994. The U.S. partner institution will assist with the development of faculty and curriculum in the fields of English as a Foreign Language (EFL), business, and American studies. Program activities will include faculty and post-graduate student exchanges (post-graduates must be on a "faculty track," involved with teaching at participating institutions), and some outreach to the U.S./Russian business communities to involve them in developing appropriate business curricula. The U.S. partner must dedicate significant staff and faculty time to the project. The program will be implemented primarily through a grant to an accredited four-year U.S. post-secondary institution or consortium of accredited institutions and scholarly/professional associations.

Nizhniy Novgorod has been the setting for key economic and democratic reform in Russia. U.S. presence in the area is growing, including Peace Corps volunteers, U.S. business interests, and visiting USG officials. The focus of the U.S. effort has been to build a "critical mass" for reform among regional and local government officials, business leaders and educators. One element of this critical mass includes English language training for Russians which can be used in their professional fields. To this end, the IFLNN program will help train a pool of language-qualified professionals, enabling them to take advantage of expanded opportunities for technical assistance, bilateral exchanges, other government and private sector training programs, and commercial relations.

**Program Objectives**

The IFLNN program has three principal objectives: (1) To focus additional resources in support of democratic and market reform in Nizhniy Novgorod. English language teaching and American studies will be used as vehicles to teach business English and American business practices, and American forms of government.

(2) To establish a training center for faculty from other institutes of higher education. IFLNN's program will "train the trainers," emphasizing curriculum development, teacher training, and educational testing.

(3) To facilitate the creation of a linkage between IFLNN and U.S. institutions of higher learning that will continue to flourish after U.S. Government funding has ceased to be available.

**Grant Activities**

To achieve program objectives, the grantee institution/consortium will: (1) Help develop a structure for interdisciplinary training programs in

English as a Foreign Language (EFL), business and management practices, and American studies at the IFLNN.

(2) Conduct faculty and post-graduate student* exchanges in EFL, business, and American studies. Each exchange of persons must be a minimum of one month; however, longer visits, especially those involving faculty, are encouraged and are an important competitive factor. (*Post-graduate students must be on a faculty track and must not exceed 25% of all participants).

(3) Provide for a U.S. faculty member who must be in residence in Nizhniy Novgorod for the duration of the program as program director to ensure everyday oversight of program details.

(4) Arrange exchanges of other university personnel, including library and administrative officials.

(5) Implement exchanges of library materials.

(6) Develop new curricula and teaching materials, emphasizing content-area language instruction and EFL methodology developments.

(7) Develop testing methods.

(8) Advise IFLNN administrators on management, budget, fundraising skills, and other areas needed to operate in a decentralized environment.

(9) Undertake the translation and publication of texts, as well as the distribution of relevant publications.

**Under Separate Funding, USIA Will Supplement Activities Conducted by the Grantee Institution and IFLNN With**

(1) An English Foreign Language Fellow (EFLF), assigned by the USIA office in Moscow, who will serve for two years as coordinator of U.S. Government-funded programs at IFLNN, including general oversight and monitoring. The EFLF will serve as the U.S. Information Agency presence at, and liaison between departments within, the IFLNN. University representatives must regularly consult with the EFLF regarding IFLNN activities.

(2) Fulbright lecturers, academic specialists, and other support for the IFLNN.

(3) The rights to Western texts which could be published locally.

(4) Support for a student advising office, to provide interested students with information about admissions, courses of study, and other data regarding possible study in the United States, as well as information about other USG-funded exchanges and training programs.

(5) An information center, which the USIA office in Moscow is in the process of establishing.

**Guidelines**

*Eligibility*

In the U.S., participation in the program is open to accredited four-year colleges and universities with established American studies and business programs. Consortia of four-year colleges and universities are also eligible. Colleges/universities applying under this program may collaborate with U.S. scholarly, professional, or international educational associations and organizations. Proposals from institutions with experience working in Russia will receive preference. Proposals from a consortium must be submitted by a single member institution with authority to represent the consortium. The Agency encourages proposals from, and consortia including, eligible Historically Black Colleges and Universities (HBCUs) and other institutions in the U.S. with significant minority student enrollment. U.S. institutions are responsible for the submission of proposals and must collaborate with the IFLNN in planning and preparing proposals. U.S. and Russian institutions are encouraged to consult about the proposed project with U.S. Information Service (USIS) offices in Moscow.

*Institution Representatives*

Participants representing U.S. institutions and traveling under USIA grant support must be U.S. citizens. Participants representing the IFLNN must be citizens, nationals, or permanent residents of Russia. Projects must comply with J–1 visa regulations and must refer to this requirement in the proposal narative.

*Ineligibility*

A proposal will be deemed technically ineligible if:

(1) It does not fully adhere to the guidelines established herein and in the application packet, including budgetary requirements.

(2) The U.S. applicant is not an accredited four-year college or university.

(3) The project includes profits or fees.

(4) The project does not constitute a direct partnership with the IFLNN.

(5) The project does not provide for in-country presence of American faculty.

**Proposed Budget**

A comprehensive line item budget must be submitted with the proposal by the deadline. Funds requested from the Agency must not exceed $500,000 for a program not less than three years in duration. The Agency reserves the right to reduce, increase, or otherwise modify proposal budgets in accordance with the needs of the program. Specific guidelines for budget preparation are available in the application packet.

*Allowable Costs*

Program Costs

—Travel: International and domestic (via American flag carriers). May include one planning trip with one American and one IFLNN participant.
—Per diem and maintenance (one month minimum): Including lodging, meals and incidental expenses.
—Salaries and benefits for U.S. participant(s) while in residence in Nizhniy Novgorod.
—Honoraria or compensation for in-country work, not to exceed $100 per day per person.
—Student exchanges (not to exceed 25% of all exchanges): Travel, per diem/maintenance, memberships and conferences (IFLNN students only), educational materials, medical insurance, and other direct program costs for post-graduate faculty-track student exchanges.

Tuition fees are not an eligible cost under this program.

—Membership in U.S. professional associations and fees for attendance at professional conferences in the U.S. for foreign participants.
—Educational materials, including but not limited to: Translation and publication of instructional materials; collections to be placed in the IFLNN information center; electronic communications; other equipment as needed. These costs may not exceed 25% of the total requested grant amount.
—Medical insurance for foreign participants during U.S. visits. Medical insurance is mandatory for all participants in J–1 visa exchange programs.

Administrative Costs (Not to Exceed 20% of Requested Budget)

—Salaries and benefits.
—Communications (telephone, facsimile, postage, etc.)
—Office supplies.
—Other direct costs.

Indirect costs or overhead costs are not eligible for funding under this program.

Special Note on Cost-Sharing

Cost-sharing may be in the form of allowable direct or indirect costs. The recipient must maintain written records to support all allowable costs which are claimed as being its contribution to cost

participation, as well as cost to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A110, Attachment E. Cost-sharing and matching should be described in the proposal. In the event the recipient does not provide the minimum amount of cost sharing as stipulated in the recipient's budget, the USIA contribution will be reduced in proportion to the recipient's contribution.

The recipient's proposal shall include the cost of an audit that: 1. Complies with the requirements of OMB Circular No. A–133, Audits of Institutions of Higher Education and Other Nonprofit Institutions;

2. complies with the requirements of American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) No. 92–9; and.

3. includes review by the recipient's independent auditor of a recipient-prepared supplemental schedule of indirect cost rate computation, if such a rate is being proposed. The audit costs shall be identified separately for:

1. preparation of basic financial statements and other accounting services; and.

2. preparation of the supplemental reports and schedules required by OMB Circular A–133, AICPA SOP 92–9, and the review of the supplemental schedule of indirect cost rate computation.

**Application Requirements**

Proposals must be submitted by the deadline and must conform to the eligibility requirements identified in this announcement and in the application packet.

1. A proposal cover sheet (in addition to the Bureau cover sheet) with names of institutions, project directors, their addresses, telephone and fax numbers. A sample cover sheet format is included in the application packet.

2. A comprehensive line item budget outlining specific expenditures and anticipated funding sources. Detailed information concerning eligible and ineligible items and required budget format is available in the application packet. The proposed budget must conform with the allowable costs described in this document and the guidelines found in the application packet. Budget items requiring additional explanation should be contained in a brief budget narrative.

3. Documentation of institutional support for the proposed program, including signed letters of endorsement from the president, chancellor, or director of the U.S. institution(s) and the IFLNN, making specific reference to the IFLNN program. The letter from the IFLNN must include a commitment by the IFLNN to maintain their faculty/staff exchange participants on salary and benefits during the exchange. A general letter of support or an agreement between the participating institutions without reference to the IFLNN program will not fulfill this requirement. This document must be received at USIA by 5 p.m. Washington, DC, time on May 20, 1994. A sample letter of endorsement and commitment is included in the application packet.

**Review Process**

The IFLNN program review process will be comprised of technical and Agency reviews. Proposals will be deemed technically eligible only if they adhere to the guidelines established herein and in the application packet. Technically eligible proposals will be reviewed by the Office of Academic Programs, appropriate geographic area offices, and budget and contract offices. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

**Review Criteria**

Technically eligible applications will be competitively reviewed according to the following criteria: 1. Soundness of proposal indicating academic and professional quality, as reflected by a clear statement of program goals and means to accomplish the goals, and detailed description of project with statement on how the proposed project will be implemented and evaluated.

2. Probable impact of the proposed partnership in achieving the goal of reforming educational administration and curricula at the foreign partner institution.

3. Feasibility of the program plan as it relates to stated goals and activities of the RFP.

4. Quality of scholarly and professional credentials/experience of participants in relation to the goals of the proposed exchange plan, including language proficiency.

5. Appropriateness of length of exchange visits, given project goals.

6. Evidence of strong institutional commitment by participating institutions, demonstrated in part by cost-sharing and letters of institutional support.

7. Evidence of mutual advancement of cultural and political understanding of Russia and the U.S. through development of individual and institutional ties.

8. Evidence from U.S. institutions of prior experience in the region.

9. Promise of long-term impact in achieving Agency/legislative objectives.

10. USIA overseas post assessment of feasibility.

11. Cost-effectiveness.

12. Sustainability of project/follow-on activities subsequent to Agency funding.

**Notice**

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

**Notification**

All applicants will be notified of the results of the review process on or about August 1, 1994. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: March 12, 1994.

**Barry Fulton,**

*Acting Associate Director, Bureau of Educational and Cultural Affairs.*

[FR Doc. 94–6264 Filed 3–16–94; 8:45 am]

BILLING CODE 8230–01–M

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## Enrichment Programs for International Students in the New York City Metropolitan Area

**AGENCY:** United States Information Agency.

**ACTION:** Notice—request for proposals.

**SUMMARY:** The Bureau of Educational and Cultural Affairs of the United States Information Agency seeks applications from non-profit organizations in the New York metropolitan area to coordinate and implement programs which enhance the experience of self-sponsored international students attending colleges and universities in the New York City area. The organization will develop programs that serve to familiarize international students with New York City's complex cultural, political, and ethnic structures, and provide a bridge between the campus environment and American communities.

USIA anticipates awarding up to $35,000 for the implementation and coordination of these programs. This

amount may augment functions currently provided to international students by educational and other institutions.

**DATES:** Deadline for proposals: All copies must be received at the U.S. Information Agency by 5 p.m. Washington, DC time on April 15, 1994.

Faxed documents will not be accepted, nor will documents postmarked on April 15, 1994 but received at a later date. It is the responsibility of each grant applicant to ensure that proposals are received by the above deadlines.

The duration of the grant will be July 1, 1994 through June 30, 1995. No funds may be expended until the grant agreement is signed.

**ADDRESSES:** The original and 15 copies of the completed application, including required forms, should be submitted by the deadline to: U.S. Information Agency, Ref.: E/ASA–92–02, Office of Grants Management, E/XE, 301 4th Street SW., room 336, Washington, DC 20547.

**FOR FURTHER INFORMATION CONTACT:** Interested organizations should contact Shirley Graham at the U.S. Information Agency, Advising and Student Services Branch (E/ASA), Room 349, 301 4th Street, SW., Washington, DC 20547; telephone: (202) 619–5435 to request detailed application packets, which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Bureau's authorizing legislation, programs must maintain a nonpolitical character and should be balanced and representative of the diversity of American political, social and cultural life. Overall authority for these programs is contained in the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87–256 (Fulbright-Hays Act). The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." Programs and projects must conform with all Agency requirements and guidelines and are subject to final review by the USIA contracting officer.

**Overview**

Through a grant to a non-profit organization in the New York city metropolitan area, USIA seeks programs that would enable self-sponsored international students to experience the United States: Its history, culture, values, policies and lifestyles. Self-sponsored international students should be provided an opportunity to utilize the city's resources productively; and to take an active role in city life. To understand more fully American life and culture, students must be provided the opportunity to become personally involved with and understand "typical" American activities such as volunteerism, observance of national and religious holidays, and cultural and sports events. In addition, self-sponsored international students should be encouraged to share their culture and knowledge with American students at all levels. Also important are programs which introduce foreign students to the U.S. government structure, the electoral process, the U.S. economy, business culture and trade issues, environmental protection, the arts and American cultural heritage. A variety of approaches such as workshops, home hospitability, and community outreach programs may be utilized.

Enrichment programs should be designed not only to enhance international students' understanding of America's cultural and ethnic diversity, but they should also enable the students to teach Americans their own cultural, ethnic, political, and social diversity, thereby promoting mutual understanding and long-term friendships. This multicultural component can be met by emphasizing interaction—interpersonal, intercultural communication—between students and American citizens.

Another focus of this program could be to identify international students having leadership potential whose experience in this program could make a substantial contribution to mutual understanding and communication between the U.S. and their home countries in the future. In this regard, workshops to develop such leadership skills as public speaking and conflict resolution for future international leaders should be included in the program. Organizations must provide a program outline demonstrating their ability to enlist the participation of informed lecturers, keynote speakers, and/or recognized experts whose credentials and experience are evidence of in-depth knowledge of workshop topics.

**Guidelines**

Proposals should include a listing of names and titles, of the executive officer(s) of the organization and of the person(s) directly responsible for the project. Resumes or curriculum vitae of key personnel should be provided.

Organizations should demonstrate the ability to recruit and maintain the necessary cadre of volunteers required to participate in program events.

**Proposed Budget**

Organizations must submit a comprehensive line-item budget for which specific details are available in the application packet. Budget will not exceed $35,000.

Cost sharing is encouraged. Cost sharing may be in the form of allowable direct or indirect costs. The recipient must maintain written records to support all allowable costs which are claimed as being its contribution to cost participation, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, Attachment E. Cost sharing and matching should be described in the proposal. In the event the recipient does not provide the minimum amount of cost sharing as stipulated in the recipient's budget, the Agency's contribution will be reduced in proportion to the recipient's contribution.

The recipient's proposal shall include the cost of an audit that: (1) Complies with the requirements of OMB Circular No. A–133, Audits of Institutions of Higher Education and other Nonprofit Institutions; (2) complies with the requirements of American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) No. 92–9; and (3) includes review by the recipient's independent auditor of a recipient-prepared supplemental schedule of indirect cost rate computation, if such rate is being proposed.

The audit costs shall be identified separately for: (1) Preparation of basic financial statements and other accounting services; and (2) preparation of the supplemental reports and schedules required by OMB Circular No. A–133 AICPA SOP 92–9, and the review of the supplemental schedule of indirect cost rate computation.

**Review Process**

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the budget and contracts offices. Proposals may also be reviewed by the Agency's Office of General Counsel. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

**Review Criteria**

Technically eligible applications will be competitively reviewed according to the following criteria:

a. *Quality of program plan:* Proposals should exhibit a thorough knowledge and understanding of the needs of self-sponsored students living in the New York metropolitan area, as well as the Agency's mission to promote mutual social, cultural, and political understanding between the people of the United States and the people of other countries.

b. *Program planning:* Proposal must include a detailed agenda of program activities and demonstrate their potential effectiveness in promoting mutual understanding. Agenda should adhere to the program overview and guidelines described above. Program activities should emphasize cross-cultural sensitivity, i.e. demonstrate knowledge of specific cultures and customs, and include workshops/seminars on interpersonal/intercultural communication.

c. *Institutional capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program goals and adhere to the guidelines described above.

d. *Multiplier effect/impact:* Program activities should be designed to foster long-term mutual understanding between citizens of the United States and other countries, as well as the establishment of long-term individual and consequentially institutional linkages—for example, by identifying international students having leadership potential as described in the program overview above.

e. *Institution's track record/ability:* Proposals should demonstrate a track record of successful programs, including responsible fiscal management and full compliance with all reporting requirements for past Agency grants, if any, as determined by USIA's Office of Contracts (M/KG). The Agency will consider the past performance of prior grantees and the demonstrated potential of new applicants.

f. *Evaluation plan:* Proposals should provide a plan for evaluation by the grantee institution, and periodic progress reports.

g. *Cost-effectiveness:* The overhead and administrative components of grants, as well as salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Details on budget preparation are included with application package.

h. *Cost-sharing:* The Agency encourages cost-sharing through other private sector support as well as institutional direct-funding contributions. Evidence of such cost sharing should be detailed in proposal.

**Notice**

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final awards cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

**Notification**

All applicants will be notified of the results of the review process on or about May 15, 1994. Funded proposals will be subject to periodic reporting and evaluation requirements.

Dated: March 10, 1994.

**Barry Fulton,**

*Associate Director, Acting Bureau of Educational and Cultural Affairs.*

[FR Doc. 94–6038 Filed 3–16–94; 8:45 am]

BILLING CODE 8230–01–M

# Sunshine Act Meetings

Federal Register
Vol. 59, No. 52
Thursday, March 17, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## FEDERAL ELECTION COMMISSION

**DATE AND TIME:** Tuesday, March 22, 1994 at 10:00 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:**

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbrtration
Internal personnel rules and procedures or matters affecting a particular employee

**DATE AND TIME:** Wednesday, March 23, 1994 at 10:00 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:**

Internal Personnel Rules and Procedures or matters affecting a particular employee
Audits conducted pursuant to Title 26, U.S.C.

**DATE AND TIME:** Thursday, March 24, 1994 at 10:00 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This meeting will be open to the public.

**ITEMS TO BE DISCUSSED:**

Correction and Approval of Minutes
Petition for Rulemaking Filed by the Center for Responsive Politics
Legislative Recommendations, 1994 (continued from meeting of March 10, 1994)
Administrative Matters

**PERSON TO CONTACT FOR INFORMATION:** Press Officer, Telephone: (202) 219–4155.

**Delores Hardy,**
*Administrative Assistant.*

[FR Doc. 94–6466 Filed 3–15–94; 3:08 am]

BILLING CODE 6715–01–M

# Corrections

Federal Register
Vol. 59, No. 52
Thursday, March 17, 1994

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

### 43 CFR Public Land Order 7029

[OR-943-4210-06; GP4-038; OR-19014, OR-19115]

### Partial Revocation of Executive Order Dated December 12, 1917, and Secretarial Order Dated December 12, 1917; Oregon

*Correction*

In rule document 94-4094 appearing on page 8868 in the issue of Thursday, February 24, 1994, make the following corrections:

1. In the first column, under **SUMMARY**, in the tenth line, "Grand" should read "Grant".

2. In the same column, in paragraph 1., in the fifth line, "Waterproof" should read 'Waterpower".

BILLING CODE 1505-01-D

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[Docket No. CO-050-4210-04; COC54886]

### Notice of Realty Action; Colorado

*Correction*

In notice document 94-2632 beginning on page 5610 in the issue of Monday, February 7, 1994, under **DATES**, in the second line, "March 9, 1994" should read "May 8, 1994".

BILLING CODE 1505-01-D

federal register

Thursday
March 17, 1994

## Part II

# Department of Defense

### Department of the Army

32 CFR Part 536
The Army Claims System; Proposed Rule

**DEPARTMENT OF DEFENSE**

**Department of the Army**

**32 CFR Part 536**

**The Army Claims System**

**AGENCY:** Department of the Army, DOD

**ACTION:** Proposed Rule.

**SUMMARY:** The Department of the Army announces a revision and consolidation of 32 CFR parts 536, Claims Against the United States and 537, Claims on Behalf of the United States in order to bring them in line with new policies and procedures being promulgated in Army Regulation 27–20, Claims. This revision retains part 536 as The Army Claims System. Part 537 will be removed and held in reserve for future use. This part prescribes the policies, procedures, and responsibilities for investigating, processing, and settling claims against and in favor of the United States under the authority conferred by certain statutes, regulations, international and interdepartmental agreements, and Department of Defense directives. It is intended to ensure that claims are properly investigated, adjudicated objectively and fairly, and either paid or collection action initiated. Because of the complexity and length of changes and consolidation of parts 536 and 537, a breakout of the scope or responsibilities of each subpart to this whole part is listed in the Supplemental Information part of this submission. JAG offices, individuals and/or organizations currently using Army Regulation 27–20 or the current issue of 32 CFR part 536 and 537, dated 1 July 1993, should review this revision against the current versions in order to determine the additions, deletions or other changes being made. By reviewing the supplemental information portion, reading of the complete part becomes necessary in order to understand the entire part.

**DATES:** Comments must be received by the Army Claims Service not later than April 18, 1994.

**ADDRESSES:** Director, U.S. Army Claims Service, Building 4411, Llewellyn Ave., Fort Meade, Maryland 20755–5360.

**FOR FURTHER INFORMATION CONTACT:** LTC Cashiola, (301) 677–7622 or 7960.

**SUPPLEMENTARY INFORMATION:** (Subpart A). Subpart A is the introduction of part 536. (Subpart B). Subpart B describes the investigation and processing of claims investigation and the importance of claims investigation. (Subpart C). This subpart is applicable in all locations and prescribes the substantive bases and special procedural requirements for the settlement of claims against the United States for death; personal injury; or damage, loss, or destruction of property caused by military personnel or civilian employees of the DA acting within the scope of their employment and incident to the noncombat activities of the DA, provided such claim is not for personal injury or death of a member of the Armed Forces or Coast Guard or civilian officer or employee whose injury or death is incident to service. (Subpart D). This subpart prescribes the substantive bases and special procedural requirements for the administrative settlement of claims against the United States under the FTCA and the implementing Attorney General's Regulations based on death, personal injury, or damage to or loss of property that accrues on or after 18 January 1967. (Subpart E). This subpart prescribes the substantive bases and special procedural requirements for the administrative settlement and payment, in an amount not more than $1,000, of any claim against the United States not cognizable under any other provision of law for damage or loss of property, or for personal injury or death caused by a member or employee of the DA incident to the use of a U.S. vehicle at any location or incident to the use of other U.S. property on a Government installation. (Subpart F). This subpart is applicable in all places and sets forth the procedures to be followed in the settlement and payment of claims for death, personal injury, or damage, loss, or destruction of property caused by members or employees of the Army National Guard; noncombat activities of the Army National Guard when engaged in training or duty under 32 U.S.C. provided such claim is not for personal injury or death of a member of the Armed Forces or Coast Guard and an employee whose injury or death is incident to service. (Subpart G). This subpart provides procedures and defines responsibilities for the investigation, processing, and settlement of claims arising out of acts or omissions of members of a foreign military force or civilian component present in the United States, or a territory, commonwealth, or possession thereof under the provisions of reciprocal international agreements which contain claims settlement provisions applicable to claims arising in the United States such as Article VIII of the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty. (Subpart H). This subpart deals with claims against the United States. Title 10, U.S.C., section 4802, provides for the settlement or compromise of claims for damage caused by a vessel of, or in the service of, the Department of the Army (DA) or by other property under the jurisdiction of the DA; compensation for towage and salvage service, including contract salvage, rendered to a vessel of, or in the service of, the DA or other property under the jurisdiction of the DA or damage caused by a maritime tort committed by any agent or employee of the DA or by property under the jurisdiction of the DA. (Subpart I). This subpart sets for the standards to be applied and the procedures to be followed in the processing of claims for damage, loss, or destruction of property owned by or in the lawful possession of an individual whether civilian or military, a business, a charity, or a State or local government, where the property was wrongfully taken or willfully damaged by military members of DA. (Subpart J). This subpart implements the Foreign Claims Act (FCA) and authorizes the administrative settlement of claims of inhabitants of a foreign country, or by a foreign country or a political subdivision thereof, against the United States for personal injury or death or property damages caused outside the United States, its territories, commonwealths, or possessions by military personnel or civilian employees of the DA, or claims which arise incident to noncombat activities of the Army. (Subpart K). This subpart deals with personal claims and related recovery actions, delegation of authority and prescribes the substantive bases and special procedural rules for the administrative settlement of claims against the United States submitted by the Active Army, Army National Guard and U.S. Army Reserve personnel, and civilian employees of DOD and DA for damage to or loss of personal property incident to their service. (Subpart L). This subpart sets forth procedures to be followed in the settlement and payment of claims by employees of nonappropriated fund activities for the loss of or damage to personal property incident to their employment, and for claims generated by the acts or omissions of the employees of such funds. (Subpart M). This subpart establishes the authority and responsibility for affirmative claims. This subpart prescribes procedures for the administrative determination, assertion, collection, settlement, and waiver of claims in favor of the United States for damage to, loss, or destruction of Army property, and for the recovery of the reasonable value of medical care furnished or to be furnished by the

United States under the statutes cited in section 536.213. (Subpart N). This subpart sets forth procedures for all aspects of records management to include, arrangement of files, file management, maintenance of and retrieval of files, files disposition, etc., and monthly claims reporting system as pertains to Claims Office Administration.

**Executive Order 12291**

This proposed rule has been reviewed under Executive Order 12291. The effect of this proposed rule on the economy will be less than $100 million.

**Regulatory Flexibility Act**

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980. This action does not have a significant impact on a substantial number of small entities.

**Paperwork Reduction Act**

This proposed rule does not contain reporting or recordkeeping requirements subject to approval by the Office of the Management and Budget under the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

**List of Subjects in 32 CFR Part 536**

Claims, Foreign claims, Tort claims.

32 CFR part 536 is proposed to be revised to read as follows:

## PART 536—THE ARMY CLAIMS SYSTEM

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**Appendix A to Part 536—References**

**Appendix B to Part 536—Glossary**

**Authority**: 10 U.S.C. 939, 2733, 2734, 2734a, 2736, 2737, 3012, 4801 through 4804, and 4806; 28 U.S.C. 1346(b), 2401(b), 2402, 2671 through 2680; and 32 U.S.C. 715.

## Subpart A—The Army Claims System

### General

**§ 536.1 Purpose.**

This part prescribes the policies, procedures, and responsibilities for investigating, processing, and settling claims against and in favor of the United States under the authority conferred by certain statutes, regulations, international and interdepartmental agreements, and Department of Defense (DOD) directives. It is intended to ensure that claims are properly investigated, adjudicated objectively and fairly, and either paid or collection action initiated.

**§ 536.2 References.**

Required and related publications and prescribed and referenced forms are listed in appendix A to this part.

**§ 536.3 Explanation of abbreviations and terms.**

Abbreviations and special terms used in this regulation are explained in appendix B to this part.

**§ 536.4 Types of claims.**

(a) This regulation covers the following type of claims:

(1) Claims cognizable under the following claims settlement authorizations:

(i) The Military Claims Act (MCA), 10 U.S.C. 2733. (See subpart C.)

(ii) The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671–2680. (See subpart D.)

(iii) The Act of 9 October 1962, 10 U.S.C. 2737. (See subpart E.)

(iv) The National Guard Claims Act (NGCA), 32 U.S.C. 715. (See subpart F.)

(v) Title 10, United States Code (U.S.C.), section 2734a and 2734b. (See subpart G.)

(vi) The Maritime Claims Settlement Act, 10 U.S.C. 4801–4804, 4806. (See subpart H.)

(vii) Article 139, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 939. (See subpart I.)

(viii) The Foreign Claims Act (FCA), 10 U.S.C. 2734. (See subpart J.)

(ix) Title 31, U.S.C., section 3721. (See subpart K.)

(x) Federal Claims Collection Act, 31 U.S.C. 3711. (See subpart M.)

(xi) Federal Medical Care Recovery Act, 42 U.S.C. 2651–53. (See subpart M.)

(2) Claims against nonappropriated fund activities and the risk management program (RIMP). (See subpart L.)

(3) Claims under industrial security regulations (DOD Directive (DODD) 5220.6) and claims by the U.S. Postal Service for losses or shortages in postal accounts caused by unbonded Army personnel (39 U.S.C 411 and DOD Manual 4525.6–M). (See DA Pam 27–162, chap 5, sec XI.)

(b) DA Pam 27–162, chapter 8 lists other laws and regulations under which claims not covered by this regulation may be cognizable.

(c) Where a conflict exists between a general provision of this part and a specific provision found in subparts implementing a specific claims statute, the specific provision will control.

**§ 536.5 Command and organizational relationships.**

(a) The Secretary of the Army has delegated authority to The Judge Advocate General (TJAG) to assign areas of responsibility and designate functional responsibility for claims purposes. TJAG has delegated authority to the Commander, U.S. Army Claims Service (USARCS), to carry out responsibilities assigned in § 536.7(b).

(b) USARCS, a field operating agency of the Office of TJAG, is the agency through which the Secretary of the Army and TJAG discharge their responsibilities for the administrative settlement of claims worldwide. (See AR 10–72.) The proper mailing address of USARCS is Commander, U.S. Army Claims Service, Office of The Judge Advocate General, Fort George G. Meade, Maryland 20755–5360.

(c) Command claims services. (1) Command claims services exercise general supervisory authority over claims matters arising within their assigned areas of operation. Command claims services will provide—

(i) Effective control and supervision of the investigation of incidents occurring within the geographic area of the command, occurring in other areas for which the command is assigned claims responsibility or occurring in the course of the command's operations.

(ii) Services for the processing and settlement of claims for and against the United States.

(2) The commander of a major overseas command or other commands that include areas outside the United States, its territories, and possessions, and report directly to the Department of the Army (DA) may be designated by TJAG to establish, a command claims service.

(3) A command claims service may be a separate organization with a designated commander or chief. If it is part of the Office of the Staff Judge Advocate (SJA) of the command, the SJA will also be the chief of the command claims service.

(d) The following may be designated as area claims offices:

(1) An office under the supervision of the senior judge advocate (JA) of each command or organization so designated by the Commander, USARCS. The senior JA is the head of the area claims office.

(2) An office under the supervision of the senior JA of each command in the area of operations of a command claims service so designated by the chief of that service after coordination with the Commander, USARCS (see § 536.7(c)(2)). The senior JA in the office is the head of the area claims office.

(3) The legal office of each engineer district within the United States and such other engineer commands or agencies as designated by the Commander, USARCS with concurrence of the Chief of Engineers (COE) for all claims generated by such districts, commands, or agencies. The district counsel or the attorney in charge of the legal office of the command or agency is the head of the area claims office.

(e) Claims processing offices are normally small legal offices or subordinate elements of area claims offices, which are designated by the Commander, USARCS; a command claims service; or an area claims office. These offices are established for the investigation of all potential and actual claims arising within their jurisdiction, either on an area basis or on a command or agency basis. A claims officer (see appendix B to this part) will not be a claims processing office; his or her role is limited to claims investigation. There are four types of claims processing offices as follows (§ 536.8(c)):

(1) Claims processing offices without approval authority.

(2) Claims processing offices with approval authority.

(3) Medical claims processing offices.

(4) Special claims processing offices.

(f) The chief of a command claims service and the head of an area claims office or a claims processing office with approval authority may delegate, in writing, any portion or all of his or her monetary approval authority to a subordinate JA or claims attorney in his or her service or office. The authority to act upon appeals or requests for reconsideration, to disapprove claims (including disapprovals based on substantial fraud), or to make final offers will not be delegated. Copies of delegations within claims processing offices will be provided to the area claims office and, if so directed, to command claims services.

**§ 536.6 Designation of claims attorneys.**

(a) The Commander, USARCS, the senior JA of a command having a command claims service or the Commander, USAREUR Claims Service, the head of an area claims office, or the Chief Counsel, COE may designate a qualified attorney other than a Judge Advocate as a claims attorney. The head of an area claims office may designate a claims attorney to act as a claims processing office with approval authority.

(b) To be eligible as a claims attorney, an individual must be a civilian employee of the DA or DOD, in grade GS–11 or above; a member of the bar of a State, the District of Columbia, or a jurisdiction where U.S. Federal law applies; and be performing primary duties as a legal adviser. These requirements can be waived by the

Commander, USARCS, in appropriate cases.

**Responsibilities, Operations, Policies, and Guidance**

**§ 536.7 Responsibilities.**

(a) *The Judge Advocate General.* TJAG has Army Staff responsibility for administrative settlement of claims worldwide by and against the U.S. Government, generated by employees of the U.S. Army and, DOD components other than the Departments of the Air Force and Navy (see DODD 5515.9). Certain claims responsibilities of TJAG are exercised by The Assistant Judge Advocate General (TAJAG), as set forth in this regulation.

(b) *Commander, USARCS.* Commander, USARCS will—

(1) Supervise and inspect U.S. Army claims activities worldwide.

(2) Formulate and implement claims policies and uniform standards for claims office operations.

(3) Supervise the investigation, processing, and settlement of claims against and on behalf of the United States under the statutes and regulations listed in paragraph 1–4.

(4) Designate area claims offices, claims processing offices, and claims attorneys within DA and DOD components other than the Departments of the Navy and Air Force.

(5) Designate Continental United States (CONUS) geographic areas of claims responsibility.

(6) Recommend action to be taken by the Secretary of the Army or the Attorney General of the United States as appropriate, regarding claims in excess of $100,000 under the FCA, the MCA, and the NGCA and other claims that have been appealed to the Secretary of the Army, or are in excess of $25,000 under the FTCA.

(7) Operate the "receiving State office" for claims cognizable under Article VIII of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), as implemented by 10 U.S.C 2743b (Subpart G).

(8) Settle claims of the U.S. Postal Service for reimbursement under 39 U.S.C 411 (see DOD Manual 4525.6–M) and of DOD under industrial security regulations (DODD 5220.6).

(9) Settle claims against carriers, warehouse firms, insurers, and other third parties for loss of, or damage to, personal property of service members incurred while in storage or in transit at Government expense (subpart K).

(10) Formulate and recommend proposed legislation for Congressional enactment of new statutes and the amendment of existing statutes considered essential for orderly and expeditious administrative settlement of noncontractual claims.

(11) Perform post settlement review of claims.

(12) Prepare, justify, and defend estimates of budgetary requirements and administer the Army claims budget.

(13) Maintain permanent records of claims for which TJAG is responsible.

(14) Assist in developing disaster and maneuver claims plans designed to implement responsibilities set forth in paragraphs (d)(11) of this section and § 536.15(c).

(15) Develop and maintain plans for a disaster or civil disturbance for geographic areas not under the jurisdiction of an area claims authority and in which the Army has single service responsibility or in which the Army is likely to be the predominant Armed Force.

(16) Take initial action on claims arising in emergency situations as outlined in § 536.15(c).

(17) Provide assistance as available or take appropriate action to ensure that command claims services and area claims offices are carrying out their responsibilities as set forth in paragraphs (c) and (d) of this section.

(18) Serve as proponent for Claims Legal Automated Information Management System (CLAIMS) and provide standard automated claims data management programs for use worldwide.

(19) Ensure proper training of claims personnel.

(20) Coordinate claims activities with the Air Force, Navy, Marine Corps, and other DOD agencies to ensure a consistent DOD claims program.

(21) Supervise the investigation and processing of medical malpractice claims arising in Army medical centers within the United States. Provide medical claims JAs, medical claims attorneys and medical claims investigators assigned to such medical centers with technical guidance and direction on such claims.

(22) Coordinate support with the Office of The Surgeon General on matters relating to medical malpractice claims.

(23) Issue an accounting classification to all properly designated claims settlement and approval authorities.

(24) Perform the investigation, processing, and settlement of claims arising in areas not within the areas of operation of command claims services unless specifically delegated to a SJA of a command or designee.

(c) *Chiefs of command claims services.* Chiefs of command claims services will—

(1) Exercise claims settlement authority as specified in this regulation, to include appellate authority where so delegated.

(2) Designate area claims offices and grant claims settlement authority thereto. A grant of such authority will not be effective until coordinated with the Commander, USARCS and an office code assigned. However, the chief of a command claims service may redesignate a claims processing office already having an assigned office code as an area claims office without coordination with the Commander, USARCS. The Commander, USARCS will be informed of such a designation.

(3) Designate claims processing offices and grant claims approval authority thereto. Only claims processing offices staffed with a JA or claims attorney may be granted approval authority. A grant of such authority will not be effective until coordinated with the Commander, USARCS and an office code assigned.

(4) Train claims personnel and monitor their activities.

(5) Implement pertinent claims policies.

(6) Prepare and publish command claims directives.

(7) Administer the command claims expenditure allowance, providing necessary data, estimates, and reports to USARCS.

(8) Perform the responsibilities of an area claims office (see paragraph (d) of this section), as applicable.

(9) Serve as the U.S. sending State office, if so designated, when operating in an area covered by a status of forces agreement.

(d) *Heads of area claims offices.* Heads of area claims offices will—

(1) Ensure that claims in their area of responsibility are promptly investigated according to this regulation.

(2) Ensure that each organization or activity (for example, U.S. Army Reserve (USAR) or Army National Guard (ARNG) unit, Reserve Officers' Training Corps (ROTC) detachment, recruiting company or station, and DOD agency) within the area appoints a claims officer to investigate claims incidents not requiring investigation by a JA (§ 536.16(c)(2)) and ensure that this officer is adequately trained.

(3) Act as a claims settlement authority on claims within the monetary jurisdictions set forth in this regulation and forward claims beyond such jurisdictions to the Commander, USARCS or to the chief of a command claims service, as appropriate, for action.

(4) Designate claims processing offices and request the Commander, USARCS or the chief of a command claims

service, as appropriate, to grant claims approval authority to a claims processing office with respect to claims within that office's jurisdiction, as specified under paragraphs (b)(4) and (c)(2), of this section.

(5) Prepare and publish a claims directive concerning the investigation and processing of claims matters for the guidance of all claims processing offices within their area.

(6) Implement claims policies and guidance furnished by TAJAG or Commander, USARCS through policy directives or the Claims Manual and establish and implement necessary claims policies and procedures not contrary to the foregoing.

(7) Ensure that there are an adequate number of qualified JAs or claims attorneys, claims examiners, claims adjudicators and claims clerks in all claims offices within their area to take prompt action on claims and that they are adequately trained.

(8) Budget and fund for claims investigations and activities to include per diem and transportation of claims personnel, claimants and witnesses, independent medical examinations, appraisals, independent expert opinions, long distance phone calls, recording and photographic equipment, use of express mail or couriers, and other necessary expenses.

(9) Within continental United States (CONUS), procure and disseminate adequate legal publications on local law and verdicts relating to tort claims within the area of jurisdiction.

(10) Notify Commander, USARCS of all claims and claims incidents as required by § 536.17 and § 536.21(b)(2).

(11) Develop and maintain written plans for a disaster or civil disturbance. The plan should include a requirement for an advance party to assess the need for the presence of a special claims processing office. The plans may be internal Office of the SJA plans or an annex to an installation/organizational plan. (See also § 536.8(c)(4)(iii).)

(12) Implement the Army's Article 139 claims program. (See § 536.142.)

(e) *Heads of claims processing offices.* Heads of claims processing offices will—

(1) Investigate all potential and actual claims arising within its assigned jurisdiction, either on an area basis or on a command or agency basis. Only a claims processing office with approval authority can adjudicate and pay all presented claims within its monetary jurisdiction.

(2) Ensure that units and organizations within its jurisdiction have appointed claims officers for the investigation of claims not requiring investigation by a JA. (See § 536.16.)

(3) Budget and fund for claims investigations and activities to include per diem and transportation of claims personnel, claimants and witnesses, independent medical examinations, appraisals, independent expert opinions, long distance phone calls, recording and photographic equipment, use of express mail or couriers, and other necessary expenses.

(4) Within CONUS, procure and maintain legal publications on local law and verdicts relating to tort claims within their jurisdiction.

(5) Notify the Commander, USARCS of all claims and claims incidents as required by § 536.17 and § 536.21(b)(2).

(6) Implement the Army's Article 139 claims program. (See § 536.142.)

(f) *Chief of Engineers.* The COE, through the Chief Counsel, will—

(1) Provide general supervision of the claims activities of engineer area claims offices.

(2) Ensure that each engineer area claims office has a claims attorney designated by the Commander, USARCS, as prescribed in § 536.6.

(3) Ensure the training of claims personnel and the continuing inspection of their activities.

(4) Provide for implementation of pertinent claims policies.

(5) Provide for budgeting in accordance with existing Army regulations and command directives for temporary duty (TDY), long distance phone calls, recording equipment, cameras, and other expenses for investigation and processing of claims.

(6) Take action to procure and have available adequate legal publications on local law relating to claims arising within the United States, its territories, and possessions.

(g) *Commanding General, U.S. Army Health Services Command (CG, HSC).* The CG, HSC will, through his SJA, ensure that adequate and qualified medical claims JAs and medical claims investigators are assigned for the investigation and processing of medical malpractice claims arising at Army medical centers under his or her control. In accordance with an agreement between TJAG and The Surgeon General, such personnel will be used primarily in investigating and processing of medical malpractice claims and provided with the necessary funding and research materials to carry out this function.

(h) *Chief, National Guard Bureau (NGB).* The Chief, NGB will—

(1) Ensure that a point of contact for claims matters is designated in each adjutant general office.

(2) Provide the name, address, and telephone number of the point of contact to the Commander, USARCS.

(3) Designate claims officers to investigate claims generated by ARNG personnel and forward investigations to the active Army area claims office having jurisdiction over the area in which the claims incident occurred.

(4) Publish a regulation to carry out these responsibilities.

(i) *Commanders of major Army commands (MACOMs).* Commanders of MACOMs through their SJAs will—

(1) Assist USARCS in monitoring area claims offices and claims processing offices under their respective command control for compliance with responsibilities assigned in paragraphs (d) and (e) of this section.

(2) Assist claims personnel in obtaining qualified expert and technical advice from units and organizations under their respective command control on a nonreimbursable basis except that the requesting office may be required to provide TDY funding.

(3) Assist TJAG, through the Commander, USARCS, in the implementation of the functions set forth in paragraph (b) of this section.

(4) Coordinate with the area claims office within whose jurisdiction a maneuver will occur to ensure the prompt investigation and settlement of claims arising from the maneuver.

**§ 536.8 Operations of claims components.**

(a) *Command claims services.* A command claims service will be supervised by the SJA of the command. If the command claims service is a separate organization, the command SJA will designate a JA as the chief of the service. Otherwise, the SJA will be the chief of the service. Adequate, qualified claims personnel will be assigned to ensure that claims are promptly investigated and acted upon. With the concurrence of the service may designate area claims offices within its area of operations to carry out claims responsibilities within specified geographic areas.

(b) *Area claims offices.* (1) The area claims office is the principal office for the investigation and adjudication or settlement of claims, and will be staffed with qualified legal personnel under the supervision of the SJA or command JA or Corps of Engineer district or command legal counsel.

(2) The full-time responsibility for claims investigations and processing in a portion of the area or for claims related to the activities of a unit or organization within the area may be delegated to another command, unit, or activity by the establishment of a claims

processing office at the command, unit or authority. (See § 536.7 (d)(4) and (e).) Normally, all claims processing offices will operate under the supervision of the area claims office in whose area the claims processing office is located. Where a proposed claims processing office is not under the command of the parent organization of the area claims office, this designation may be effected by a support agreement or memorandum of understanding between the affected commands.

(3) Normally, claims that cannot be settled by an engineer area claims office will be forwarded directly to the Commander, USARCS with notice to the Chief Counsel, COE of such referral. However, the Chief Counsel, as part of his or her responsibility for litigation of suits involving civil works and military construction activities, may require that an engineer area claims office forward claims through engineer channels provided that such requirement does not preclude final action by Commander, USARCS within the time limitations set forth in subparts D and H.

(c) *Claims processing offices.* For a chapter 11 claim, if the adjudicated amount of a claim is in excess of the monetary jurisdiction of the head of the claims processing authority, the claim will be approved and paid up to the delegated authority of that office and immediately forwarded to the next higher claims authority for additional payment. (See § 536.161(e).)

(1) Claims processing offices without approval authority. A claims processing office that has not been granted claims approval authority will provide for the investigation of all potential and actual claims arising within its assigned jurisdiction, either on an area basis or on a command or agency basis. Once the investigation is completed, the claims file will be forwarded to the appropriate area claims office for action. Alternatively, an area claims office may direct that a claims investigation made by a claims processing office without approval authority be forwarded to another claims processing office within the area that has approval authority if the claim is within the jurisdiction of the latter.

(2) Claims processing office with approval authority. A claims processing office that has been granted approval authority must provide for the investigation of all potential and actual claims arising within its assigned jurisdiction, either on an area basis or on a command or agency basis, and for the adjudication and payment of all presented claims within its monetary jurisdiction. If the estimated value of a claim, after investigation, is beyond the payment authority of the claims processing office or if disapproval is the appropriate action, the claim file will be forwarded to the area claims office unless otherwise specified in this regulation, or forwarded to USARCS or the command claims service, as appropriate, if directed by such service.

(3) Medical claims processing offices. The medical claims JAs at Army medical centers, other than Fitzsimons Army Medical Center and Walter Reed Army Medical Center, may be designated by the SJA/head of area claims office for the installation on which the center is located as claims processing offices with approval authority for medical malpractice claims only. Claims beyond their approval authority will be investigated and forwarded to the Commander, USARCS. The SJA, Health Services Command, Quality Assurance Division, OTSG (DASG–PSQ) and the Consultation Case Review Branch, Clinical Policy and Consultants Division, Office of the Surgeon General (CCRB), will be advised by USARCS of all referrals, provided a copy of all claims, and informed of their disposition.

(4) Special claims processing offices. (i) The Commander, USARCS, the chief of a command claims service or the head of an area claims office may designate special claims processing offices within his or her command for specific, short-term purposes (for example, maneuvers, civil disturbances, and emergencies). These special claims processing offices may be delegated approval authority necessary to effect the purpose of their creation, but in no case will this delegation exceed the approval authority maximums set forth in other chapters of this regulation for regular claims processing offices. All claims will be processed under the claims expenditure allowance and claims command and office code of the authority who established the office or a code assigned by USARCS. The existence of any special claims processing office must be reported to the Commander, USARCS.

(ii) A special claims processing office is the proper organization to process and approve, as appropriate, maneuver damage claims, except where a foreign government is responsible for adjudication under an international agreement (see subpart G). Personnel from the maneuvering command should be used in the investigation of claims and, at the discretion of the area claims office, may be assigned to the special claims processing office. Claims filed after the termination of the maneuver will be processed by the area claims office. Claims arising within the jurisdiction of other area claims offices, while units are traveling to or from the maneuver, will be investigated by the special claims processing office and forwarded for action to the area claims office in whose area the claims arose. Claims for damage to real or personal property arising on private land being used under a permit may be paid from funds specifically budgeted by the maneuver for such purposes in accordance with AR 405–15.

(iii) A special claims processing office provided for a disaster or civil disturbance should include a claims approving authority with adequate investigatory, administrative, and logistical support, to include damage assessment and finance and accounting support. It should not be dispatched prior to notification of Commander, USARCS. The concurrence of Commander, USARCS must be obtained prior to the payment of the first claim.

(5) Claims processing offices discussed in paragraphs (c) (2) through (4) of this section must be supervised by an assigned JA or claims attorney in order to exercise delegated approval authority.

**§ 536.9 Claims policies.**

(a) *General.* (1) Claims investigation and adjudication should be accomplished at the lowest level possible, that is, by the claims processing office or area claims office with monetary authority over the estimated total value of all claims arising from the incident in question. The expeditious investigation and settlement of claims is essential to the successful fulfillment of the Army's responsibilities under the claims statutes implemented by this regulation.

(2) Where technical errors exist in the filing of a claim or in its format, claimants should be advised of such errors and the need for corrective action. If the errors concern a jurisdictional matter, advice should be given expeditiously and a record should be maintained. The advice should include a warning that the error must be corrected prior to the expiration of the statute of limitations.

(b) *Investigative environment.* In the investigation of claims, every effort should be made to create a cooperative environment engendering the free exchange of information and evidence. The goal of obtaining sufficient information to make an objective and fair analysis should be paramount. Personal contact with claimants or their representatives is frequently essential to clarify the issues both during investigation and prior to adjudication.

Where settlement is not feasible, issues of disagreement or dispute should be clearly identified and spelled out to facilitate the resolution of any reconsideration, appeal, or in appropriate cases, litigation.

(c) *Claims directives and plans.* (1) Two copies of command claims directives will be furnished to the Commander, USARCS. Area claims office directives will be distributed to all DA and DOD commands, installations, and activities within the area of responsibility with an information copy to Commander, USARCS.

(2) One copy of all area claims offices' disaster/civil disturbance plan or annex will be furnished to the Commander, USARCS.

(d) *Interpretations.* The Commander, USARCS will publish written interpretations of the provisions of this regulation and establish and publish policy as to those matters that are within agency discretion. Interpretations and policies that reference this provision will have the same force and effect as this regulation.

(e) *Exceptions.* If it is considered to be in the best interest of the Government, the Commander, USARCS may grant authority to deviate from the specific requirements contained in this regulation in a particular instance except as to matters that are based on statutes, treaties and international agreements, executive orders, controlling directives of the Attorney General or Comptroller General, or otherwise have the force and effect of law.

(f) *Guidance.* The Commander, USARCS may publish bulletins, manuals, handbooks, notes, and a DA Pamphlet to provide claims authorities with guidance on administrative and procedural matters related to the implementation of this regulation. These will be binding on all Army claims personnel.

(g) *Communication.* All claims personnel are authorized to communicate directly with personnel of the USARCS for guidance on matters of policy or relating to the implementation of this regulation.

(h) *Private relief bills.* There is no established procedure under which DA sponsors private relief legislation; this is a matter between an individual and his or her Congressman. Claims personnel will remain neutral in private relief matters. No statement should be made that purports to reflect a DA position on a private relief bill.

**§ 536.10 Guidance concerning disclosure of information and assistance.**

(a) *Conflict of interest.* Government personnel are forbidden to represent any claimant or to receive any payment or gratuity for services rendered. They may not accept any share or interest in a claim or assist in its presentation, under penalty of Federal criminal law (18 U.S.C. 203, and 205).

(b) *Release of information.* (1) Government personnel are prohibited from disclosing information that may be the basis of a claim or any evidence of record in any claims matter except as authorized by statutory of regulatory authority. Certain documents which would normally be privileged or exempt from release, such as unclassified statements, documents containing opinions, conclusions, or findings, may be released to a claimant or his or her attorney, whenever release may help settle a claim or avoid unnecessary litigation, unless such release is barred by statute.

(2) All requests for records and information made pursuant to the Freedom of Information Act (FOIA) or the Privacy Act (PA) will be processed in accordance with the procedures set forth in AR 25–55 or AR 340–21. Requests submitted by a claimant or his or her attorney, which cite only the FOIA, will be processed under the time limits of the FOIA and the exceptions and fees of the PA and FOIA, as required by AR 25–55, paragraph 1–512c. Except for medical quality assurance records exempt from disclosure by 10 U.S.C. records protected by the Privacy Act of 1974, records within a category for which withholding of the record is discretionary (AR 25–55, paragraph 3–101) may be released to a claimant or his or her attorney, if no legitimate purpose exists for withholding it.

(3) When it is determined that exempt information should not be released, the request will be forwarded to USARCS. For requests processed only under the FOIA, the commander, USARCS, may deny release of the records, acting on behalf of TJAG, the initial denial authority. The commander, USARCS will forward to TJAG all requests processed under the FOIA and PA. TJAG is the initial denial authority for PA requests (AR 340–21, paragraph 1–7i).

(c) *Claims assistance.* The foregoing prohibitions do not apply to information and assistance provided in the performance of official duty. Any person who indicates a desire to file a claim against the United States cognizable under one of the chapters of this regulation will be instructed concerning the procedure to follow. The claimant will be furnished claim forms and, when necessary, will be assisted in completing claim forms and assembling evidence. He or she will not be assisted in determining what amount to claim. In the vicinity of a field exercise, maneuver, or disaster, information may be disseminated concerning the right to present claims, the procedure to be followed, and the names and location of claims officers and engineer repair teams. When the government of a foreign country in which U.S. Armed Forces are stationed has assumed responsibility for the settlement of certain claims against the United States, officials of that country will be furnished pertinent information and evidence so far as security considerations permit.

**§ 536.11 Single-service claims responsibility (DODD 5515.8).**

(a) *Statutes and agreements.* DOD has assigned single-service responsibility for the settlement of claims in certain countries under the following statutes and agreements:

(1) FCA (10 U.S.C. 2734); DODD 5515.3, Settlement of Claims under 10 U.S.C. 2733 and 2734.

(2) MCA (10 U.S.C. 2733); DODD 5515.3, Settlement of Claims under 10 U.S.C. 2733 and 2734.

(3) 10 U.S.C. 2734a and 2734b, pro rata cost-sharing of claims pursuant to international agreements.

(4) NATO SOFA (4 UST 1792, TIAS 2846) and other similar agreements.

(5) Act of September 25, 1962 (42 U.S.C. 2651–2653), Claims for Reimbursement for Medical Care Furnished by the United States.

(6) 10 U.S.C. 2737, claims not cognizable under any other provision of law.

(7) The Federal Claims Collection Act (31 U.S.C. 3711–3719), as implemented by DODD 7045.13; the Act of June 10, 1921 (31 U.S.C. 71), claims and demands by the Government of the United States.

(8) 10 U.S.C. 2736, Advance Payments.

(b) *Specified foreign countries.* Responsibility for the settlement of claims cognizable under the laws listed above in the following countries has been assigned to military departments as indicated below:

(1) Department of the Army: Austria, Belgium, El Salvador, France, Federal Republic of Germany, Grenada, Honduras, and Korea, the Marshall Islands and Switzerland.

(2) Department of the Navy: Bahrain, Iceland, Israel, Italy, Portugal, and Tunisia.

(3) Department of the Air Force: Australia, Azores, Canada, Cyprus, Denmark, Egypt, Greece, India, Israel, Japan, Luxembourg, Morocco, Nepal, The Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Turkey, United Kingdom.

(4) Except when they arise in countries for which single-service responsibility is assigned in paragraphs (b) (1), (2), and (3) of this section, single-service claims responsibility for claims involving, or generated by the U.S. Central Command or units assigned or attached thereto, is assigned to the Department of the Air Force. The addresses of United States sending State offices and single-service offices are contained in DA Pam 27–162, figure 7–1.

(c) *When claims responsibility has not been assigned.* On an interim basis prior to receiving confirmation and approval from the appropriate office in DOD, the appropriate unified commander may, when necessary to implement contingency plans, assign single-service responsibility for processing claims in countries where such assignment has not already been made.

**§ 536.12 Cross-servicing of claims (DODD 5515.3).**

(a) *Where another military department has single-service claims responsibility.* Claims, claims by and against the United States resulting from Army activities or caused by members or employees of the DA in a country where another department has been assigned single-service claims responsibility will be investigated by the Army and referred to that department for settlement.

(b) *Where claims responsibility has not been assigned.* Claims, claims cognizable under the FCA or the MCA generated by another military department in a foreign country where single-service claims responsibility has not been assigned may, upon request of the department concerned, be settled by the Army. Conversely, Army claims may, in appropriate cases, be referred to another department for settlement.

(c) *Claims generated by the Coast Guard.* Claims resulting from activities, or generated by members or employees, of the Coast Guard while operating as a service of the Department of Transportation may, upon request, be settled under this regulation by a foreign claims commission appointed as authorized herein, but will be paid from appropriations of the Coast Guard (10 U.S.C. 2734(g) and 2734a(c)).

## Subpart B—Investigation and Processing of Claims

### Investigation

**§ 536.13 Importance of the claims investigation.**

Because evidence developed during an investigation provides the basis for every subsequent step in the administrative settlement of a claim or the defense of a lawsuit, a prompt and thorough investigation will be conducted on all potential and actual claims for or against the government. Adverse as well as favorable information must be collected and recorded and the legal and factual findings of the claims JA/attorney must be preserved in the format specified in § 536.22.

**§ 536.14 Reasons for investigation.**

(a) The investigation is performed to ascertain the facts of an incident. Which facts are relevant will often depend on the law and regulations applicable to the conduct of the parties involved, but as general guidance, the investigation should develop definitive answers to such questions as "When," "Where," "Who," "What," and "How." Generally, the time, place, persons, and circumstances involved in an incident may be established by a simple report, but the cause and the resulting damage may require extensive effort to obtain all the pertinent facts.

(b) The object of the investigation is to gather, with the least possible delay, the best available evidence without accumulating excessive evidence concerning any particular fact. The claimant is often an excellent source of such information and should be contacted early in the investigation. The investigative file should include medical records, witness interviews, photographs, and expert opinions.

**§ 536.15 Immediate investigation requirement.**

(a) Immediate investigation of an incident is required when—

(1) Property other than Government property is damaged, lost, or destroyed. Damage resulting directly or indirectly from combat need only be investigated to the extent necessary to confirm that the combat exclusion of the appropriate statute is applicable.

(2) Government property is damaged, lost, or destroyed under circumstances that may give rise to a claim in favor of the Government under subpart N.

(3) The incident results in injury to or death of, any civilian other than to a civilian of the Army while in performance of duty, an employee of the United States or its instrumentalities while acting within the scope of their employment. For deaths or injuries resulting directly or indirectly from combat activities of our forces, the investigation merely has to develop sufficient information to verify that the combat exception of the appropriate claims statute is applicable.

(4) A claim is made.

(5) Investigation is requested by another armed service of the United States.

(6) A member of the uniformed services, a dependent, or any other person who is eligible for medical care at Army medical treatment facilities is injured under circumstances that permit recovery of the cost of hospital and medical care under subpart N.

(7) An incident occurs in CONUS involving foreign nationals who are members of a foreign military force or civilian components of parties to the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty, resulting in personal injury, death, or property damage (subpart G).

(8) A patient, other than potential claimants excluded by § 536.51(j), § 536.75 (r) through (t) and § 536.95, while under treatment by the Army Medical Service, dies, is injured, or otherwise disabled physically, mentally, or emotionally due to—

(i) A medical or surgical accident; or

(ii) Care that does not meet standards for non-Government facilities similar to the Army facility providing the care; or

(iii) An incident that could give rise to a claim against the United States under this regulation; or

(9) Competent authority so directs.

(b) Investigation by a claims officer is required when the situation or consequences described in paragraphs (a) (1) through (4), and (a)(9) of this section arise from activities of the ARNG or its personnel.

(c) Claims arising out of situations that may be expected to generate a substantial number of claims in a short period of time and are properly cognizable for settlement under this regulation (such as maneuvers or other special operations, emergencies, civil disturbances, aircraft and missile accidents, or disasters) will be investigated in accordance with procedures set forth herein by the claims office responsible for the area in which the incident occurred. No claim arising out of such an emergency situation will be paid until the concurrence of the Commander, USARCS has been obtained. (See § 536.8(c)(4)(iii).

(d) Where an accident occurs that could only result in a claim against the United States that is not payable

because of the incident to service rule, for example, barred by the Feres Doctrine, or the Federal Employees' Compensation Act (FECA), or the Longshoremen's and Harborworkers Compensation Act (LHWCA), the investigation may be limited to that necessary to make such a determination. However, claims officials will ensure that the appropriate commander or organization safety office is aware of the incident so that measures to avoid a recurrence can be pursued.

**§ 536.16 Unit claims officers.**

(a) Commanders' responsibility. Commanders and heads of DA and DOD components whose personnel, equipment or operations are involved in an incident giving rise to a potential or actual claim for or against the government (see § 536.15(a), will appoint a commissioned officer, a warrant officer or a qualified civilian employee to conduct an initial factual investigation of the incident.

(1) Installation commanders, brigade commanders, commanders of separate battalions, state ARNG Adjutant Generals and other commanders whose operations may generate a significant number of claims should consider appointing a claims officer on standing orders to facilitate training and coordination with the claims JA/attorney supporting the unit.

(2) Senior noncommissioned officers (E6 thru E9) may be appointed as assistant claims officers to perform duties under the supervision of a claims officer.

(3) Claims officer appointment orders should designate the claims JA/attorney who supports the unit as the claims officer's legal advisor. The orders will direct the claims officer to seek guidance from the claims JA/attorney at the outset of the investigation and before completion of the investigation whenever the potential value of the claim is in excess of $15,000 or an actual claim in excess of that amount has been filed.

(4) The scope and duration of the investigation will depend on the severity and complexity of the incident and may range from merely obtaining investigation reports already prepared by police and other investigators to a formal investigation by a board of officers under the provisions of chapter 5, AR 15–6. In addition to the provisions of this chapter, claims officers will follow the guidance in Chapter 5, DA PAM 27–162 and the advice of the claims JA/attorney listed as their advisor.

(5) Unit claims officers, in addition to making a report of investigation as specified in § 536.16(c), will account for and preserve all available evidence for use in future litigation. Evidence will be retained until released by the claims JA/attorney. Therefore, the claims officer will consult with the claims JA/attorney before disposal, destruction or repair of damaged property or other evidence. The claims officer will also act as the claims JA/attorney's point of contact for support and assistance from the unit.

(6) Claims officers must coordinate their work with concurrent criminal and safety investigations, which have priority within DA for access to accident sites and witnesses (see paragraph 1–4d, AR 15–6 and paragraphs 4–8a(2), 5–1a(1) and 5–4 AR 385–40). To the greatest extent possible claims officers should take advantage of the work already done on these other investigations (see § 536.19 of this part). Although there are limits on the information safety personnel can release to claims officers, some of the information in safety reports can be released (see paragraphs 1–10 and 5–6, AR 385–40).

(b) Report of claims officer—(1) Format. The claims officer will prepare a written report of investigation on DA Form 1208 (Report of Claims Officer), except that no recommendation on disposition of prospective claims will be entered in block 11. Where a formal investigation is conducted in accordance with the procedures in chapter 5, AR 15–6, the report may be submitted on DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers). If the claims officer does not feel either form is appropriate, the claims JA/attorney advising the claims officer will be consulted for guidance.

(2) Processing. The report should normally be completed and submitted to the appointing authority within 60 days of the accident/incident. If a final report will not be completed within that time one or more interim reports may be required by the commander or claims JA/attorney. The appointing authority will either return the report for further investigation or, if satisfied that it is as complete as possible given the information available, forward one copy of the report to the appropriate claims office with or without comment.

(3) Content. The report will contain findings of fact concerning the incident, to include the circumstances leading to the incident (e.g. training and experience of Army personnel involved) and the resulting property damage and/or injuries. These findings should be based on the evidence reasonably available within the time available for completion of the report. See chapter 5, DA PAM 27–162 for guidance on the information needed in the most common types of claims incidents.

(4) Limits on findings. The unit claims officers will not make findings concerning questions of liability or attempt to assess a dollar value on personal injuries. The findings should merely state the facts (who, what, where, when, and how). While a clear and complete statement of the facts will often make it clear who is responsible for the damage or injury, the determination of legal liability and the appropriate amount of compensation is the responsibility of the claims JA/attorney or the courts.

(5) Use and release of information. The report of this initial investigation may be used in conjunction with any administrative or legal action within DOD, such as line of duty investigations, reports of surveys, disciplinary actions under the Uniform Code of Military Justice or civilian personnel regulations, contract actions, or the collateral investigation of an Army accident required by paragraph 1–7c, AR 385–40. It may also be used by the commander or the unit's safety officers as the basis for their safety report (DA Form 285 and 285–1) when a centralized accident investigation or separate safety investigation is not conducted. It may be released to the public, to law enforcement personnel, state and federal regulatory agencies and other non-DOD entities subject to the provisions of the Freedom of Information Act and the Privacy Act.

(6) Disposition of reports. The claims processing office or area claims office having jurisdiction the type of claim involved will retain the claims officer's report until a claim is received or until six months after the time for filing a claim is past. If no claim is filed within the statutory limit, the report will be disposed of as an organizational record in accordance with AR 25–400–2.

(c) If an incident occurs, or a claim is filed, in a foreign country where no appropriate commander is located, investigative assistance may be sought from the Defense Attache or the Military Assistance and Advisory Group (MAAG). Incidents involving Attache or MAAG personnel, and claims arising from their activities, will be investigated in accordance with DIAM 100–1B, volume 1, section T, chapter 1, or AR 175, chapter 6, as appropriate.

(d) Under the provisions of DODD 5515.9 the Commander, USARCS, or designee, may request assistance from DOD components whose personnel are involved in incidents generating claims in the investigation of such claims, and may appoint DOD personnel as claims

officers for the purpose of conducting such investigations.

**§ 536.17 Claims office responsibility.**

(a) The claims JA/attorney receiving notice of an incident requiring investigation will immediately refer it to the appropriate claims officer and will notify, the Commander, USARCS of all major incidents involving serious injury or death, or where non Federal property damage exceeds $25,000. In some cases the claims JA/attorney assigned to the case may decide that a unit claims officer investigation is not necessary and waive the requirement.

(b) The heads of area claims offices and the chiefs of command claims services are responsible for ensuring that a prompt and thorough claims investigation is conducted of all claims for or against the Army arising in their area before they take or recommend final action on a claim. The investigation of incidents and claims arising out of the activities of the Corps of Engineers (COE) is the responsibility of the appropriate COE district or division Counsel. On claims in excess of $25,000, the claims JA/attorney assigned to the case should consult with the action officer at USARCS on the extent of the investigation (see § 536.21).

(c) The initial investigation by the unit claims officer is supposed to be completed promptly after the accident and may not be sufficient for final resolution of the claim. The unit's investigation will often be completed before a formal claim is filed and before all information about the full extent of the damages is available. An interview of the claimant may not have been possible or advisable. New information submitted with the claim may require further investigation. The more extensive investigation usually required for final action on a claims will often require the use of not just unit claims officers but also claims JA's/attorneys and investigators within the area claims office, experts within and from outside DOD and personnel from USARCS.

**§ 536.19 Transfer of responsibility.**

(a) Transfer of responsibility is authorized when the investigation may be more practicably conducted or completed by the claims officer of another installation or unit. When two or more commands are involved, the common superior commander or the Commander, USARCS will decide who will conduct the investigation. The commanding officer whose personnel or equipment is involved will furnish to the authority responsible for conducting the investigation all available information concerning the incident.

(b) Transfer will be accomplished by direct transmittal of a report of the incident in writing, with all available evidence (or orally, later confirmed in writing).

(c) When more than one Federal agency is or may be involved, the claims office receiving the claim will contact, at the field level, all other affected agencies in order to obtain the designation of a single agency to investigate and determine the merits of the claim. If such a designation cannot be agreed upon, USARCS will be notified in order to attempt to resolve the matter at agency level or to request the Department of Justice to make a designation. If the DA is the designated agency, the claimant will be notified to correspond only with the DA. This is not to be construed to preclude assistance in the investigation from other Federal agencies.

(d) If a claim is received that arises solely out of the activities of another Federal agency, the claim will be transferred to such agency and the claimant notified of such transfer. If the appropriate agency cannot be identified, the claim will be returned to the claimant informing him or her of this fact.

(e) When an incident occurs where the Army has no unit or installation conveniently located for conducting an investigation, but another U.S. military department does have an installation or unit in the vicinity, the responsible officer may request the commanding officer or commander of any organization of another U.S. military department to conduct or assist in the investigation. Similar requests from another military department will be honored if possible.

**§ 536.19 Investigative procedures.**

(a) *General.* A claims investigator will be guided by policies, procedures, and guidance set forth in DA Pam 27–162 or furnished by the Commander, USARCS. For other than routine incidents, guidance should be obtained from the claims approval or settlement authority who will have jurisdiction based on the probable value of the largest single claim arising from the incident. The extent and nature of the investigation should be guided by the specific requirement of the situation. If it is considered in the best interest of the Government, the Commander, USARCS, or the chief of a command claims service, may grant authority to deviate from the specific requirements contained in this regulation in a particular investigation, except as to procedures that are based on statute or have the force of law.

(b) *Information from other investigations.* (1) The investigator should obtain a copy of the report of any prior investigation that was made for purposes other than claims; for example—

(i) Police reports.

(ii) Line of duty reports.

(iii) AR 15–6 investigations.

(iv) Reports of survey.

(v) IG investigations.

(vi) Safety investigations.

(vii) Government contractor investigations.

(viii) Investigations by other governmental agencies such as National Transportation Safety Board; Food and Drug Administration; Center for Disease Control; Bureau of Alcohol, Tobacco, and Firearms; and Consumer Product Safety Commission.

(2) While such an investigation may not be adequate for claims and litigation purposes, it may contain evidence and leads of value to the investigator. If the report of the prior investigation contains diagrams, photographs, or witness statements, it is not necessary for the investigator to cover the same ground. Copies of such items may be made and included in the claims investigation. Generally, however, it will be necessary for the investigator to obtain more complete statements from witnesses. This is especially true for statements in medical quality assurance reports and reports of Army accidents prepared by Army safety personnel, as there are regulatory restrictions on the use of these statements in connection with claims and litigation.

(3) When military records fail to confirm the occurrence of a traffic accident upon which a claim is based, or substantial doubt arises regarding the nature or extent of the actual damages or injuries allegedly sustained, claims authorities should contact the Bureau of Motor Vehicles of the appropriate State or municipality to ascertain whether an accident report of the incident is a matter of record and, if so, a copy of such report should be obtained.

(c) *Statements of witnesses.* Perhaps the most important phase of an investigation is the securing of statements from available witnesses, including the claimant and persons associated with him or her, for example, persons riding in the vehicle. The claims investigator may take the unsworn statements of a witness or may, if the statement is satisfactory for claims purposes, use a statement secured by another investigator.

(d) *Photographs and diagrams.* Claims investigators should have cameras and obtain photographs and diagrams to describe the scene of incidents that they

investigate. Photographs and drawings should indicate when taken or made and by whom.

(e) *Claims requiring information of a specialized nature.* Depending on the nature of the incident, the investigator must decide on the specialized nature of evidence that will be required. In this regard, reference should be made to DA Pam 27–162 wherein specific items of information and documentation required for various categories of incidents are listed. Sufficient documentation of property losses or damages and personal injury or death should be obtained. Technical advice and assistance will be furnished by other DA agencies such as the Tank and Automotive Command or the Army Safety Center for vehicular accidents, or the Army Aviation Reserve Board and the Corpus Christi Army Depot for aircraft accidents.

(f) *Completion of investigation.* Upon completion of the investigation, the investigator must carefully review the report to ascertain whether all pertinent information has been included and inconsistencies reconciled. The review should take into consideration the following questions: Is the report of investigation complete enough to enable the approving authority to decide how the incident occurred? On whom does the responsibility for the incident rest? What is the extent of any loss or damage suffered? In the ordinary case, if the investigator has included in the report all information pertaining to the "what," "who," "where," "when," and "how" of the occurrence, the information needed by those who must decide the claim will be satisfied.

**Claims Receipt and Disposition**

**§ 536.20 Presentation.**

(a) *Who may present.* (1) A claim may be presented by the owner of the property, or in the owner's name by a duly authorized agent or legal representative. As used in this regulation an owner includes the following:

(i) For real property. The mortgagor, or the mortgagee, if he or she can maintain a cause of action in the local courts involving a tort to that specific property. When notice of divided interests in real property is received, the claim should, if feasible, be treated as a single claim or a release from all interests must be obtained.

(ii) For personal property. A bailee, leasee, mortgagee, and conditional vendor, or others having title for purposes of security only, are not proper claimants unless specifically authorized in the chapter in question. If more than one party has an interest in the property, all must join in the claim or a release from all interests must be obtained.

(2) A claim for personal injury may be presented by the injured person or by a duly authorized agent or legal representative.

(3) A claim based on death may be presented by the executor or administrator of the deceased's estate, or by any person determined to be legally or beneficially entitled. The amount allowed will, to the extent practicable, be apportioned among the beneficiaries in accordance with the law applicable to the incident.

(4) A claim for medical, hospital, or burial expenses may be presented by any person who by reason of family relationship has, in fact, incurred the expenses for which the claim is made. For claims cognizable under the provisions of the FTCA, see subpart D. (See § 536.86 for restrictions on damages allowable in claims involving death or personal injury under the Act of 9 October 1962 (10 U.S.C. 2737).)

(5) A claim presented by an agent or legal representative will be made in the name of the claimant and signed by the agent or legal representative showing his or her title or capacity. Where a claim is presented by an agent or legal representative—

(i) Written evidence of the authority of the agent or legal representative to act, such as a power of attorney, is required, or

(ii) Where the authority is conferred by State statute, a citation to that statute is required. (See DA Pam 27–162, app H, section I, paragraph 14–2; see also § 536.21 for additional requirements relating to settlements.)

(6) A claim normally will include all damages that accrue by reason of the incident. Where the same claimant has both a claim for damage to or loss of property and a claim for personal injury or a claim based on death arising out of the same incident, each of the foregoing or any combination of them ordinarily represent only an integral part of a single claim or cause of action. Under subparts C through J of this part, a single claimant is entitled to be compensated only one time for all damages or injuries arising out of an incident.

(b) *Subrogation.* A claim may be presented by the subrogee in his or her own name if authorized by the law of the place where the incident giving rise to the claim occurred, provided subrogation is not barred by the portion of this regulation applicable to the type of claim involved.

(1) The claims of the subrogor (insured) and subrogee (insurer) for damages arising out of the same incident constitute separate claims and it is permissible for the aggregate of such claims to exceed the monetary jurisdiction of the approving or settlement authority.

(2) A subrogor and a subrogee may file a claim jointly or individually. A fully subrogated claim will be paid only to the subrogee. Whether a claim is fully subrogated is a matter to be determined by local law. Some jurisdictions permit the property owner to file for property damage even though he or she has been compensated for the repairs by his or her insurer. In such instances a release should be obtained from both parties in interest or be released by both of them. The approved payment in a joint claim will be by joint check that will be sent to the subrogee unless both parties specify otherwise. If separate claims are filed, payment will be by check issued to each claimant to the extent of his or her undisputed interest.

(3) Where a claimant has made an election and accepted workmen's compensation benefits, both statutory and case law of the jurisdiction should be scrutinized to determine to what extent the claim of the injured party against third parties has been extinguished by acceptance of compensation benefits. While it is infrequent that the claim is fully extinguished and where it is not, the only proper party claimant is the workmen's compensation carrier. Even where the injured party's claim has not been fully extinguished, most jurisdictions provide that the compensation insurance carrier has a lien on any recovery from the third party and no settlement should be reached without approval by the carrier where required by local law (19 American Law Reports (ALR) 766, supplemented by 27 ALR 493, 37 ALR 838, 67 ALR 249, 88 ALR 665, and 106 ALR 1040). Also, claims from the workmen's compensation carrier as subrogee or otherwise will not be considered payable where the United States has paid the premiums, directly or indirectly for the workmen's compensation insurance. Applicable contract provisions holding the United States harmless should be used.

(4) Whether medical payments paid by an insurer to its insured can be subrogated depends on local law. Some jurisdictions prohibit these claims to be submitted by the insurer notwithstanding a contractual provision providing for subrogation. Therefore, local law should be researched prior to deciding the issue, and claims forwarded to higher headquarters for adjudication should contain the results

of said research. Such claims, where prohibited by State law, will also be barred by the Antiassignment Act. (See paragraph (c) of this section.)

(5) Care will be exercised to require insurance disclosure consistent with the type of incident generating the claim. Every claimant will, as a part of the claim, make a written disclosure concerning insurance coverage as to—

(i) The name and address of every insurer;

(ii) The kind and amount of insurance;

(iii) Policy number;

(iv) Whether a claim has been or will be presented to an insurer, and if so, the amount of such claim; and

(v) Whether the insurer has paid the claim in whole or has indicated payment will be made.

(vi) Each subrogee must substantiate his or her interest or right to file a claim by appropriate documentary evidence and should support the claim as to liability and measure of damages in the same manner as required of any other claimant. Documentary evidence of payment to a subrogor does not constitute evidence either of liability of the Government or of the amount of damages. Approving and settlement authorities will make independent determinations upon the evidence of record and the law.

(vii) Subrogated claims are not cognizable under subparts E, J or K.

(c) *Transfer and assignments.* (1) Except as they occur by operation of law or after a voucher for the payment has been issued, unless within the exceptions set forth by statute (31 U.S.C 3727 and AR 37–107), the following are null and void:

(i) Every purported transfer or assignment of a claim against the United States, or of any part of or interest in a claim, whether absolute or conditional.

(ii) Every power of attorney or other purported authority to receive payment of all or part of any such claim.

(2) The purposes of the Antiassignment Act are to eliminate multiple payment of claims, to cause the United States to deal only with original parties, and to prevent persons of influence from purchasing claims against the United States.

(3) In general, this statute prohibits voluntary assignments of claims with the exception of transfers or assignments made by operation of law. The operation of law exception has been held to apply to claims passing to assignees because of bankruptcy proceedings, assignments for the benefit of creditors, corporate liquidations, consolidations or reorganizations, and where title passes by operation of law to heirs or legatees. Subrogated claims that arise under a statute are not barred by the Antiassignment Act. For example, subrogated workmen's compensation claims are cognizable when presented by the insurer.

(4) Subrogated claims that arise pursuant to contractual provisions may be paid to the subrogee if the subrogated claim is recognized by State statute or decision. For example, an insurer under an automobile insurance policy becomes subrogated to the rights of a claimant upon payment of a property damage claim. Generally, such subrogated claims are authorized by State law and are therefore not barred by the Antiassignment Act.

(5) Before claims are paid, it is necessary to determine whether there may be a valid subrogated claim under Federal or State statute or subrogation contract held valid by State law. If there may be a valid subrogated claim forthcoming, payment should be withheld for this portion of the claim. If it is determined that claimant is the only proper party, full settlement is authorized.

(d) *Action by claimant*—(1) Form of claim. (i) The claimant will submit his or her claim using authorized official forms whenever practicable. A claim is filed only when the vital elements (see Appendix B to this part) have been supplied in writing by a person authorized to present a claim (paragraph (a) of this section) unless the claim is cognizable under a chapter that specifies otherwise.

(ii) A claim may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a).

(2) Signatures. (i) The claim and all other papers should be signed in ink by the claimant or his or her duly authorized agent. Such signatures will include the first name, middle initial, and surname. A married woman should sign her claim in her given name; for example, "Mary A. Doe."

(ii) Where the claimant is represented, the supporting evidence required by paragraph (a)(5) will be required only if the claim is signed by the agent or legal representative. However, in all cases in which a claimant is represented, the name and address of the representative will be included in the file together with copies of all correspondence and records of conversations and other contacts maintained and included in the file. Frequently, these records are determinative as to whether the statute of limitations has been tolled.

(3) Presentation. The claim be presented to the commanding officer of the unit involved; the legal office of the nearest Army post, camp, or station; or other military establishment convenient to the claimant. In a foreign country where no appropriate commander is stationed, the claim may be submitted to any attache of the U.S. Armed Forces. (See AR 1–75.) Claims arising overseas which are cognizable under Article VIII of the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty, Treaty of Mutual Cooperation and Security Between the United States of America and Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan or other similar treaty or agreement are filed with designated claims officials of the receiving State.

(e) *Evidence to be submitted by claimant.* The claimant should submit the evidence necessary to substantiate his or her claim. It is essential that independent evidence be submitted that will substantiate the correctness of the amount claimed.

(f) *Statute of limitations*—(1) *General.* Each statute available to the DA for the administrative settlement of claims, except the Maritime Claims Settlement Act (10 U.S.C. 4802), specifies the time during which the right to file a claim must be exercised. These statutes of limitations, which are jurisdictional in nature, are not subject to waiver unless the statute expressly provides for waiver. Specific information concerning the period for filing under each statute is contained in the appropriate implementing chapter of this regulation.

(2) *When a claim accrues.* A claim accrues on the date on which the alleged wrongful act or omission results in an actionable injury or damage to the claimant or his or her decedent. Exceptions to this general rule may exist where the claimant does not know of the injury or damage, or does not know the cause of injury or damage. In those cases, the claim accrues when the injured party, or someone acting on his or her behalf, knows or should know about both the existence and cause of the injury. However, this exception does not apply when, at a later time, he or she discovers that the acts inflicting the injury may constitute medical malpractice. (See United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352 (1979).) The discovery rule is not limited to medical malpractice claims; it has been applied to diverse situations involving violent death, chemical and atomic testing, and erosion and hazardous work environment. In claims for indemnity or contribution against the United States, the accrual date is the time of payment for which indemnity is

sought or on which contribution is based.

(3) *Effect of infancy, incompetency, or the filing of suit.* The statute of limitations for administrative claims is not tolled by infancy or incompetency. Likewise, the statute of limitations is not tolled for purposes of filing an administrative claim by filing of a suit based upon the same incident in a Federal, State, or local court against the United States or other parties. (For the effect of filing an administrative claim with an agency other than the Army, see § 536.53(b), § 536.77 (b) and (c) and § 536.102)

(4) *Amendment of claims.* A claim may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). A claim may be amended by changing the amount, the bases of liability, or elements of damages concerning the same incident. Parties may be added only if the additional party could have filed a joint claim initially as in paragraph (a)(1) of this section. If the additional party had a separate cause of action, his or her claim may not be treated as an amendment but only as a separate claim and is thus barred if the statute of limitations has run. For example, if a claim is timely filed on behalf of a minor for personal injuries, a subsequent claim by a parent for loss of services is considered a separate claim and is barred if it is not filed prior to the running of the statute of limitations. Another example is where a separate claim is filed for loss of services or consortium by a spouse arising out of injuries to the husband or wife of the claimant. On the other hand, if a claim is timely filed by an insured for the deductible portion of his or her property damage, a subsequent claim by the insurer based on payment of property damage to its insured may be filed as an amendment even though the statute of limitations has run, unless final action has been taken on the insured's claim.

(5) *Date of receipt stops the running of the statute.* In computing the time to determine whether the period of limitation has expired, exclude the first day and include the last day, except when it falls on a nonworkday such as Saturday, Sunday, or a legal holiday, in which case it is to be extended to the next workday.

**§ 536.21 Disposition of claims.**

(a) *General.* When a claim is received, the date and the designation of the receiving command or office will be stamped or otherwise noted on all copies. If the receiving command or office is not responsible for the investigation, the claim will be transmitted to the claims office of the command or installation concerned.

(b) *By the command concerned.* Following completion of the claims investigation, the command claims service or claims office responsible for the claim may take the following actions on all claims other than those on for which USARCS has exclusive jurisdiction (see § 536.21(c)).

(1) If the claim is of a type and amount within the jurisdiction of the claims office of the command concerned and the claim is meritorious in the amount claimed, it will be approved and paid.

(2) If a claim in an amount in excess of the monetary jurisdiction of the claims office is meritorious in a lesser amount within its jurisdiction, the claim may be approved for payment provided the amount offered is accepted by the claimant in settlement of the claim.

(3) If the claim is not of a type within the jurisdiction of the claims office, or if the claimant will not accept an amount within its jurisdiction, the claim with supporting papers and a recommendation for appropriate action will be forwarded to the next higher claims authority. Any personnel claim forwarded to a higher authority for settlement will be accompanied by a memorandum of opinion. Prior to forwarding any tort claim, the USARCS AAO must be consulted and a joint decision reached on whether a memorandum of opinion must be submitted.

(4) If the claim is determined to be not meritorious, it will be disapproved provided the claims office has settlement authority for claims of the type and amount involved. If the type and amount of the claim requires denial by a higher authority, the claim will be forwarded through claims channels to the appropriate authority accompanied by a claims memorandum of opinion recommending denial. Prior to the disapproval of a claim under a particular statute, a careful review should be made to ensure that the claim is not properly payable under a different statute or on another basis.

(c) *Claims within the exclusive jurisdiction of USARCS.* Authority to settle the type of claims listed below has not been delegated below USARCS. Command claims services or area claims offices receiving these types of claims will investigate them in accordance with this regulation and guidance from USARCS. Regardless of the amount claimed, a mirror copy of the claims will be sent to Tort Claims Division, USARCS immediately on receipt. Once the investigation is complete, the files on these claims should be forwarded directly to USARCS with a memorandum of opinion recommending disposition.

(1) Claims arising in the United States out of the actions of members of the force or civilian component of a NATO nation or headquarters (subpart G, statutory authority).

(2) Maritime claims for or against the Army other than those arising overseas within the jurisdiction of a command claims service or those within the jurisdiction of Corps of Engineers and other specially designated claims offices ( See subpart H).

(3) Claims based on the denial of a security clearance by the government to civilian employee of defense contractors (DODD 5220.6, section 10, paragraph C).

(4) Claims by the U.S. Postal Service against the Military Postal Service Agency.

(5) In areas where the FTCA is applicable, any claim except those under chapter 11, arising out of an accident involving a POV driven by a member of the Army, or by ARNG personnel as defined in chapter 6, based on an allegation that the POV travel was within the scope of employment. On these claims the memorandum of opinion will include a specific discussion on the issue of scope of employment under applicable law (See chapters 4 and 5, AR 27–40).

(d) *Mirror file requirement.* In addition to the claims listed in § 536.21, USARCS is responsible for monitoring the investigation and settling the following claims. A copy of these claims and of any claims listed in paragraph (c) of this section, will be forwarded immediately on receipt to the Commander, USARCS, ATTN: JACS-TCD .

(1) A case that must be brought to the attention of the Department of Justice in accordance with The Attorney General's Regulations (DA Pam 27–162, appendix H).

(2) Any FTCA, MCA, or other tort claim in which the amount claimed exceeds $25,000.

(3) FTCA, MCA or other tort claims arising out of an incident if the combined amounts of the claims exceed $25,000.

(4) A claim within the exclusive jurisdiction of USARCS (see paragraph (c) of this section). The field claims office will provide USARCS duplicates of all correspondence, records and documents relevant to the investigation and processing of the claim as they are added to the file. Direct liaison and correspondence between USARCS and the field claims authority is authorized and encouraged on these and all claims.

In addition, heads of area claims offices in CONUS will advise the action officer at Tort Claims Division, USARCS who is responsible for their geographic area of all potential claims likely to meet the criteria in this paragraph or in paragraph (c) of this section, and will forward a copy of the investigation file to USARCS on request.

(e) *By higher settlement authority.* A higher claims settlement authority may take action with respect to a claim in the same manner as the initial claims office. However, if it is determined that any further attempt to settle the claim would be unwarranted, the claim will be forwarded to the Commander, USARCS, with recommendations.

(f) *Claims not cognizable under subparts C through L.* If a claim is determined not to be cognizable under this regulation, reference to DA Pam 27-162, chapter 8 may reveal a basis for compensation or consideration by another agency. If so, the claimant will be so advised. If, after investigation, it appears that the claim may not be settled under any law or regulation, the claim, the related file, and a memorandum of opinion will be forwarded through claim channels to the Commander, USARCS.

(g) *Blast damage claims.* All claims cognizable under subparts C, D and F which are based on damage to or loss of property due to explosions (for example, artillery firing, aerial bombing, or demolition of explosives) will be sent through USARCS to U.S. Army Ballistic Research Laboratories (USABRL), Aberdeen Proving Grounds, MD 21005-5055, for a technical opinion prior to settlement. See DA Pam 27-162, chap 5, sec IX.

**§ 536.22 Claims memorandum of opinion.**

(a) *Tort Claims Memorandum.* Unless otherwise agreed between the USARCS AAO and the area claims office (see section 536.21(b)(1)), the contents and arrangement of the Tort Claims memorandum will be as follows:

(1) *Part I. Identifying Data.* (i) Name, address, and social security number of all claimants/plaintiffs.

(ii) Name, address, and telephone number of attorney.

(iii) Date and place of incident.

(iv) Date and amount of claim/ad damnum of complaint.

(v) Brief (one sentence) description of claim/case.

(vi) Actual or potential companion claims (nature and status).

(2) *Part II. Jurisdiction.* Discuss applicable statute(s), whether the claim was timely and properly filed, and other jurisdictional matters.

(3) *Part III. Facts.* Provide a complete statement of the facts upon which the claim and any defense thereto are predicated. In each instance in which a fact is supported by documents or witness statements in the file, appropriate parenthetical references will be inserted into the statement of facts. Subparagraphs with descriptive headings will be used if appropriate, for example, background facts or facts about the incident.

(4) *Part IV. Legal Analysis.* List issues related to liability and the controlling law with applicable citations. Subparagraphs with descriptive headings will be used as appropriate and necessary, for example, law controlling factual issues, factual bases for claim as related to issues (duty, proximate cause), defenses, existence of joint tortfeasors. If the claim is barred by a jurisdictional defense, for example, Feres, Federal Employees Compensation Act, statute of limitations, this matter will be discussed separately. The position on liability will be stated at the end of the section.

(5) *Part V. Damages.* Discuss the following in the order listed under appropriate subheadings as necessary: Who can claim under applicable law, for example, wrongful death; description of injuries and treatment; description of property loss and proof thereof; types of special damages (such as, loss of earnings, loss of services, past and future care); type and nature of non-economic or general damages (use a summary in tabular form, as necessary, for special and general damages); effect of diminished liability on the value of the claim; effect of subrogation.

(6) *Part VI. Proposed Settlement or Action.* Discuss any proposed structured settlement. Discuss any prior offers, or negotiations and status. If a denial or final offer is indicated, so state.

(7) *Part VII. Recommendation.*

(8) *Part VIII. Document and Witness List.* (i) The witness list will include the name, SSAN, telephone number, and present and permanent address for each witness or medical reviewer.

(ii) Identify each document in the file.

(iii) For all medical malpractice claims, attach DD Form 2526 (Case Abstract for Malpractice Claims) as an enclosure. (See paragraph (c) of this section for additional instructions.)

(9) *Part IX. Responses to Pleadings* (for claims in litigation only)

(i) Proposed answer.

(ii) Defenses.

(iii) Counterclaims.

(iv) Crossclaims.

(v) Dispositive motions (identify and list).

(b) *Personnel Claims memorandum.* See section 536.168 for instructions on preparing a Personnel Claims memorandum.

(c) *Case Abstract for Malpractice Claims.* On all dental and medical malpractice claims, claims JAs will attach DD Form 2526 (Case Abstract for Malpractice Claims) to all memoranda prepared under paragraph (a) of this section, and forward to USARCS. Claims JAs will also submit this form to USARCS on all dental and medical malpractice claims settled or denied within their local authority. When a claim is transferred to USARCS without a forwarding memorandum prepared under paragraph (a) of this section, DD Form 2526 must still be completed and forwarded within 60 days after the medical records are available for review by the MTF/DTF risk manager (RM).

(1) Claims JAs/MCJAs will coordinate the completion of the form pertaining to the Standard of Care, Diagnoses, and Procedures with the MTF/DTF RM or the RM's designee. If the RM does not provide this information, claims JAs/MCJAs will note the reason and submit the form to USARCS. The sections pertaining to Provider Information and Type of Provider and Specialty of DD Form 2526 will not be completed on the form submitted to USARCS. OTSG will task subordinate commands to forward provider information on settled claims.

(2) Claims JAs are required to submit one DD Form 2526 for each incident (course of treatment or nontreatment that results in an injury) for which a claim has been filed. Derivative claims do not require a separate report. However, separate reports are required when claimants allege physical injury to more than one claimant (for example, an infant's claim for brain damage as a result of birth trauma and a mother's claim for physical injury caused by the delivery would require two reports). When a claimant alleges negligent medical care at more than one MTF/DTF, USARCS will designate the claims JA who will complete the DD Form 2526.

(d) *Subsequent action.* It is not necessary for each claims authority who considers the claim to write a separate memorandum. If a claims approval or settlement authority agrees with the memorandum of opinion written by another authority, he or she can adopt the earlier memorandum by merely stating that he or she concurs in the adopted memorandum and stating the nature of the action. If there is disagreement, in whole or in part, with the earlier memorandum, such disagreement should be stated and reasons therefor set forth in a separate

memorandum or in an addendum. The approval or settlement authority will personally sign the action, indicating position title.

**§ 536.23 Actions.**

The following actions may be taken as appropriate:

(a) Transmittal of the claim to the appropriate claims office for proposed disposition.

(b) Disapproval of the claim provided the person signing the action is a settlement authority. (See appendix B to this part).

(c) Final offer. (See appendix B to this part).

(d) Approval and certification of the claim for payment.

(1) SF 1034 (Public Voucher for Purchases and Services Other Than Personal) will be used on all claims settled under this regulation except claims settled under subpart D which will be paid utilizing an SF 1145 (Voucher for Payment Under the Federal Tort Claims Act). (See § 536.35(a)(1) for exceptions.)

(2) When an SF 1034 is to be paid by the GAO, the certification block of the SF 1034 will not be signed by Army Officials. GAO officials will certify any payment made by that agency. (See § 536.35(a)(1) for exceptions.)

(3) Payment of a claim under subpart D in excess of $2,500 is obtained by forwarding necessary documentation to the GAO. Complete information on the requirements to effect such payments are set forth in § 536.35(b). Note that the approval or settlement authority signs only the approval block (lower left) of the SF 1145 before submitting a claim to the GAO for payment.

(e) Subsequent action. See § 536.22(d).

**Liability and Quantum Determinations**

**§ 536.24 General considerations.**

(a) *Liability.* In the adjudication of tort claims arising in the United States, the liability of the United States generally is determined in accordance with the law of the state or country where the act or omission occurred, except that any conflict between local law and an applicable United States statute will be resolved in favor of the latter. However, in claims arising in foreign countries, liability may be based in whole or in part on local law or as otherwise provided in subpart C for settlements of claims of United States inhabitants arising overseas under the Military Claims Act. (See § 536.55(c). Where liability is not clear or other issues exist, settlements should truly reflect the uncertainties in the adjudication of such issues. Compromise settlements are encouraged provided agreement can be reached that reflects the reduced value of the damages as measured against the full value or range of value if such uncertainties or issues did not exist and were it possible for the claimant to successfully litigate the claim.

(b) *Quantum exclusion.* The costs of filing a claim and similar costs (for example, court costs, bail, interest, inconvenience expenses, or costs of long distance telephone calls or transportation in connection with the preparation of a claim) are not proper quantum elements and will not be allowed.

(c) *Property damage.* Property damage compensable under the tort claims provisions of this regulation means damage to tangible real or personal property (see glossary). It does not include mere diminution of value of real property unless there is some corresponding physical damage to the property, nor does it include damage to reputation, employment rights or constitutional rights. Other remedies may be available for such injuries but they are generally not cognizable under the FTCA, MCA, FCA or the Maritime Claims Settlement Act.

**§ 536.25 Incident to service exclusionary rule.**

(a) *General.* A claim for personal injury or death of a member of the armed forces of the United States or a civilian employee of the United States that accrued incident to his or her service is not payable under this regulation. A property damage claim that accrued incident to the service of a member of the Armed Forces may be payable under 31 U.S.C. 3721 (subpart K) or the MCA (subpart C), depending on the facts.

(b) *Property damage claims.* A claim for damage to or loss of personal property of a claimant who is within one of the categories of proper party claimants listed in § 536.163, which is otherwise cognizable under § 536.164, must first be considered thereunder. If a claim is not clearly compensable under subpart K, and it arises incident to a noncombat activity of the DA or was caused by a negligent or wrongful act or omission of military personnel or civilian employees of DOD, it may be cognizable under either the MCA or the FTCA. The claim, if meritorious in fact, will probably be payable under one authorization or another regardless of whether the claim accrued incident to the service of the claimant.

(c) *Personal injury and death claims.* (1) Only after the death or personal injury has been determined to have not been incurred incident to the member's service should subparts C and D be studied to determine which, if either, provides a proper basis for settlement of the claim. In any event, the rule in U.S. v. Brooks, 176 F.2d 482 (4th Cir. 1949) requiring setoff of amounts obtained though military or veterans' compensation systems against amounts otherwise recoverable will be followed. Other Government benefits funded by general Treasury revenues, not by the claimant's contributions, may also be used as a setoff against the settlement, for example, *Overton* v. *United States*, 619 F.2d 1299 (8th Cir. 1980).

(2) As the incident to service issue is determinative as to whether this type of claim may be processed administratively, the applicable law and facts should be carefully considered before deciding that injury or death was not incident to service. Such claims also are often difficult to settle on the issue of quantum and thus more likely to end in litigation. Moreover, the United States may well elect to defend the lawsuit on the basis of the incident to service exclusion and this defense could be prejudiced by a contrary administrative determination that a service member's personal injuries or death were not incident to service. Doubtful cases will be forwarded to the Commander, USARCS without action along with sufficient factual information to permit a determination of the incident to service question.

**§ 536.26 Property damage appraisers.**

(a) Appraisers will be used as follows: (1) Appraisers should be used in all claims where an appraisal is reasonably necessary and useful in effectuating the administrative settlement of the claim. Appraisals may not be economically feasible in some cases involving property damage of less than $100 per item and the extent of damage may be determined by personal inspection and agreement with the claimant.

(2) Where an appraisal is considered necessary, the claims officer and claimant should mutually agree, whenever possible, upon a disinterested appraiser after determining the approximate cost of the appraisal. The method of payment should be agreed upon in advance.

(i) If the claimant pays for the appraisal and can substantiate payment thereof by a paid bill or cancelled check, such cost is a reimbursable element of damage.

(ii) If the DA is absorbing the cost of the appraisal, payment is made from Appropriations, Operation and Maintenance, Army (AR 37–108, paragraph 3–74).

(3) If a single appraiser cannot be agreed upon, a joint appraisal can be

conducted (that is one in which an appraiser chosen by claimant and an appraiser chosen by the Government both examine the property and submit their respective appraisals). Joint appraisals should be coordinated and monitored by the claims officer. The cost of a single or joint appraisal should be commensurate with the amount of damage allegedly sustained and the fee charged by other appraisers for similar work.

(b) Appraisals by other organizations within the DA, the other Armed Services, or other Federal agencies may be used in addition to or in lieu of independent appraisal when obtainable. Other organizations within DA may be called upon to furnish such appraisals; for example, engineer districts will furnish an appraiser, if available, in regard to damage to buildings or diminution in value of real property, provided the requesting office defrays travel expenses for the individual's TDY.

**§ 536.27 Independent medical examinations.**

(a) In claims involving serious personal injuries, for example, cases in which there is an allegation of temporary or permanent disability, the claimant should be examined by an independent physician, or other medical specialist, depending upon the nature and extent of the injuries. The necessity for, and the cost of, the examination should be commensurate with the severity of the injuries allegedly sustained and the fee charged by other examiners for similar work. To preclude duplication of effort and expense, both claimant and the claims officer must agree, in advance, upon the following:

(1) The examiner chosen to conduct the examination and the location of the medical facility (whether governmental or civilian).

(2) That the examiner's report constitutes the best evidence of the nature and extent of claimant's injuries.

(3) The method of paying for the examination.

(b) The necessity for conducting the medical examination must be approved by the claims office having monetary jurisdiction over the largest claim or potential claim arising out of the incident. If a medical report is submitted in conjunction with the filing of a claim, such report should be included in the file.

(c) Payment of a civilian examiner's fee can be accomplished in either of the following two ways:

(1) The claimant can incur the cost of the examination and submit a paid receipt or cancelled check, which constitutes a reimbursable element of damage in evaluating the claim.

(2) The DA can absorb the cost of the examination (payment is made from Appropriations, Operation and Maintenance, Army (AR 37–108, paragraph 3–74)) by the claims office having responsibility for investigating the claim.

(d) As to an examination costing in excess of $750 or when local funds are exhausted, a request for funding may be directed to Commander, USARCS with appropriate justification.

(e) If the parties cannot agree upon an independent examiner, and if either the examiner chosen by the claimant or the results of the examination are not acceptable, the Government may demand that the claimant be examined by an examiner acceptable to the Government.

(f) Examinations of claimants at Army medical treatment facilities are authorized by AR 40–3. Such examinations may be used in addition to or in lieu of the foregoing where indicated.

**§ 536.28 Effect on award of other payments to claimant.**

The total award to which the claimant (and subrogees) may be entitled normally will be computed as follows:

(a) Determine the total of the loss or damage suffered.

(b) Deduct from the total loss or damage suffered any payment, compensation, or benefit the claimant has received from the following sources:

(1) The U.S. or ARNG employee/member who caused the damage.

(2) The U.S. or ARNG employee's/member's insurer.

(3) Any person or agency in a surety relationship with the U.S. employee; or

(4) Any joint tortfeasor or insurer, to include Government contractors under contracts or in jurisdictions where it is permissible to obtain contribution or indemnity from the contractor in settlement of claims by contractor employees and third parties.

(5) Any advance payment made pursuant to the section entitled "advance payments" of this subpart.

(6) Any benefit or compensation based directly or indirectly on an employer-employee relationship with the United States or Government contractor and received at the expense of the United States, including but not limited to medical or hospital services, burial expenses, death gratuities, disability payment, or pensions.

(7) The State (Commonwealth and so forth) whose employee or ARNG member (32 U.S.C. section 101(3) caused or generated an incident that was a proximate cause of the resulting damages.

(8) Value of Federal medical care.

(9) Benefits paid by the Department of Veterans Affairs (VA) that are intended to compensate the same elements of damage. When the claimant is receiving money benefits from the VA under 38 U.S.C. 351 for a nonservice connected disability or death based on the injury that is the subject of the claim, acceptance of a settlement or an award under the FTCA will discontinue the VA monetary benefits until the amount that would have otherwise been received in VA monetary benefits is equal to the total amount of the agreement or award including attorney fees. While monetary benefits received under 38 U.S.C. 351 must be discontinued as above, medical benefits, that is, VA medical care may continue provided the settlement or award expressly provides for such continuance and the appropriate VA official is informed of such continuance.

(10) When the claimant is receiving money benefits under 38 U.S.C. 410b for non-service connected death, arising from the injury that is the subject of the claim, acceptance of a settlement or award under the FTCA or under any other tort procedure will discontinue the VA benefits until the amount that would have otherwise been received in VA benefits is equal to the amount of the total settlement or award including attorney fees. The discontinuation of monetary benefits under 38 U.S.C. 410b has no effect on the receipt of other VA benefits. The claimant should be informed of the foregoing prior to the conclusion of any settlement and thus afforded an opportunity to make appropriate adjustment in the amount being negotiated.

(11) The value of other Federal benefits to which the claimant did not contribute, or at least to the extent they are funded from general revenue appropriations.

(12) From collateral sources where permitted by State law (for example, State or Federal workers' compensation, social security, private health, accident, and disability benefits paid as a result of injuries caused by a health care provider).

(c) No deduction will be made for any payment the claimant has received by way of voluntary contributions, such as donations of charitable organizations.

(d) Where a payment has been made to the claimant by his or her insurers or other subrogee, or under workmen's compensation insurance coverage if subrogated interests are allowable, the award based on total damages will be

apportioned in relation to their separate interests (§ 536.20).

(e) After deduction of permissible collateral and noncollateral sources, also deduct that portion of the loss or damage believed to have been caused by the negligence of the claimant, third parties whose negligence can be imputed to the claimant, or joint tortfeasors who are liable for their share of the negligence (for example, where some form of the Uniform Contribution Among Joint Tortfeasors Act has been passed).

**§ 536.29 Claims with more than one potential source of recovery.**

(a) The Government seeks to avoid multiple recovery (that is, claimants seeking recovery from more than one potential source) and to minimize the award it must make. The claims investigation should therefore identify other parties potentially liable to the claimant and/or their insurance carriers; indicate the status of any claims made or include a statement that none has been made so that it can be assured there is only one recovery and the Government does not pay a disproportionate share. Where no claim has been made by the claimant against others potentially liable, if applicable State law grants the Government the right to indemnity or contribution, and it is felt the Government may be entitled to either under the facts developed by the claims investigation, the claims officer or attorney should formally notify the other parties of their potential liability, the Government's willingness to share information, and its expectation of shared responsibility for any settlement. Furthermore, the claimant may be receiving or entitled to receive benefits from collateral and non-collateral sources (§ 536.28), which can be deducted from the total loss or damage. Accordingly, a careful review must be made of applicable State laws regarding joint and several liability, indemnity, contribution, comparative negligence, and the collateral source doctrine.

(b) If a demand by a claimant or an inquiry by a potential claimant is directed solely to the Army, where it appears that the responsible Army employee may have applicable insurance coverage, the employee should be queried as to whether he or she has liability insurance.

(1) If so, determine if his or her insurer has made or will make any payment to claimant. Under applicable State laws, the United States may also be an insured entitled to coverage under the employee's liability policy. (See 16 ALR3d 1411; United States v. State Farm Mutual Ins. Co., 245 F. Supp. 58 (D. Ore. 1965.)) Therefore, where there may be applicable insurance coverage, the policy language should be reviewed, together with the rules and regulations of the State insurance regulatory body, or determine whether—

(i) The United States comes within the definition of "insured".

(ii) The exclusion of the United States from policy coverage conforms with state laws and policy.

(iii) Appropriate consideration has been given for a policy where the United States has been excluded from coverage.

(2) If the employee refuses to cooperate in providing this information, he or she should be advised to comply with the notice requirements of the insurance policy and to request the insurance carrier to contact the claims officer or attorney. The case should be followed to ascertain whether the employee's insurer has made or will make any payment to the claimant before deciding whether to settle the claim against the Government. Normally, the award, if any, to the claimant will be reduced by the amount of the payment of the employee's insurance carrier.

(c) If the employee is the sole target of the claim and Army claims authorities arrange to have the claim made against the Government, the employee should be required to notify his or her insurance carrier according to the policy and inform Army claims authorities of the name of the insurance carrier and details of the coverage. Except when the driver's statute is applicable, the insurance carrier is expected to participate in the negotiation of the claims settlement and to pay its fair share of any award to the claimant.

(d) Where the responsible Army employee is "on loan" to another employer other than the United States (for example, an ROTC instructor at a civilian institution or performing duties for a foreign government), it should be determined whether there is applicable statutory or insurance coverage concerning the acts of the responsible employee and appropriate contribution or indemnification should be sought. In the case of foreign governments, applicable treaties or agreements are controlling.

(e) A great many claims cognizable under the FTCA are now settled on a compromise basis. A major consideration in many such settlements is the identification of other sources of recovery. This is true in a variety of factual situations where there is a potential joint tortfeasor; for example, multi-vehicle accidents with multiple drivers and guest passengers, State or local government involvement, contractors performing non-routine tasks for the Government, medical treatment rendered to claimants by non-Government employees, or incidents caused by a member or employee of the military department of a State or Commonwealth with whom the DA does not have a cost-sharing agreement. The law of the jurisdiction regarding joint and several liability, indemnity, and contribution may permit shared financial responsibility, but even in jurisdictions that do not permit contribution, a compromise settlement can be reached with the other tortfeasor's insurance company paying a portion of the total amount of the claim against the Government. For these reasons, every effort should be made to identify the insurance of all potential tortfeasers involved and the status of any claims made, and to demand contribution or indemnity where substantial reason exists to believe that liability for the loss or damage should be shared.

(f) When a claim is filed against the Government under a chapter that does not permit the payment of a subrogated interest (subparts E, J, K), it is important to ensure that full information is obtained from the claimant regarding insurance coverage since it is the legislative intent of the statutes upon which these chapters are based that insurance coverage be fully utilized before using appropriated funds to pay the claims.

**Settlement Procedures**

**§ 536.30 Settlement.**

(a) *General.* Settlement means denial or payment of a claim in full or in part. When an approval or settlement authority determines that a claim is meritorious in an amount within his or her monetary jurisdiction, the claim will be approved in that amount under the statute determined to be proper regardless of the statutory basis asserted by the claimant. Every effort will be made to settle claims at the lowest level possible commensurate with the actual value of the claim.

(b) *Award of full amount claimed.* If an approval or settlement authority approves a claim in full, the claim will be certified for payment to the appropriate disbursing officer. Enclosures listed in § 536.35 will be forwarded with the claim. The claimant will be notified of the action taken on the claim. A settlement agreement is required prior to payment.

(c) *Award of less than full amount.* When an approval or settlement authority determines that a claim is meritorious in part, he or she will—

(1) Notify the claimant in writing of his or her action.

(2) Request the execution of a settlement agreement (in triplicate) in final and complete settlement of the claim in the reduced amount.

(3) If an approval authority, inform the claimant that if he or she does not desire to accept the award, he or she should indicate in the reply the reasons for rejection. If a settlement authority, and the action is taken under subparts C or F, inform the claimant of the right to appeal. (See § 536.63 and § 536.103.) DA Pam 27–162 provides sample formats for letters notifying claimants of the actions taken on their claims. (Figure 5–10 is to be used by field approving and settlement authorities; figures 5–8 through 5–11 are to be used by claims authorities in conjunction with § 536.37 of this part.)

(d) *Nonacceptance of reduced award.* When a claimant rejects a partial award, the approval authority may reconsider the matter and, if justified, make further efforts to settle the claim. When further efforts to settle appear unwarranted, the claim and related file will be forwarded to the settlement authority having jurisdiction over the largest claim or potential claim arising out of the incident with a memorandum of opinion. The claimant should be advised of such referral.

(e) *Civil works claims.* Engineer civil works claims settled under the provisions of the FTCA in an amount of $2,500 or less normally are paid out of funds controlled by the COE rather than claims appropriations. Unsettled claims in this category should, therefore, be forwarded to the Commander, USARCS. An information copy will be sent to the COE, ATTN: Chief Counsel, unless the latter waives that requirement. Civil works claims received outside engineer channels should be forwarded without further action to the district or division engineer in whose area the incident occurred, or to the COE, ATTN: Chief Counsel.

(f) *Settlement of property damage claims.* All claims submitted for only property damage or for only personal injury should be evaluated for other potential claims. Under tort claims statutes, only one payment may be made to a claimant on all claims arising out of a single incident. Therefore, a property damage claim arising from an incident in which the claimant sustained injury should not be paid unless the claimant executes a release for any potential injury claim. Likewise, when a property damage claim is settled the claimant should be informed that subsequent claims for hidden damage or loss of use are precluded by the settlement.

**§ 536.31 Claims forwarded without settlement.**

(a) *Claims beyond monetary jurisdiction.* If the chief of a command claims service or the head of a claims office considers a claim meritorious in an amount exceeding their jurisdiction, they will forward the claim with a memorandum of opinion to the settlement authority having jurisdiction over the largest claim or potential claim arising out of the incident. The claimant should be informed of this referral. In most cases the claimant should not be informed of the amount of award recommended. However, for claims arising under the Foreign Claims Act notice of the amount recommended may be required in accordance with § 536.156.

(b) *Claims recommended for disapproval.* If a claim is forwarded to higher authority with a recommendation for denial, the claimant will be advised of this referral but not of the recommendation.

(c) *Companion claim.* When two or more claims arising from the same incident are by reason of differences in amounts within the monetary jurisdiction of different approval or settlement authorities, all such claims will be forwarded to the authority having jurisdiction over the claim presented in the greatest amount. This authority may either settle the claims or return the claim to the appropriate field claims office for settlement in accordance with his or her guidance.

(1) The same procedure will be followed when a potential claim exists in an amount estimated to be beyond the jurisdiction of the approval or settlement authority actually considering the matter. For example, the foregoing applies when a small subrogated property damage claim is received arising from an incident in which severe personal injury or death has occurred but to which no claim has yet been filed. In a case of clear liability, authorization to settle the claim within the monetary jurisdiction of the requesting officer may be obtained telephonically or by other expeditious means.

(2) Similarly, where there is a claim for property damage and no evidence (for example, police report, report of survey, collateral accident investigation, and witness interviews) of personal injury, the property damage claim may be settled by the authority having jurisdiction. However, where there is evidence of personal injury, the foregoing caveat regarding settlement and payment of lesser claims will apply. In such instances the claimant will be informed that settlement of a property damage claim will preclude settlement of a subsequently filed personal injury claim and vice versa. (See § 536.176 on personnel claims and § 537.32 on companion claims in litigation.)

(d) *Property claim of a claims authority or superior.* A claim arising from loss or damage to the property of an approval or settlement authority or his or her superior officer in the chain of command will be forwarded without recommendation to the next higher settlement authority (in the case of a division, this would be a corps level settlement authority; in an overseas area, this includes a command claims service) or to USARCS.

**§ 536.32 Settlement agreement.**

(a) *General.* (1) Except under subpart K, if a claim is determined to be meritorious in an amount less than claimed, or if a claim involving personal injuries or death is approved in full, a settlement agreement will be obtained prior to payment. A settlement agreement may be required in other instances when, in the opinion of the adjudicating authority, good legal practice so dictates; for example, where family or other multiple interests may be involved.

(2) A DA Form 1666 may be used for settlement of claims under the FTCA for less than $2,500 and for all other claims payable from Army funds. Claims payable in excess of $2500 under the FTCA will be settled using Standard Form 1145, Voucher for Payment Under the Federal Tort Claims Act. In some cases a special settlement agreement may be necessary to reflect the full understanding of the parties. However, all such special agreements should incorporate the language of the acceptance block on the Standard Form 1145.

(3) Acceptance by a claimant of an award under subparts C and K constitutes a full and final settlement and release of any and all claims against the United States and against the military or civilian personnel whose act or omission gave rise to the claim. The claimant should be so advised prior to the initiation of negotiations. Where this is done orally and the claimant is unrepresented, a memorandum of the conversation should be placed in the file and a copy furnished to the claimant. Also, settlement negotiations with unrepresented claimants should also be preserved in the form of

memoranda retained in the file with a copy furnished to the claimant. While a settlement agreement is not required in claims adjudicated under subpart K, the settlement authority approving payment may require one at his or her discretion.

(b) *Claims involving minors.* (1) Generally, only a court-appointed guardian of the estate of a minor, or a person performing a similar function under the supervision of a court, can execute a binding settlement agreement relative to a minor's claim. Therefore, a guardian of the estate of the minor or similar functionary must be appointed by a court of competent jurisdiction and must execute a settlement agreement before a claim is approved and paid. (See § 536.35.) However, this requirement can be eliminated and the settlement agreement can be signed by a parent, next-of-kin, or a friend if the contemplated payment is small and the cost of obtaining a court-appointed guardian would materially deplete the award.

(2) In foreign countries where the amount agreed to does not exceed $2,500.00, the requirement for obtaining a guardian may be eliminated. However, in areas where the FTCA (subpart D) applies, local law should be consulted as a basis for determining whether a court appointed guardian should be required. The requirement to appoint a guardian should not be imposed until a particular claim is determined to be meritorious in an amount that would require the appointment of a guardian. The claimant should be advised of this requirement well in advance of settlement negotiations so that the cost of establishing guardianship can be considered by the claimant as a factor in evaluating the claim. This requirement also can be eliminated if local law authorizes or requires a claim such as for the death of a parent of the minor, to be presented on behalf of the estate of the decedent by an administrator, administratrix, or the like. In such cases, a settlement agreement signed by the administrator, administratrix, or the like will suffice if, under local law, such action is binding on the minor.

(3) The above provisions are in addition to, not in lieu of, the requirements of § 536.20(a)(5).

(c) *Claims involving incompetents.* The above stated principles may also be applied in appropriate cases involving incompetents. Authority to waive the foregoing requirements in appropriate cases is delegated to the Commander, USARCS. If it is felt that the foregoing requirements are materially impeding settlement of the claim, the matter should be brought to the attention of the Commander, USARCS for appropriate resolution.

(d) *Claims involving workmen's compensation carriers.* The settlement of a claim involving a claimant who has elected to receive workmen's compensation benefits under local law may require the consent of the workmen's compensation carrier and in certain jurisdictions the State agency with authority over workmen's compensation awards. Accordingly, claims approval and settlement authorities should be aware of local requirements.

**§ 536.33 Vouchers.**

Vouchers are prepared in an original and three copies. The original and two copies (one marked as comeback copy) will be transmitted to the disbursing office and one copy retained as a suspense copy. Upon payment of the claim, the disbursing office will return the comeback copy, which will be included in the file when it is transmitted to the Commander, USARCS for post settlement review.

**§ 536.34 Accounting codes.**

(a) Certifying an approved claim for payment creates an obligation against the claims appropriation for the fiscal year then in progress. Accordingly, the voucher will bear the appropriate accounting code for both the appropriation charged and the current fiscal year, irrespective of the date the claim accrued or was filed. Confusion sometimes arises at the end of a fiscal year; for example, an approved claim is certified for payment on 28 September (the last business day of a fiscal year), but it is obvious that it will not be actually paid (i.e., a check issued by the disbursing activity) until on or after 1 October (the first day of the following fiscal year). At the time the check is issued, the accounting code will not be advanced to the next fiscal year. Claims checks are issued using the accounting code of the fiscal year in which the claim was certified for payment (i.e., the fiscal year in which the voucher was signed).

(b) The accounting code for each type of claim remains constant, except for the third digit of the code which is the second digit of the fiscal year (e.g., "0" for "FY 90"). The accounting codes for claims appropriations are published each fiscal year in the AR 37–100 series. Accounting codes used in the payment of claims and refunds, and their references, are listed below; the "X" denotes the space where the second digit of the fiscal year appears.

TABLE B–1.—FREQUENTLY USED CLAIMS ACCOUNTING CODES

Accounting code: 21X2020 22–0205 P202097.23–4230 FAJA S99999, 21X2020 22–0305 P202097.23–4230 FAJA S99999.
Reference: Subpart C (Military Claims Act).

Accounting code: 21X2020 22–0203 P202097.21–4230 FAJA S99999, 21X2020 22–0303 P202097.21–4230 FAJA S99999.
Reference: Subpart C (Military Claims Act).
Use symbol only if claim approved for $2,500 or less—if approved for more than $2,500, allotment symbol will be filled in by GAO.

Accounting code: 21X2020 22–0208 P202097.26–4230 FAJA S99999, 21X2020 22–0308 P202097.26–4230 FAJA S99999.
Reference: Subpart E (Nonscope Claims).

Accounting code: 21X2020 22–0206 P202097.24–4230 FAJA S99999, 21X2020 22–0306 P202097.24–4230 FAJA S99999.
Reference: Subpart F (National Guard Claims Act).

Accounting code: 21X2020 22–0207 P202097.25–4230 FAJA S99999, 21X2020 22–0307 P202097.25–4230 FAJA S99999.
Reference: Subpart H (Maritime Claims).

Accounting code: 21X2020 22–0204 P202097.26–4230 FAJA S99999, 21X2020 22–0304 P202097.26–4230 FAJA S99999
Reference: Subpart J (Foreign Claims Act).

Accounting code: 21X2020 22–0201 P202097.11–4230 FAJA S99999, 21X2020 22–0301 P202097.11–4230 FAJA S99999.
Reference: Subpart K (Personnel Claims Act).

**§ 536.35 Payment.**

(a) *General.* Except as provided in § 536.35(a)(1), when a claim has been determined to be payable, the approval or settlement authority will transmit the following to the appropriate disbursing office:

(1) The voucher (SF 1034 or SF 1145 as appropriate) in triplicate, with a request that one copy be returned with voucher number and date of payment noted thereon.

(2) Two copies of—

(i) The claim. (Under subpart K this means DD Form 1842 (Claim for Loss of or Damage to Personal Property Incident to Service).)

(ii) The settlement agreement, as required.

(iii) Actions and other documents as required; for example, DA Form 1668 signed by the approving or settlement authority (as the substitute for action in small claims under subparts C, D, E, F, H or J) attorney general approval and court approval on claims for minors and incompetents.

(iv) Original power of attorney, where appropriate.

(b) *Electronic payment procedures.* At installations where electronic payment procedures have been implemented, the approving or settlement authority will electronically transmit payment information to the servicing finance and accounting office. The claim, the settlement agreement, any actions or other required documents, and the original power of attorney will not be transmitted to the finance and accounting office, but will be retained in the claims file. Instead, a "payment report" produced by the claims automation program provided such offices by USARCS, which evidences or supports the fact that a claims official has approved a claim payment, will be transmitted to the disbursing activity in accordance with locally established procedures. The method of transmission used should not result in avoidable or significant delay in the issuance of checks for claims payments. The payment report includes—

(1) The name of the payee.

(2) The payee's social security number (if available).

(3) The payee's address.

(4) The date the claim was filed.

(5) The claim number.

(6) The amount claimed.

(7) The amount of the approved payment.

(8) The date the payment was recorded in claims records.

(9) The claims office identification.

(10) The claims office's office code.

(c) *Payments in excess of $2,500 under the FTCA (§ 536.78).* Claims paid in excess of $2,500 under the FTCA will be submitted to the GAO with the same documentation as indicated in (a) above but with the following exceptions:

(1) Standard Form 1145 will be signed by the settlement authority on the lower left side only. The space on the right side for the authorized certifying officer will not be signed.

(i) Where a minor is payee, the full legal name of the individual should be listed on the voucher; for example, "John Doe, Sr., as guardian of John Doe, Jr." Descriptive words such as "Mrs. John Doe and her three minor children" should not be used.

(ii) The accounting classification will not be placed on the voucher. This is accomplished by the GAO as the payment is made from Treasury funds.

(2) The letter of transmittal to the GAO will include a statement that the individual whose signature appears on the voucher as certifying authority is the person having authority to act under the provisions of the FTCA and § 536.80.

(3) The Attorney General will approve payments in excess of $25,000 in lieu of action of the approval or settlement authority.

(d) *Advance payment.* When it has been determined that an advance payment will be made, the approval or settlement authority will transmit to the appropriate disbursing officer—

(1) SF 1034 (in triplicate) with a request that one copy be returned with voucher number and date of payment.

(2) The original copy and one copy of the action by the approval or settlement authority authorizing advance payment and the Advance Payment Acceptance Agreement. (See § 536.47)

(e) *Payment involving minors.* Payment will be made to the individual who executed the settlement agreement on behalf of the minor.

(f) *Lost, stolen, forged, destroyed, or undeliverable Government checks.* Army disbursing officers have the authority to issue substitute checks for checks that have been issued by the Army and that are subsequently lost, destroyed, or rendered undeliverable. (See AR 37103, chap. 4, secs. VII through X.) Some Federal agencies do not yet have this authority. Inquiries from payee or endorsees of Army-issued checks should be referred to an Army comptroller; inquiries regarding other agencies should be referred to the specific agency involved. For claims paid by the GAO, if the Treasury check is lost or stolen, the payee or endorsee should be referred to the Check Forgery Insurance Fund, Department of the Treasury (31 U.S.C 3343, 31 CFR 235.1 through 235.6). The Fund can reimburse such losses provided the specific requirements of the Statute are met. The Fund is administered by the Commissioner, Financial Management Service, Department of the Treasury, 3700 East-West Highway, Hyattsville, MD 20782.

**§ 536.36 Effect of payment.**

Acceptance of an award by the claimant, except for advance payment, constitutes for the United States, military personnel, or civilian employee whose act or omission gave rise to the claim, a release from all liability to the claimant, based on the act or omission. However, on tort claims only one payment may be made for all damages a claimant sustains from an incident. Therefore, a signed unconditional settlement agreement is needed to ensure that the claimant understands the finality of accepting payment.

**§ 536.37 Notification as to denial of claims.**

(a) *General.* The nature and extent of the written notification to the claimant as to the denial of his or her claim should be based on whether the claimant has a judicial remedy following denial or an administrative recourse to appeal.

(b) *Final actions under subpart D.* If the settlement authority has information that could be a persuasive factor for the claimant as to whether to resort to litigation, such information may be orally transmitted to the claimant and, in appropriate cases, released under normal procedures in accordance with AR 340–17 or AR 340–21. However, the written notification of the denial should be general in nature; for example, denial on the weaker ground of contributory negligence should be avoided and the inclination should be to deny on the basis that the claimant was solely responsible for the incident. The claimant will be informed in writing of his or her right to bring an action in the appropriate U.S. District Court not later than 6 months after the date of mailing of the notification. See DA Pam 27–162, figures 5–8 and 5–9.

(c) *Final actions under subparts C, F and J.* Final agency actions under subparts C, F or J are subject to appeal and the claimant will be so informed. Also, the notice of final action will be sufficiently detailed to provide the claimant with an opportunity to know and attempt to overcome the basis for denial. The claimant should not be afforded a valid basis for claiming surprise when an issue adverse to him or her is asserted as a basis for denying the appeal (see DA Pam 27–162, figs 5–8 and 5–9).

(d) *Denials on jurisdictional grounds.* Regardless of the nature of the claim or the statute under which it may be considered, claims denied on jurisdictional grounds that are valid, certain, and not easily overcome (and for this reason no detailed investigation as to the merits of the claim is conducted) should contain in the denial letter a statement that the denial on such grounds is not to be construed as an expression of opinion on the merits of the claim or an admission of liability. If sufficient factual information is available to make a tentative ruling on

the merits of the claim, liability may be expressly denied.

(e) *Claims that may be considered under more than one chapter.* In doubtful cases as to whether subparts C, D and F are the appropriate chapters to consider the claim, the claimant will be advised of the alternatives; for example, the right to sue or the right to appeal. Similarly, a claimant may be advised of his or her alternative remedies when the claimant is a military member and the issue of "incident to service" is not clear.

(f) *Denial after litigation.* On those claims cognizable under the FTCA in which the claimant files suit after six months without agency action, a formal denial will be sent to the claimant unless the Assistant United States Attorney responsible for the litigation of the suit expressly directs otherwise. The denial will be on the basis that the claim is no longer amenable to administrative settlement. Other reasons for denial may also be given.

**Small Claims**

**§ 536.38 General.**

This section provides an expeditious procedure for the investigation and payment of claims (regardless of the amount claimed) that may be without extensive investigation. If it appears that a claim should be denied or cannot be settled within the limits specified in this section, it will be fully investigated under normal procedures. The use of small claims procedures is not mandatory; however, these procedures should be used whenever considered appropriate in the judgment of the claims approval or settlement authority, as considerable processing time and expense is usually saved thereby. If a fully investigated claim is received by an approval or settlement authority, which in his or her opinion could properly have been processed under small claims procedures, the claim will be settled in accordance with normal procedures. Appropriate corrective action will be taken to ensure the use of small claims procedures in similar future cases.

**§ 536.39 Investigation.**

The investigation will be made so as to develop most expeditiously the facts necessary to determine whether the claim is meritorious and in what amount. The evidence required may be obtained by telephone, from incident reports, and other forms of hearsay evidence. Written statements of witnesses, written estimates of repairs, and the like are not required. The approving authority must be convinced and state on DA Form 1668 that—

(a) The United States is liable for the damage or injury incurred.

(b) The claimant is a proper claimant.

(c) The amount approved, as claimed or agreed upon, is reasonably substantiated.

**§ 536.40 Report of investigation.**

When it appears that a small claim may arise, the report of investigation will be prepared on DA Form 1668. The investigator will append a brief summary of the evidence developed. The summary may be used as a basis for completion of the investigation after a claim has been filed. This report is exempted from control in accordance with AR 335–15, paragraph 7–2t.

**§ 536.41 Processing.**

(a) If the amount claimed under chapter 11 is not more than $1,000, or in the case of a tort claim is not more than $2500, and is considered meritorious in full, the claims JA/attorney will complete DD Form 1842 or DA Form 1668 and pay the claim.

(b) A claim under subpart K is meritorious in an amount of $1,000 or less, or if a tort claim is meritorious in the amount of $2500 or less, the claim JA/attorney may settle the claim.

(c) After coordination with the responsible approving or settlement authority, unit claims officers may be authorized to attempt to procure a settlement agreement. If a settlement agreement is obtained, the claims officer will complete the small claims certificate for amount of recommended payment and transmit it, in triplicate, with the claim and settlement agreement, to the approval or settlement authority.

(d) If a claimant refuses to accept a sum offered under this section or if it appears that a claim should be disapproved, the small claims procedures will not be employed; the claim will be fully investigated and processed.

(e) Nonappropriated fund claims will be forwarded by the approval or settlement authority for payment as prescribed in subpart L.

(f) Claims under chapter 11. DA Form 1668 will not be employed in the settlement of small claims under chapter 11. Such a claim will be submitted on DD Form 1842. Procedures in subpart K will be used.

**§ 536.42 Settlement agreement.**

When a claimant is available and agrees to accept a sum less than originally claimed, he or she will be requested to sign, in ink, a statement to that effect on any open space on each copy of the claim form (SF 95 (Claim for Damage, Injury, or Death)). If not readily available, the claimant will be requested to sign and return in triplicate a DA Form 1666 or Standard Form 1145, which will be attached to the claim form.

**§ 536.43 Payment.**

(a) If a small claim is payable under any chapter except subparts G and I, the approval or settlement authority will allow the procedures of either § 536.35(a) and § 536.35(a)(1).

(b) [Reserved]

(c) Except for claims cognizable under subpart K and personnel claims cognizable under subpart L an approval authority who has been appointed an agent officer under AR 37–103, chapter 15, may pay the claim, and will require the claimant to sign, in triplicate, a receipt in the following language:

_____

(Date)

I hereby acknowledge receipt of _____ in full satisfaction and final settlement of the within claim.

_____

(Signature)

_____

(Name printed)

(d) This above receipt may be printed, stamped, typed, or written in ink in any available space on the front or back of the signed claim form. If not on the claim form, the receipt will be modified to identify and will be firmly affixed to the appropriate claim.

**Advance Payments**

**§ 536.44 Authority.**

This section implements the act of 8 September 1961 (75 Stat. 488, 10 U.S.C 2736) as amended by Public Law 90–521 (82 Stat. 874), Public Law 98–564, and Public Law 100–456. No new liability is created by 10 U.S.C 2736, which merely permits partial advance payments on meritorious claims as specified above. (See § 536.178 for emergency partial payments in personnel claims, which are not governed by 10 U.S.C 2736.)

**§ 536.45 Conditions for advance payment.**

(a) An advance payment not in excess of $100,000 is authorized in the limited category of claims resulting in immediate hardship arising from incidents that are payable under subparts C, F or J. An advance payment is authorized only under the following circumstances:

(1) The claim must be determined to be cognizable and meritorious under the provisions of subparts C, F or J.

(2) There exists an immediate need of the person who suffered an injury, damage, or loss, or of the family of a

person who was killed for food, clothing, shelter, medical, burial expenses, other necessities, or other resources for such expenses that are not reasonably available.

(3) The payee, so far as can be determined, would be a proper claimant, as is the spouse or next of kin of a claimant who is incapacitated.

(4) The total damage sustained must exceed the amount of the advance payment.

(5) A properly executed advance payment acceptance agreement has been obtained.

**§ 536.46 Authorization.**

The authorities listed below are authorized to make advance payments as follows:

(a) Under subparts C and F of this part, TJAG and TAJAG may make advance payments in amounts not exceeding $100,000; the Commander, USARCS, in amounts not exceeding $25,000; and the authorities designated in § 536.61(a) (4) and (5) and § 536.103(c)(3), in amounts not exceeding $10,000, subject to advance coordination with USARCS if the estimated total value of the claim exceeds their monetary authority. Requests for advance payments in excess of $10,000 will be forwarded to USARCS for processing.

(b) Under subpart J of this part, three-member claims commissions may make advance payments under the Foreign Claims Act in amounts not exceeding $10,000, subject to advance coordination with USARCS if the estimated total value of the claim exceeds their monetary authority.

**§ 536.47 Advance payment acceptance agreement.**

Prior to making any advance payment, the authority approving such payment will obtain an executed acceptance agreement from the claimants.

## Subpart C—Claims Cognizable Under the Military Claims Act

**§ 536.48 Statutory authority.**

The statutory authority for this chapter is contained in the act of 10 August 1956 (70A Stat. 153, 10 U.S.C. 2733), commonly referred to as the "Military Claims Act," as amended by Public Law 90–522, 26 September 1968 (82 Stat. 875), Public Law 90–525, 26 September 1968 (82 Stat. 877), Public Law 93–336, 8 July 1974; the act of 8 September 1961 (75 Stat. 488, 10 U.S.C. 2736), as amended by Public Law 90–521, 26 September 1968 (82 Stat. 874); and the act of 30 October 1984, Public Law 98–564.

**§ 536.49 Scope.**

This subpart is applicable in all locations and prescribes the substantive bases and special procedural requirements for the settlement of claims against the United States for death; personal injury; or damage, loss, or destruction of property—

(a) Caused by military personnel or civilian employees of the DA acting within the scope of their employment.

(b) Incident to the noncombat activities of the DA, provided such claim is not for personal injury or death of a member of the Armed Forces or Coast Guard or civilian officer or employee whose injury or death is incident to service.

**§ 536.50 Claims payable.**

(a) *General.* Unless otherwise prescribed, a claim for personal injury, death, or damage or loss of real or personal property is payable under this chapter when—

(1) Caused by an act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the DA acting within the scope of their employment, including certain Red Cross volunteers meeting the criteria in AR 40–3, paragraph 2–42, or

(2) Incident to the noncombat activities of the DA.

(b) *Property.* The loss or damage to property that may be the subject of claims under this chapter includes—

(1) Real property used and occupied under lease, express or implied, or otherwise (for example, in connection with training, field exercises, or maneuvers). An allowance may be made for the use and occupancy of real property arising out of trespass or other tort, even though claimed as rent. (See DA PAM 27–162, paragraph 8–46.)

(2) Personal property bailed to the Government under an agreement, express or implied, unless the owner has expressly assumed the risk of damage or loss. Some losses may be payable using Operations and Maintenance, Army funds. (See DA Pam 27–162, paragraph 8–41.) Clothing damage or loss claims arising out of the operation of an Army Quartermaster laundry are considered to be incident to service and are payable only if claimant is not a proper claimant under subpart K.

(3) Registered or insured mail in the possession of the DA, even though the loss was caused by a criminal act. (See DA Pam 27–162, paragraph 8–61 for settlement of claims by the U.S. Postal Service.)

(c) *Effect of FTCA.* A claim may be settled in the United States only if the FTCA has been judicially determined not to be applicable to claims of this nature or if the claim arose incident to noncombat activities.

(d) *Advance payments.* Advance payments (10 U.S.C. 2736, as amended) in partial payment of meritorious claims to alleviate immediate hardship are authorized as provided in subpart B.

**§ 536.51 Claims not payable.**

A claim is not payable that—

(a) Results wholly from the negligent or wrongful act of the claimant or agent. (See section 536.55(b) on comparative negligence.)

(b) Is for reimbursement for medical, hospital, or burial expenses furnished at the expense of the United States.

(c) Is purely contractual in nature.

(d) Arises from private as distinguished from Government transactions.

(e) Is based solely on compassionate grounds.

(f) Is for war trophies or articles intended directly or indirectly for persons other than the claimant or members of his or her immediate family, such as articles acquired to be disposed of as gifts or for sale to another, voluntarily bailed to the Army, or is for precious jewels or other articles of extraordinary value voluntarily bailed to the Army. The preceding sentence is not applicable to claims involving registered or insured mail. No allowance will be made for any item when the evidence indicates that the acquisition, possession, or transportation thereof was in violation of DA directives.

(g) Is for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property or interests therein by and for the DA, except as authorized by § 536.50(b). Real estate claims founded upon contract are generally processed under AR 405–15. (See DA Pam 27–162, paragraph 8–46.)

(h) Is not in the best interests of the United States, is contrary to public policy, or is otherwise contrary to the basic intent of the governing statute (10 U.S.C. 2733); for example, claims by inhabitants of unfriendly foreign countries or by or based on injury or death of individuals considered to be unfriendly to the United States. When a claim is considered to be not payable for the reasons stated in this paragraph, it will be forwarded for appropriate action to the Commander, USARCS, together with the recommendations of the responsible claims office.

(i) Is presented by a national, or a corporation controlled by a national, of

a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is and, at the time of the incident, was friendly to the United States. A prisoner of war or an interned enemy alien is not excluded as to a claim for damage, loss, or destruction of personal property in the custody of the Government otherwise payable.

(j) Is for personal injury or death of a member of the Armed Forces or Coast Guard or a civilian employee that is incident to his or her service (10 U.S.C. 2733(b)(3)).

(k) Is listed in section 536.75, except for claims listed in section 536.75(n) and (r).

**§ 536.52 Claims having multiple remedies.**

(a) *Claims cognizable under other chapters.* (1) Claims based upon a single act or incident cognizable under this subpart and subparts H or K will be first considered under the latter chapters; if not payable under any of those chapters, the claim will be considered under this chapter.

(2) A claim may not be paid under this chapter if it is covered by the Federal Tort Claims Act (subpart E) or the Foreign Claims Act (subpart J). (See 10 U.S.C. 2733(b)(2)).

(3) Where a Status of Forces Agreement or other agreement provides for host country adjudication of a claim, the treaty process may be the claimants exclusive remedy (see subpart G). Where a foreign country is responsible for adjudication of the claim under the terms of such an agreement, it may not be paid under the provisions of this chapter. If the foreign country refuses to recognize legal responsibility for the claim, or to consider it under applicable treaty provisions, the chief of a command claims service or, where the estimated value of the claim is within USARCS authority, the Commander, USARCS may authorize adjudication of the claim under this chapter. The mere fact a foreign country fails to pay the claims on its merits is not sufficient basis for invoking this authority.

(b) *Claims based upon multiple acts or theories of liability.* Where claims cognizable under this chapter are based upon more than one act or injury and where one or more of the acts or injuries are also cognizable under the FTCA (subpart D) (for example, claims alleging acts of medical malpractice both in a foreign country and in the United States or claims alleging negligence in the conduct of a noncombat activity), the claims will be processed as follows:

(1) *Meritorious claims.* (i) If the primary cognizable act or incident upon which the claim is based is not cognizable under subpart D, the claim may be considered and paid under this chapter. However, the settlement agreement must expressly release the United States from any further liability under the FTCA or any other statute or regulation for all acts or incidents upon which the claim was based. If the claim is over $25,000, any proposed settlement will be coordinated with USARCS prior to final action.

(ii) If the primary cognizable act or incident upon which the claim is based is cognizable under subpart D, the claim will be first considered under subpart D. If the claim is determined by proper authority to be nonmeritorious under subpart D but meritorious under this subpart (for example, negligence occurred overseas but none occurred in the United States or there is no negligence in the conduct of a noncombat activity), it may be considered and paid under this subpart. However, an agreed settlement must be reached that expressly releases the United States from further liability under the FTCA or any other statute or regulation for all acts or incidents upon which the claim was based. If the claim was presented in an amount over $25,000, any proposed settlement will be coordinated with USARCS.

(2) *Nonmeritorious claims.* Where claims are based upon multiple acts or incidents, some or all of which may be cognizable under subpart D (FTCA), extreme care will be taken prior to any disapproval based upon this chapter. Whether a claim is covered by Cognizability under the FTCA is a litigable issue. Such claims will be disapproved under this chapter only as follows:

(i) A claim presented in an amount not over $25,000, may be disapproved by an office with settlement authority having jurisdiction over the claim only if the claim is determined to be nonmeritorious under both this subpart and subpart D; however the disapproval procedures established in subpart D must be fully satisfied. In such cases, the disapproval notification will advise the claimant of his or her concurrent rights to appeal the disapproval under this subpart or to institute suit under the FTCA. (See § 536.63.) In case of doubt concerning the applicability of this paragraph, the question will be referred to USARCS.

(ii) Claims of the type covered by this paragraph, which are presented in an amount over $25,000, will be disapproved only by the USARCS.

(c) *Claims in litigation.* Disposition under this chapter of any claim of the type covered by this paragraph that goes into litigation in any State or Federal court under any State or Federal statute or ordinance will be suspended pending disposition of such litigation, and the claim file will be forwarded to USARCS. The Commander, USARCS, in coordination with the U.S. Department of Justice, may determine that final disposition under this chapter during pendency of the litigation is in the best interests of the United States. This paragraph will also apply to any litigation brought against any agent of the United States in his or her individual capacity that is based upon the same acts or incidents upon which a claim under the chapter is based.

**§ 536.53 Presentation of claim.**

(a) *When claim must be presented.* A claim may be settled under this chapter only if presented in writing within 2 years after it accrues. If a claim accrues in time of war or armed conflict, or if war or armed conflict intervenes within 2 years after it accrues, and if good cause is shown, the claim may be presented not later than 2 years after war or armed conflict is terminated. As used in this paragraph, a war or armed conflict is one in which any Armed Force of the United States is engaged. The dates of commencement and termination of an armed conflict must be established by concurrent resolution of Congress or by determination of the President.

(b) *Where claim must be presented.* A claim must be presented to an agency or instrumentality of the DA. However, the statute of limitations is tolled if a claim is filed with another Government agency and forwarded to the DA within 6 months, or if the claimant makes inquiry of the DA concerning his or her claim within 6 months after it was filed with another agency of the Government. If a claim is received by an official of the DA who is not a claims approval or settlement authority under this chapter, the claim will be transmitted without delay to the nearest claims office or JA office for delivery to such an office.

**§ 536.54 Procedures.**

So far as not inconsistent with this chapter, the claims procedures set forth in subpart B will be followed. Subrogated claims will be processed as prescribed in § 536.20(b).

**§ 536.55 Law applicable to liability.**

(a) *Claims arising within the United States, and its territories, commonwealths and possessions.* As to claims arising in the United States, its

territories, commonwealths, and possessions, the law of the place where the act or omission occurred will be applied in determining liability and the effect of contributory negligence on the claimant's right to recover damages. However, theories of strict or absolute liability will not be applicable to claims under this subpart.

(b) *Claims arising within foreign countries.* (1) For claims arising in a foreign country, liability of the United States will be assessed by reference to the law of the District of Columbia applicable to torts committed in and having their operative effect in the District (i.e. District of Columbia choice of law rules will not be applicable). The United States shall be liable in the same manner and to the same extent as a private individual under like circumstances, except that theories of absolute or strict liability may not be applied under this chapter. Damages will be determined under the provisions of §§ 536.56 through 536.59.

(2) The law of the place in which the alleged negligent act occurred will be applied to determine the effect of the claimant's own negligence on the merits of the claim. Where there is no law on this issue, the MCA requires application of traditional rules of contributory negligence.

(3) In traffic accident cases, questions of negligence, and the degree of the claimant's comparative negligence, will be evaluated based on the traffic and vehicle safety laws and regulations of the country in which the accident occurred, but only to the extent they are not specifically superseded or preempted by U.S. military traffic regulations. Likewise, where a claim is based on the failure to comply with some safety or regulatory standard, the standard applicable at time and in the place where the claim arose will be used, rather than any comparable standard in the District of Columbia.

**§ 536.56 Measure of damages for property claims.**

(a) *General.* The measure of damages in property claims arising in the United States or its possessions will be determined in accordance with the law of the place where the incident occurred. The measure of damages in property claims arising overseas will be determined in accordance with the law of the District of Columbia (see § 536.55(a). However, punitive or exemplary damages, including damages considered punitive in nature under 28 U.S.C. 2674, and interest on any settlement are not payable.

(b) *Proof of damage.* The information listed below (similar to that required by 28 CFR 14.4(c) (DA Pam 27–162, appendix H)) will be submitted by a claimant to substantiate a claim.

(1) Proof of ownership.

(2) Detailed statement of amount claimed for each item of property.

(3) Itemized receipt or estimate for all repairs.

(4) Statement giving date of purchase, price and, where not economically repairable, the salvage value.

(c) *Appraisals.* The assistance of appraisers should be used in all claims where, in the opinion of the claims officer, an appraisal is reasonably necessary and useful in effectuating administrative settlement of claims. (See § 536.26 for procedures on appraisals.)

**§ 536.57 Measure of damages in injury or death claims arising in the United States or its possessions.**

Measure of damages in injury or death claims arising in the United States or its possessions will be assessed as follows:

(a) Where an injury or an injury resulting in death arises within the United States or its possessions, the measure of damages will be determined in accordance with the law of the State or possession wherein the injury arises. However, punitive or exemplary damages, including damages considered punitive in nature under 28 U.S.C. 2674, and interest on any settlement are not payable.

(b) The information listed below (similar to that required by 28 CFR 14.4(a) (DA Pam 27–162, appendix H)) will be submitted by a claimant to substantiate a wrongful death claim:

(1) Authenticated death certificate or other competent evidence showing date and cause of death and age of decedent.

(2) Decedent's employment and occupation at time of death, including salary or earnings and duration of last employment or occupation.

(3) Names, addresses, birth dates, kinship, and marital status of survivors.

(4) Identification of persons dependent on decedent for support at time of death and the degree of support provided.

(5) Decedent's general physical and mental condition at time of death.

(6) Itemized bills or receipts for medical and burial expenses.

(7) If damages for pain and suffering are claimed, a physician's statement specifying the injuries suffered, duration of pain and suffering, drugs administered, and decedent's physical condition between time of injury and time of death.

(c) The information listed below (similar to that required by 28 CFR 14.4(b) (DA Pam 27–162, appendix H)) will be submitted by a claimant to substantiate a personal injury claim:

(1) Written report by the attending physician or dentist setting forth the—

(i) Nature and extent of injury.

(ii) Nature and extent of treatment.

(iii) Degree of temporary or permanent disability.

(iv) Prognosis.

(v) Period of hospitalization.

(vi) Diminished earning capacity.

(2) Itemized bills or receipts for medical, dental, and hospital expenses.

(3) If the prognosis includes future treatment, a statement of expected expenses for such treatment.

(4) If the claim includes lost time from employment, a statement by the employer showing the actual time lost and wages and/or salary lost.

(5) If the claim includes lost income by a self-employed claimant, documentary evidence of such loss.

**§ 536.58 Measure of damages in injury or death claims arising in foreign countries.**

(a) Where a claim for an injury, or injury resulting in death, arises outside of the United States or its possessions, the elements of damages payable under this subpart will be the same as those payable in a similar claim arising under the law of the District of Columbia applicable to torts committed in and having their operative effect in the District of Columbia. The amount paid will be based on generally accepted economic principles. All awards for future payments of economic damages will be discounted to present value. Awards under this chapter will be reduced by any benefits which have been or are reasonably likely to be paid, if the benefit or payment is from the general revenues of the United States and the claimant did not contribute to or purchase the benefit. In death cases, taxes and personal consumption will be deducted from any award for lost economic contribution or lost earnings. Punitive or exemplary damages, including damages considered punitive in nature under 28 U.S.C. 2674, and interest on any settlement are not payable.

(b) The information listed in § 536.57 (b) or (c), as appropriate, will be submitted by the claimant to substantiate a claim.

(c) A claimant who alleges a serious personal injury resulting in temporary or permanent disability should be examined by an independent physician or other medical specialist. The purpose of the examination is not just to confirm the impairment but also to help assess its extent, prognosis and treatment. See § 536.27 for independent medical examination procedures.

**§ 536.59 Failure to substantiate a claim.**

(a) The Government is not obligated to take final action on a claim until it has been supported by the claimant with specific facts substantiated by appropriate documentary evidence, reports of investigation, medical records, or witness statements. As the burden of proof is on the claimant, the failure to substantiate a claim within a reasonable time can be the basis for denial of the claim. Upon request, the claimant must—

(1) Provide the documentation required by sections §§ 536.56 through 536.58.

(2) Undergo necessary medical examinations.

(3) Permit questioning of the claimant, his or her witnesses, and treating medical personnel.

(4) Submit an expert opinion in a professional negligence action.

(b) Failure to comply with these requirements may provide a basis for denial of a claim, in full or in part.

**§ 536.60 Structured settlement.**

(a) The use of the structured settlement device by approval and settlement authorities is encouraged in all appropriate cases. A structured settlement should not be used when contrary to the desires of the claimant.

(b) Notwithstanding the above, the Commander, USARCS may require or recommend to higher authority that an acceptable structured settlement be made a condition of award notwithstanding objection by the claimant or his or her representative where—

(1) Necessary to ensure adequate and secure care and compensation to a minor or otherwise incompetent claimant over a period of years;

(2) Where a trust device is necessary to ensure the long-term availability of funds for anticipated further medical care;

(3) Where the injured party's life expectancy cannot be reasonably determined.

**§ 536.61 Settlement authority.**

(a) The Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or other designee of the Secretary of the Army must approve settlements in excess of $100,000.

(b) Delegations of authority. (1) Disapprovals and final offers in claims acted on under the delegations set forth herein are subject to appeal to the authorities specified in paragraph (d) of this section.

(2) The TJAG and TAJAG are delegated authority to pay up to $100,000 in settlement of a claim and to disapprove a claim regardless of the amount claimed. The Commander, USARCS will process such claims as prescribed in § 536.62.

(3) The Commander, USARCS, or designees, are delegated authority to pay up to $25,000 in settlement of a claim and to disapprove or make a final offer in a claim regardless of the amount claimed.

(4) The SJA and, subject to limitations imposed by him or her, the chief of the command claims service of the commands listed below are delegated authority to pay up to $25,000 in settlement of a claim, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding $25,000:

(i) USAREUR.

(ii) Eighth U.S. Army, Korea.

(iii) USARSO.

(5) Area claims offices are delegated authority to pay up to $15,000 in settlement of a claim, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding $15,000.

(6) Claims processing offices with approval authority are delegated authority to approve, in full or in part, claims presented for $5,000 or less, and to pay claims regardless of the amount claimed provided an award of $5,000 or less is accepted in full satisfaction of the claim.

(c) Settlement of multiple claims arising from a single incident. (1) Where a single act or incident gives rise to multiple claims cognizable under this chapter, and where one or more of these claims apparently cannot be settled within the jurisdiction of the authority initially acting on the claims, no final offer will be made and all claims will be forwarded with recommendation as to disposition to the authority having jurisdiction over the largest claim for a determination of liability.

(2) If such authority determines that liability of the United States is established, he or she may return claims of lesser value to the field office for settlement within that office's jurisdiction. Care will be exercised by the field office to avoid compromising the discretion of the higher authority by conceding liability in claims of lesser amount.

(d) Appeals. Denials or final offers on claims described as allows may be appealed to the official designated:

(1) For claims presented in an amount over $100,000, final decisions on appeals will be made by The Secretary of the Army or designee.

(2) For claims presented for $100,000 or less and any denied claim, regardless of the amount claimed, in which the denial was based solely upon an incident to service bar (FERES), on exclusionary language in a federal statute governing compensation of federal employees for job related injuries (see, for example, § 536.75(s) and (t)) or upon the lack of timely filing, final decisions on appeals will be made by TJAG or TAJAG, except that claims presented for $25,000 or less and not acted on by the Commander, USARCS are governed by paragraph (d)(3) of this section.

(3) For claims presented for $25,000 or less, final decisions on appeals will be made by the (Commander, USARCS, or his designee or the chief of a command claims service for claims acted on by an area claims office under such service's jurisdiction). See §§ 536.63 and 536.64 for rules relating to the notification of appeal rights and processing.

(e) Delegated authority. Authority delegated by this paragraph will not be exercised unless the claims settlement or approval authority has been assigned an office code.

**§ 536.62 Claims over $100,000.**

(a) Claims cognizable under 10 U.S.C. 2733 and this chapter, which are meritorious in amounts over $100,000, will be forwarded to the Commander, USARCS, who will negotiate a settlement subject to approval by the Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or designee, or require the claimant to state the lowest amount that will be acceptable and provide appropriate justification. Tender of a final offer by the Commander, USARCS, constitutes an action subject to appeal. The Commander, USARCS, will prepare a memorandum of law with recommendations and forward the claim to the Secretary of the Army, or designee, for final action. The Secretary, or designee, will either disapprove the claim or approve it in whole or in part.

(b) If one or more claims arising from an incident are approved in an amount over $100,000, only $100,000 will be paid from the Claims Appropriation, after the execution of a settlement agreement. The excess will be reported to the Claims Division, GAO, 441 G Street, NW, Washington, DC 20548, together with documents listed in § 536.35(a).

**§ 536.63 Settlement procedures.**

(a) *Procedures.* Approval and settlement authorities will follow the procedures set forth in subpart B in paying, denying, or making final offers

on claims. A copy of the notification will be forwarded to Commander, USARCS. The settlement authority will notify the claimant by certified mail (return receipt requested) of a denial or final offer and the reason therefor as set forth in § 536.37. The letter of notification will inform claimants of the following:

(1) They must accept or appeal as provided in paragraph (b) of this section.

(2) The official who will act on the appeal and that the appeal will be addressed to the settlement authority who last acted on the claim.

(3) No form is prescribed for the appeal but claimants must fully set forth the grounds for appeal, or state that they appeal on the basis of the record as it exists at the time of denial or final offer.

(4) The appeal must be postmarked not later than six months after the date of mailing of the notice of action on the claim. If the last day of the appeal period falls on a day on which the post office is closed, the next day on which it is open for business will be considered the final day of the appeal period.

(b) *Acceptance and appeal.* For final offers, a settlement agreement releasing the government from all liability will be mailed along with the final offer notice. Claimants will be advised that they must either submit an appeal or accept the offer within 180 days of the date of mailing of the final offer notice. If they fail to do either, the offer will be withdrawn, the claim will be denied and the file will be closed without further recourse.

(c) *Companion FTCA claims.* Where a claim for the same injury has been filed under subpart D, and the denial or final offer applies equally to such claim, the letter of notification must advise the claimant that any suit brought as to any portion of the claim filed under the FTCA must be brought not later than 6 months from the date of mailing of the notice of denial or final offer. Further, the claimant must be advised that if suit is brought, action on any appeal under this subpart will be held in abeyance pending final determination of such suit.

**§ 536.64 Action on appeal.**

(a) The appeal will be examined by the settlement authority who last acted on the claim or his or her successor, to determine if the appeal complies with the requirements of this regulation. The settlement authority will also examine the claims investigative file and decide whether additional investigation is required; ensure that all allegations or evidence presented by the claimant, agent, or attorney are documented in the file; and ensure that all pertinent evidence is included in the file. If the claimant states that he or she appeals, but does not submit supporting materials within the 180 day appeal period, the appeal will be treated as being on the record as it existed at the time of denial or final offer. Unless action under paragraph (b) of this section is taken, the claim and complete investigative file, including any additional investigation required, and a tort claims memorandum will be forwarded to the appropriate appellate authority for necessary action on the appeal.

(b) If the evidence in the file, including information submitted by the claimant with the appeal and any necessary additional investigation, indicates the appeal should be granted, in whole or in part, the settlement authority who last acted on the claim or his or her successor will attempt to settle the claim. If a settlement cannot be reached, the appeal will be forwarded in accordance with paragraph (a) of this section.

(c) As to an appeal that requires action by TJAG, TAJAG, or the Secretary of the Army or designee, the Commander, USARCS may take the action in paragraph (b) of this section or forward the claim together with a recommendation for action. All matters submitted by the claimant will be forwarded and considered.

(d) Since an appeal under this chapter is not an adversary proceeding, no form of hearing is authorized. A request by the claimant for access to documentary evidence in the claims file to be used in considering the appeal should be granted unless access is not permitted by law or regulation.

(e) If the appeal authority upholds a final offer or authorizes an award on appeal from a denial of a claim, the notice of the appellate authority's action will inform the claimant that they must accept the award within 180 days of the date of mailing of the notice of the appellate authority's action or the award will be withdrawn, the claim will be deemed denied and the file will be closed without further recourse.

**§ 536.65 Cross-servicing of claims.**

(a) *Single-service claims responsibility.* Per DODD 5515.8, the DOD has assigned single-service responsibility to the various military departments for the settlement of claims in specified countries.

(b) *Claims settlement procedures.* Per DODD 5515.3, the DOD has directed that where a single Service has been assigned a country or area claims responsibility, that Service will settle claims cognizable under 10 U.S.C. 2733 in accordance with the departmental regulations of that Service.

**§ 536.66 Attorney fees.**

In the settlement of any claim pursuant to 10 U.S.C. 2733 and this chapter, attorney fees will not exceed 20 percent of the final cost to the United States of the award. On structured settlements, the cash payment due immediately upon final approved must be sufficient to allow payment of attorneys fees equal to 20% of the total cost of the settlement.

**§ 536.67 Payment of costs, settlements, and judgments related to certain medical malpractice claims.**

(a) *General.* Costs, settlements, or judgments cognizable under 10 U.S.C. 1089(f) for personal injury or death caused by any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel (including medical and dental technicians, nurse assistants, therapists, and Red Cross volunteers meeting the criteria in AR 40–3, paragraph 2–42) of DA will be paid provided—

(1) The alleged negligent or wrongful actions or omissions arose in performance of medical, dental or related health care functions (including clinical studies and investigations) within the scope of employment;

(2) Such personnel furnish prompt notification and delivery of all process served or received and other documents, information, and assistance as requested; and cooperate in the defense of the action on its merits.

(b) Requests for indemnification. All requests for indemnification under this paragraph should be forwarded to the Commander, USARCS, for action using procedures contained in this chapter. (See DODD 6000.6.)

**§ 536.68 Payment of costs, settlements, and judgments related to certain legal malpractice claims.**

(a) *General.* Costs, settlements, and judgments cognizable under 10 U.S.C. 1054(f) for damages for injury of loss of property caused by any attorney, paralegal, or other member of a legal staff within DA will be paid provided that—

(1) The alleged negligent or wrongful actions or omissions arose in connection with providing legal services while acting within the scope of duties or employment,

(2) Such personnel furnish prompt notification and delivery of all process served or received, and other documents, information, and assistance

as requested; and cooperate in the defense of the action on the merits.

(b) *Requests for indemnification.* All requests for indemnification under this paragraph should be forwarded to the Commander, USARCS, for action utilizing the procedures contained in this subpart.

## Subpart D—Claims Cognizable Under the Federal Tort Claims Act

### § 536.69 Authority.

The statutory authority for this subpart is the FTCA (60 Stat. 842), (28 U.S.C. 2671–2680), as amended by the Act of 18 July 1966 (Public Law 89–506; 80 Stat. 306), Public Law 93–253, 16 March 1974 (88 Stat. 50), and Public Law 97–124, 29 December 1981, and as implemented by the Attorney General's Regulations (28 CFR 14.1–14.11).

### § 536.70 Scope.

(a) This subpart prescribes the substantive bases and special procedural requirements for the administrative settlement of claims against the United States under the FTCA and the implementing Attorney General's Regulations (DA Pam 27–162, appendix H) based on death, personal injury, or damage to or loss of property that accrues on or after 18 January 1967. If a conflict exists between this regulation and the Attorney General's Regulations, the latter governs.

(b) Citations to cases interpreting and applying the FTCA are contained in the Federal Tort Claims Handbook provided by USARCS. That handbook should be used in conjunction with this subpart.

### § 536.71 Claims payable.

(a) Unless otherwise prescribed, claims for death, personal injury, or damage to or loss of property (real or personal) are payable under this subpart the injury or damage is caused by negligent or wrongful acts or omissions of military personnel or civilian employees of the DA or DOD while acting within the scope of their employment under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The FTCA is a limited consent to liability without which the United States is immune. Similarly, there is no Federal cause of action created by the Constitution that would permit a damage recovery because of the Fifth Amendment or any other constitutional provision. Immunity must be expressly waived, as by the FTCA.

(b) An *employee of the Government* (28 U.S.C. 2671) includes the following categories of tortfeasors for which the Army is responsible:

(1) Military personnel (members of the Army), including but not limited to—

(i) Members on full-time active duty in a pay status, including members—

(A) Assigned to units performing active service.

(B) Serving as ROTC instructors. (Excludes Junior ROTC instructor unless on active duty.)

(C) Serving as NG instructors or advisors.

(D) On duty or training with other Federal agencies, for example, National Aeronautics and Space Administration, DOD, State, Navy, or Air Force.

(E) Assigned as students or ordered into training at a non-Federal civilian educational institution, hospital, factory, or other industry. (This does not include members on excess leave.)

(F) On full-time duty at nonappropriated fund activities.

(G) Of the USAR and ARNG on active duty under Title 10.

(ii) Members of Reserve Units (other than members of the ARNG under subpart F) during periods of inactive duty training and active duty training, including ROTC cadets who are reservists while they are at summer camp.

(iii) Members of the ARNG while engaged in training or duty under Title 32 U.S.C. sections 316, 502, 503, 504, or 505 for claims arising on or after 29 December 1981.

(2) Civilian officials and employees of both the DOD and DA (there is no practical significance to the distinction between the terms "official" and "employee") including but not limited to—

(i) Civil Service and other full-time employees of both the DOD and DA paid from appropriated funds.

(ii) Contract surgeons (10 U.S.C. 1091 4022; AR 40–1, paragraph 4–2) and consultants (10 U.S.C. 1091; AR 40–1, paragraph 4–3; CPR A–9; FPM chapter 304) where "control" is exercised over physician's day to day practice.

(iii) Employees of nonappropriated funds if the particular fund is an instrumentality of the United States and thus a Federal agency. In determining whether or not a particular fund is a "Federal agency," consider whether the fund is an integral part of the Army charged with an essential DA operational function and the degree of control and supervision exercised by DA personnel. Members or users, as distinguished from employees of nonappropriated funds, are not considered Government employees; the same is true of family child care providers. However, claims arising out of the use of certain nonappropriated fund property, or the acts or omissions of family child care providers, may be payable from such funds under subpart L as a matter of policy, even when the user is not within the scope of employment and the claim is not otherwise cognizable under any of the other authorizations in this regulation.

(iv) Prisoners of war and interned enemy aliens.

(v) Civilian employees of the District of Columbia National Guard, including those paid under "service contracts" from District of Columbia funds.

(vi) Civilians serving as ROTC instructors paid from Federal funds.

(viii) National Guard technicians employed under 32 U.S.C. 709(a) for claims accruing on or after 1 January 1969 (Public Law 90–486, 13 Aug. 1968; 82 Stat. 755).

(3) Persons acting in an official capacity for the DOD or DA whether temporarily or permanently in the service of the United States with or without compensation including but not limited to—

(i) "Dollar a year" personnel.

(ii) Members of advisory committees, commissions, boards, or the like.

(iii) Volunteer workers in an official capacity acting in furtherance of the business of the United States. The general rule with respect to volunteers is set forth in 31 U.S.C. 665(b), which provides that, "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property." Title 5, United States Code, section 3111(c) specifically provides that student volunteers employed thereunder will be considered Federal employees for purposes of the FTCA. The same classification is applied by 10 U.S.C. 1588 to museum and family support program volunteers. The Army is permitted to accept and use certain volunteer services in Army family support programs as authorized by Public Law 98–94, September 24, 1983. Red Cross volunteers meeting the criteria set forth in AR 40–3, paragraph 2–42, are also considered to be employees of the United States for claims purposes.

(iv) Loaned servants. Employees who are permitted to serve another employer may be considered "loaned servants," provided the borrowing employer has the power to discharge the employee, control and direct the employee, and decide how he or she will perform the tasks. Whoever has retained those

powers is liable for the employee's torts under the principle of respondent superior. Where those elements of direction and control have been found, the United States has been liable; for example, for the torts of Government employees loaned for medical training and emergency assistance and county and state employees discharging Federal programs.

(c) *Scope of employment* means acting in "line of [military] duty" (28 U.S.C. 2671) and is determined in accordance with principles of respondent superior under the law of the jurisdiction in which that act or omission occurred. Determination as to whether a person is within a category listed in (b)(3) of this section will usually be made together with the scope determination. Local law should always be researched, but the novel aspects of the military relationship should be kept in mind in making a scope determination.

(d) "Line of duty" determinations under AR 600–8–1 are not determinative of scope of employment. "Joint venture" situations are likely to be frequent where the Federal employee is performing federally assigned duties but is under actual direction and control of a non-Federal entity; for example, a Federal employee in training at a non-Federal entity or ROTC instructors at civilian institutions. This could also occur where the employee is working for another Federal agency.

Furthermore, dual purpose situations are commonplace where benefits to the Government and the member or employee may or may not be concurrent; for example, use of privately owned vehicles at or away from assigned duty station, or permanent change of station with delay en route. (See subpart E for the handling of certain claims arising out of nonscope activities of members of the Army.)

**§ 536.72 Law applicable.**

The whole law of the place where the act or omission occurred, including choice of law rules, will be applied in the determining liability and quantum. Where there is a conflict between the local law and an express provision of the FTCA, the latter governs.

**§ 536.73 Subrogation.**

Claims involving subrogation will be processed as prescribed in § 536.20(b) except where that section is inconsistent with the provisions of this chapter or the Attorney General's regulations.

**§ 536.74 Indemnity or contribution.**

(a) *Sought by the United States.* It is the policy of the Department of Justice that, if the claim arises under circumstances in which the Government is entitled to contribution or indemnity under a contract of insurance or the applicable law governing joint tortfeasors, the third party will be notified of the claim and will be requested to honor its obligation to the United States or to accept its share of joint liability. (See §§ 536.28 and 536.29.) If the issue of indemnity or contribution is not satisfactorily adjusted, the claim will be compromised or settled only after consultation with the Department of Justice as provided in § 536.75(s).

(b) *Claims for indemnity or contribution.* Claims for indemnity or contribution from the United States will be compromised or settled under this chapter, if liability exists under the applicable law, provided the incident giving rise to such claim is otherwise cognizable under this chapter. As to such claims where the exclusivity provisions of the FECA may be applicable, see § 536.75(s).

(c) *ARNG vehicular claims.* (1) When a vehicle used by the ARNG, or a POV operated by a member or employee of the ARNG, is involved in an incident under circumstances that make this chapter applicable to the disposition of administrative claims against the United States and results in personal injury, death, or property damage, and a remedy against the State, or its insurer is indicated, the responsible area claims authority will monitor the action against the State or its insurer and encourage direct settlement between the claimant and the State or its insurer.

(2) Where the State is insured, direct contact with State or ARNG officials rather than the insurer is desirable. Regular procedures will be established and followed wherever possible. Such procedures should be agreed on by both local authorities and the appropriate claims authorities subject to concurrence by Commander, USARCS. Such procedures will be designed to ensure that local authorities and U.S. authorities do not issue conflicting instructions for processing claims and, whenever possible and in accordance with governing local and Federal law, a mutual arrangement for disposition of such claims as in paragraph (d) of this section is worked out.

(3) Amounts recovered or recoverable by claimant from any insurer (other than claimant's insurer who has obtained no subrogated interest against the United States) will be deducted from the amount otherwise payable.

(d) *Claims arising out of training activities of NG personnel.* Contribution may be sought from the State involved where it has waived sovereign immunity or has private insurance that would cover the incident giving rise to the particular claim. Where the State involved rejects the request for contribution, the file will be forwarded to the Commander, USARCS. The Commander, USARCS, is authorized to enter into an agreement with a State, territory, or commonwealth to share settlement costs of claims generated by the ARNG personnel or activities of that political entity.

**§ 536.75 Claims not payable.**

Exclusions listed in paragraphs (a) through (l) of this section are based upon the wording of 28 U.S.C. 2680. The remainder are based either on statute or court decisions. The interpretation of these exclusions is a Federal question to be decided under Federal law; for example, the tort of assault and battery listed in 28 U.S.C. 2680(h) should be interpreted in accordance with Federal common law principles, and where State law differs, the former will prevail. Where a claim is considered not payable under this paragraph, consult DA Pam 27–162, chapter 8 for other methods of handling. A claim is not payable under this chapter if it—

(a) Is based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid (28 U.S.C. 2680(a)). Where no negligence on the part of any Government employee is shown, and the only ground for the claim is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid, the sole question is the existence of the statute or regulation, not its validity. However, a claim should not be denied based solely on this exception without the prior approval of the Commander, USARCS.

(b) Is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved is abused (28 U.S.C. 2680(a)). A claim should not be denied solely because of this exception without the prior approval of the Commander, USARCS.

(c) Arises out of the loss, miscarriage, or negligent transmission of letters or postal matter (28 U.S.C. 2680(b)). It should be noted that administrative settlement and payment of certain mail claims is authorized under subparts C and F. Further, a limited indemnity may be obtained through other channels for the loss or damage to registered,

insured, and C.O.D. mail (39 U.S.C. 5001, et. seq.) (See DA Pam 27–162, paragraph 8–61.) The exclusion may not be applicable where State law recognizes a cause of action for invasion of privacy.

(d) Arises with respect to the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any customs or other law-enforcement officer (28 U.S.C. 2680(c)). Adequate remedies are available to anyone aggrieved by the application of the tax or customs laws of the United States (26 U.S.C. 6213), or the claimant may pay the tax and sue in the U.S. Claims Court or the appropriate U.S. District Court for a refund (28 U.S.C. 1491 and 1346(a)(1)). Other remedies are also available for the loss or detention of goods or merchandise; for example, Tucker Act, bailment provisions of the MCA (chap 3), or destruction of evidence for scientific analysis (AR 190–22, paragraph 3–8). With respect to the detention of goods by a law enforcement officer, this exception may apply to seizures in connection with an arrest.

(e) Is cognizable under the Suits in Admiralty Act (46 U.S.C. 740–752) or under the Public Vessels Act (46 U.S.C. 781–790). To be cognizable under this exclusion, the tort must have both a maritime situs and a maritime nexus, otherwise the tort is cognizable under the FTCA. Maritime claims may be considered under The Army Maritime Claims Settlement Act (10 U.S.C. 4801, et. seq.) and subpart H, and they must be settled or suit filed within 2 years of accrual of claim.

(f) Arises out of an act or omission of any employee of the Government in administering the provisions of the Trading With the Enemy Act (50 U.S.C. appendix 1–31; 28 U.S.C. 2680(e)). That Act provides that the sole remedy of any person claiming money or other property held by the Alien Property Custodian is as provided by that Act. This exception should be broadly construed.

(g) Is for damages caused by the imposition or establishment of a quarantine by the United States (28 U.S.C. 2680(f)). Claims for failure to impose a quarantine or delay in enforcing a quarantine come within the discretionary function exclusion discussed in paragraph (b) of this section.

(h) Arises out of an assault or battery (28 U.S.C. 2680(h)).

(1) Often artful pleading is employed to create a cause of action in negligence, such as alleging negligent supervision; such does not create a separate cause of action as the exception bars a claim arising out of an assault and battery even though there may have been negligent supervision. Under the 1974 amendment to 28 U.S.C. 2680(h), the activities of law enforcement officers that result in an assault or battery are removed from this exception and can create a cause of action. Such activities have accounted for most of the past claims and litigation involving the assault and battery exception.

(2) Therefore, any claim alleging use of threatening or deadly force, especially by a law enforcement officer, must be thoroughly investigated to determine whether the nature, amount, and use of such force was justified under the circumstances. (See paragraph (i) of this section for definition of investigative or law enforcement officer). Also, section 2680(h) does not apply to a claim arising out of performance of medical, dental or related health care functions (10 U.S.C. 1089(e)).

(i) Arises out of false imprisonment, false arrest, malicious prosecution or abuse of process (28 U.S.C. 2680(h)). This exception has universal applicability to all acts of false imprisonment, false arrest, malicious prosecution, or abuse of process when committed by an employee of the United States in the scope of employment. However, by amendment to 28 U.S.C. 2680(h), this exception is not applicable on or after 16 March 1974 to such actions when committed by an investigative or law enforcement officer of the United States who is empowered by law to execute searches, seize evidence, or make arrests for violations of Federal law (88 Stat. 50). Such employees are considered to include military police, but not post exchange detectives. Whether or not a Federal law enforcement officer is involved, the defense of probable cause, reasonableness, and good faith are available, provided the arrest is otherwise lawful under State law. DA Pam 27–162, paragraph 8–8c, refers to certain claims based on unjust convictions.

(j) Arises out of libel, slander, misrepresentation, or deceit (28 U.S.C. 2680(h)). The misrepresentation exception has been broadly construed to include negligent as well as intentional misrepresentation. It has not been applied in situations involving negligent failure to perform some operational task or to convey information related to public safety independent of any secondary misstatement. Where an erroneous medical diagnosis is made, the exception does not apply because malpractice is the gravamen of the action and the misrepresentation incidental. Similarly, the misrepresentation exception was held not applicable where the United States sold bomb casings to a scrap dealer expressly warranting that they were safe and fit for scrap metal processing, and one of the castings exploded. Before this exception can be applied in the determination of an administrative tort claim, the claims investigation must consider the nature of the Government's acts or omissions, as well as the information upon which the claimant may have relied to his or her detriment.

(k) Arises out of interference with contract rights (28 U.S.C. 2680(h)). This exception includes both interference with existing contract rights and interference with prospective or executed contract rights or economic advantage.

(l) Arises from the fiscal operations of the Department of the Treasury or from the regulation of the monetary system (28 U.S.C. 2680(i)). This exception includes all disbursing operations of the DA or other military services. However, such claims may be forwarded through Army finance channels for consideration.

(m) Arises out of the combat activities of the military or naval forces, or the Coast Guard, during time of war (28 U.S.C. 2680(j)). "Combat activities" is defined in the glossary.

(n) Arises in a foreign country (28 U.S.C. 2680(k)). There is no clear delineation of what constitutes a foreign country. However, the exception has been held applicable to claims arising in a leased military base in Newfoundland; in the American Embassy in Bangkok, Thailand; on Okinawa under the de facto sovereignty of the United States; on Kwajalein under the trusteeship of the United States; and to various occupied countries. (See subpart J and DA Pam 27–162, paragraph 821, for handling of certain claims arising in a foreign country.) Where the actionable negligence has occurred in the United States and only the consequences occurred in a foreign country, this exception has not been applied.

(o) Arises from the activities of the Tennessee Valley Authority (28 U.S.C. 2680(i) and 16 U.S.C. 831 et. seq.).

(p) Arises from the activities of the Panama Canal Commission (28 U.S.C. 2680(m)). (See 76A Stat. 22 through 25, and 22 U.S.C. 3761.) Claims accruing after the effective date of the Panama Canal Treaty (1 October 1979) may be cognizable under either the FCA or the MCA.

(q) Arises from the activities of a Federal land bank, a Federal intermediate credit bank, or bank for cooperatives (28 U.S.C. 2680(n)).

(r) Is for the personal injury or death of a member of the Armed Forces of the United States incurred incident to service, or for damage to a member's property incurred incident to service (*Feres* v. *United States*, 340 U.S. 135 (1950)). (See § 536.25 and DA Pam 27–162, paragraphs 8–26 through 8–28.) Currently the most significant justification for the incident to service doctrine is the availability of alternative compensation systems, and the fear of disrupting the military command relationship. Other supportive factors often cited by the courts are the service member's duty status, location, and receipt of military benefits at the time of the incident.

(1) The exception applies to members of the Army, Navy, Air Force, Marine Corps, and Coast Guard, including the Reserve Components of the Armed Forces. (See 10 U.S.C. 261.) The exception also applies to service members on the Temporary Disability Retired List, on convalescent leave, and on the extended enlistment program; to service academy cadets; and to members of visiting forces in the United States under the SOFA between the parties to the North Atlantic Treaty or similar international agreements.

(2) The incident to service doctrine has been extended to derivative claims where the directly injured party is a service member. Third party indemnity claims are barred.

(s) Is for the personal injury or death of a Government employee for whom benefits are provided by the FECA (5 U.S.C. 8101- 8150). (See DA Pam 27–162, paragraph 8–25.) Who is a Government employee under the Act is defined in the Act itself (5 U.S.C. 8101), but the term is not limited to Federal Civil Service employees. The term "Government employee" can include certain ROTC cadets (5 U.S.C. 8140) and State or local law enforcement officers engaged in apprehending a person for committing a crime against the United States (5 U.S.C. 8191), certain nurses, interns, or other health care personnel, for example, student nurses, (5 U.S.C. 5351, 8144), and certain Army Community Service Volunteers (10 U.S.C. 1588; AR 608–1).

(1) This Act provides that benefits paid under this Act are exclusive and instead of all other liability of the United States, including that under a Federal tort liability statute (5 U.S.C. 8116(c)). It extends to derivative claims, subsequent malpractice for treatment of a covered injury, injuries for which there is no scheduled compensation, and employee harassment claims for which other remedies are available (42 U.S.C. 2000e).

(2) Is from a federal civilian employee based on a allegation of a violation of some employment right or is otherwise one for which the rules governing federal civilian employment provide a comprehensive remedy. Such claims often allege emotional distress or psychological injury as a result of the alleged misconduct. Administrative remedies under the civil service regulations are the employee's exclusive remedy. Bush v. Lucas 462 U.S. 367 (1983). This exception does not bar third party indemnity claims. When there is doubt as to whether or not this exception applies, the claim should be forwarded through claims channels to the Commander, USARCS, for an opinion.

(t) Is for the personal injury or death of an employee including nonappropriated fund employees, for whom benefits are provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901–950). An employee of a nonappropriated fund instrumentality is covered by the Act (5 U.S.C. 8171). This is exclusive for covered employees, similar to that under the FECA.

(u) Is for the personal injury or death of any employee for whom benefits are provided under any workmen's compensation law if the premiums of the workmen's compensation insurance are retrospectively rated and charged as an allowable, allocable expense to a cost-type contract. (See § 536.28 and DA Pam 27–162, paragraph 8–25.) If, in the opinion of an approval or settlement authority the claim should be considered payable (for example, the injuries did not result from a normal risk of employment or adequate compensation is not payable under workmen's compensation laws), the file will be forwarded with recommendations through claims channels to the Commander, USARCS who may authorize payment of an appropriate award.

(v) Is for taking of property as by technical trespass or overflight of aircraft and of a type contemplated by the Fifth Amendment to the U.S. Constitution, or otherwise constitutes attacking. (See paragraph 2c of AR 405–15 and DA Pam 27–162, paragraphs 8–46, 8–74, and 8–75.)

(1) The Fifth Amendment to the U.S. Constitution provides in part "* * * nor shall private property be taken for public use, without just compensation."

(2) Claims for takings without just compensation are actionable under the Tucker Act (28 U.S.C. 1346(a)(2) and 1491, Appendix A., 24 Stat. 505 (1887)). Prior to referring a claimant to a Tucker Act remedy, the applicability of the procedures under AR 405–15 should be considered by referral to appropriate Corps of Engineers authorities. (See DA Pam 27–162, paragraph 8–75.)

(w) Is for damage from or by flood or flood waters at any place (33 U.S.C. 702c). This exception is broadly construed and includes multipurpose projects and all phases of construction and operation.

(x) Is for damage to property or for any death or personal injury occurring directly or indirectly as a result of the exercise of performance of, or failure to exercise or perform, any function or duty by any Federal agency or employee of the Government to carry out the provisions of the Federal Civil Defense Act of 1950 during the existence of a civil defense emergency (50 U.S.C. Appendix 2291–2297).

(y) Is based solely upon a theory of absolute liability or liability without fault. Either a negligent or wrongful act is required by the FTCA, and some type of malfeasance or nonfeasance is required (Dalehite v. United States, 346 U.S. 15 (1953); Laird v. Nelms, 406 U.S. 797 (1972)). Thus, liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or of engaging in extra-hazardous activity.

(z) Is for patent or copyright infringement. (See AR 27–60.)

(aa) Claims for damage to property of a State, commonwealth, territory, or the District of Columbia caused by ARNG personnel engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505 who are assigned to a unit maintained by that State, commonwealth, territory, or the District of Columbia will not be paid without the express approval of the Commander, USARCS.

(bb) Is for damage to property or for any death or personal injury arising out of the activities of any Federal agency or employee of the Government in carrying out the provisions of the Federal Disaster Relief Act of 1954 (Public Law 93–288, Sec. 403, 88 Stat. 143). The Act requires the local beneficiary (State or local government) to hold the Government harmless and to assume the defense of all claims arising from the removal of debris and wreckage from public or private property.

(cc) Arises from activities that present a nonjusticiable political question. The courts search for six factors, as follows, any one of which is grounds for dismissal:

(1) A commitment of the issue to a coordinate branch of Government by the text of the Constitution.

(2) A lack of judicially discoverable and manageable standards for resolving it.

(3) The impossibility of deciding without a policy determination calling for non-judicial discretion.

(4) The impossibility of undertaking independent resolution without expressing lack of respect for coordinate branches of Government.

(5) An unusual need for unquestioning adherence to a political decision already made.

(6) The potential for embarrassment from multiple pronouncements by various departments on one question.

**§ 536.76 Claims under other laws and regulations.**

Any claim that may be settled under any exclusive or specific authorization discussed in DA Pam 27–162, chapter 8, will be settled under such authority in preference to settlement under this chapter. Guidance concerning application of this policy will be obtained from USARCS.

**§ 536.77 Procedures.**

(a) General. Unless inconsistent with the provisions of this chapter, the procedures for the investigation and processing of claims set forth in subpart B will be followed.

(b) Claims arising out of tortious conduct by ARNG personnel defined in § 536.71(b)(1)(iii).

(1) Notification and investigation. The procedures in §§ 536.97 and 536.98 will be followed in NG claims arising under the FTCA.

(2) Claims against the U.S. Government received by agencies of the State. These claims will be expeditiously forwarded through the State adjutant general to the appropriate U.S. Army area claims office in whose geographic area the incident occurred.

(c) Statute of limitations. (1) To be settled under this chapter, a claim against the United States must be presented in writing to the appropriate Federal agency within 2 years of its accrual.

(2) For statute of limitations purposes, a claim will be deemed to have been presented when the appropriate Federal agency (as defined in the glossary) receives from a claimant or his or her duly authorized agent or legal representative, an executed SF 95 or written notification of an incident, together with a claim for money damages, in a sum certain, for damage to or loss of property or personal injury or death. For Federal tort claims arising out of activities of the NG, receipt of a written claim by any full time officer or employee of the NG will be considered proper receipt.

(3) A claim received by an official of the DOD will be transmitted without delay to the nearest Army claims processing office or area claims office. Inquiries concerning applicability of the statute of limitations to claims filed with the wrong Federal Agency will be referred to USARCS for resolution.

(d) Claims within settlement authority of USARCS or the Attorney General. (1) A copy of each of the type of claims described below will be forwarded immediately to the Commander, USARCS. (Subsequent documents should be forwarded or added in accordance with § 536.22(b)(2)).

(i) Claims that appear to be of a type that must be brought to the attention of the Attorney General in accordance with his or her regulations (28 CFR 14.6).

(ii) A claim in which the demand exceeds $25,000 or the total amount of all claims, actual or potential, from a single incident exceeds $25,000 $50,000.

(2) USARCS is responsible for the monitoring and settlement of such claims and will be kept informed of the status of the investigation and processing thereof. Direct liaison and correspondence between USARCS and the field claims authority or investigator is authorized on all claims matters and assistance will be furnished as required.

(e) Non-Army claims. Claims based on acts or omissions of employees of the United States, other than military and civilian personnel of the DA, civilian personnel of the DOD, and employees of nonappropriated fund activities of the DA will be transmitted forthwith to the nearest official of the employing agency; the claimant will be advised of the referral. (See § 536.18 (c) and (d) for further guidance when more than one Federal agency is involved.)

(f) Acknowledgment of claim. (1) The claimant and his or her attorney will be kept informed by personal contact, telephonic contact, or mail of the receipt of his or her claim and the status of the claim. Formal acknowledgment of the claim in writing is required only where the claim is likely to result in litigation or is presented in an amount exceeding $15,000. In this event, the letter of acknowledgment will state the date of receipt of the claim by the first agency of the Army receiving the claim.

(2) If it is reasonably clear to the office acknowledging receipt that a claim filed under the FTCA is not cognizable thereunder; for example, it is a maritime claim under chapter 8, or it falls under subparts C or F, the acknowledgment will contain a statement advising the claimant of the statute under which his or her claim will be processed. If it is not clear which subpart applies, a statement to that effect will be made and the claimant will be promptly advised when a decision is made. However all potential maritime claims will be handled in accordance with § 536.21(b)(5).

(3) When a claim has been amended as set forth in § 536.20(f)(4), the amendment will be acknowledged in all cases. Also, the claimant will be informed that the amendment constitutes a new claim insofar as concerns the 6 months in which the DA is granted the authority to make a final disposition under 28 U.S.C. 2675(a) and the claimant's option thereunder will not accrue until 6 months after the filing of the amendment.

(4) When a claim is improperly presented, is incomplete, or otherwise does not meet the requirements set forth in § 536.20(d), the claimant or his or her representative will be promptly informed in writing of the deficiencies and advised that a proper claim must be filed within the 2 year statute of limitations.

(g) Investigation. Claims cognizable under this regulation will be investigated and processed on a priority basis in order that settlement if indicated may be accomplished within the 6 months prescribed by statute.

(h) Advice to claimant. (1) A full explanation of claims procedures and of the rights of the claimant will be made to the extent necessitated by the amount and nature of the claim.

(2) In a case where litigation is likely, or where this course of action is preferred by the claimant, and it appears to be a proper case for administrative settlement, the claimant will be advised as to the advantages of administrative settlement. If the claim is within the jurisdiction of a higher settlement authority, the claim will be discussed with such authority prior to the furnishing of such advice. The claimant should be familiarized with all aspects of administrative settlement procedures including the administrative channels through which the claim must be processed for approval. He or she may be advised that administrative processing can result in more expeditious processing, whereas litigation may take considerable time, particularly in jurisdictions with crowded dockets.

(3) If appropriate, the claimant may be informed that a tentative settlement can be reached for any amount, but that awards in excess of $200,000 are subject to approval by the Attorney General. The claimant should be advised that administrative filing of the claim protects him or her under the statute of limitations for purpose of litigation and

that a suit can be filed within 6 months after the date of mailing of notice of final denial by the DA, thus potentially allowing negotiations to continue indefinitely. An attorney representing a claimant should be advised of the limitations on fees for purposes of administrative settlement (20 percent) and litigation (25 percent) and that there is no jury trial under the FTCA.

(i) *Notification to claimant of action on claim.* (1) The filing of an administrative claim and its denial are prerequisite to filing suit. Any suit must be filed not later than 6 months after notification by certified or registered mail of the denial of the administrative claim. Failure of a settlement authority to take final action on a properly filed claim within 6 months may be treated by the claimant as a final denial for the purposes of filing suit. If the claimant has provided insufficient documentation to permit evaluation of the claim, written notice should be given to this effect. Since administrative settlements are a voluntary process, the preferred method of negotiating is to attempt to exchange information on an open basis.

(2) Upon final denial of a claim, or upon rejection by claimant of a partial allowance, if further efforts to reach a settlement are not considered feasible (§ 536.21(b)(1)), the settlement authority will inform the claimant of the action on his or her claim by certified or registered mail. Notification will be made as set forth in § 536.37(b). A copy of this notification will be furnished to Litigation Division, OTJAG, and the Commander, USARCS. In all medical malpractice cases, a copy will be furnished to the Consultation Case Review Branch (CCRB), Office of the Surgeon Command and the SJA, Health Services Command.

(3) If a claim has been presented to the DA and, also, to other Federal agencies, without any notification to the DA of this fact, final action taken by the DA prior to that of any other agency is conclusive on a claim presented to other agencies unless another agency decides to take further action to settle the claim. Such agency may treat the matter as a reconsideration under 28 CFR 14.9(b) unless suit has been filed. (See § 536.82.) The foregoing applies likewise to Army claims in which another Federal Agency has taken final action.

(4) If, after final denial by another agency, a claim is filed with the Army, the new submission will not toll the 6 months limitation for filing suit unless the DA treats the second submission as a request for reconsideration under § 536.82.

(5) In those cases where claimants exercise their option under 28 U.S.C. 2675(a) and file suit after six months but before final agency action, a formal denial notice will be sent to the claimant promptly upon notification of the suit unless the Assistant United States Attorney responsible for litigation of the suit expressly requests that such action not be taken.

**§ 536.78 Payment of claims.**

(a) *Awards of $2,500 or less.* Awards of $2,500 or less are paid from the claims appropriation. For procedures, see sections 536.32 through 536.35. An explanation of various claims appropriations to be used is in section 536.34.

(b) *Awards in excess of $2,500.* Payment of awards in excess of $2,500 will be accomplished by forwarding the documents listed in § 536.35(b) to the Claims Division, GAO, 441 G Street, NW., Washington, DC 20548. When an award is in excess of $25,000, evidence that the award has been approved by the Attorney General or designee is also required. (For procedures, see §§ 536.32 through 536.35.)

(c) *Attorney as payee.* If a claimant is represented by an attorney, both the claimant and the attorney will be designated as "payees" on the voucher (SF 1145) and the check will be delivered to the attorney whose address appears on the voucher.

(d) *Broker as payee.* If the settlement requires the purchase of an annuity and establishment of a reversionary trust, the broker may be named as payee and required to dispose of the amount paid as set forth in the settlement agreement.

(e) *Attorneys fees.* Attorneys' fees are limited by 28 U.S.C. 2678 to not more than 20 percent of any award, compromise, or settlement.

**§ 536.79 Acceptance of award.**

The acceptance by the claimant of an award, compromise, or settlement made pursuant to this chapter will be final and conclusive for all purposes and will constitute a complete release of any claim against the United States and against the military or civilian personnel of the DA, or civilian employees of the DOD whose act or omission gave rise to the claim by reasons of the same subject matter. (See § 536.32 on preparing a settlement agreement.)

**§ 536.80 Delegation of authority.**

(a) Settlement authority. (1) Subject to the approval of the Attorney General for payments in excess of $200,000 in a single claim or where the total value of all claims and potential claims arising out of a single incident exceeds $200,000 or as otherwise required (see § 536.81), the following are delegated authority to settle (i.e. pay in full, pay in part or deny) and make final offers on claims under this chapter:

(i) TJAG.

(ii) TAJAG.

(iii) The Commander, USARCS or designees.

(2) Unless the Commander, USARCS alters the delegation, heads of area claims offices or their designated claims Judge Advocates/claims attorneys are delegated authority to approve and pay in full or in part, to disapprove, and to make final offers on claims presented for $25,000 or less. These offices are also authorized to approve and pay, regardless of the amount claimed, an agreed award of $25,000 or less, provided that the total value of all claims and potential claims arising out of a single incident does not exceed $50,000.

(3) Notice of disapproval or final offer issued by an authority listed in paragraphs (a)(1) and (a)(2) of this section will be in accordance with §§ 536.5(f) and 536.37 and must be accompanied by an explanation that the claimant may submit a written request for reconsideration (§ 536.82), in lieu of filing suit, to the Commander, USARCS (through the office issuing the disapproval or final offer) provided that the request is received prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b). Once received, the claimant will be advised in writing that the request will suspend the option to bring suit under 28 U.S.C. 2675(a) for 6 months from the date the request was received.

(4) Heads of claims processing offices with approval authority are delegated authority to approve and pay, in full or in part, claims presented for $5,000 or less and to compromise and pay, regardless of the amount claimed, an agreed award of $5,000 or less, provided that the total value of all claims and potential claims arising out of a single incident does not exceed $25,000 and that the claimant agrees to accept the award in full satisfaction of the claim.

(b) Office code. Authority delegated by this paragraph will not be exercised unless the claims settlement or approval authority has been assigned an office code.

**§ 536.81 Consultation with the Department of Justice.**

(a) Consultation with the Department of Justice is required when, in the opinion of the Federal agency—

(1) A new precedent or a new point of law is involved;

(2) A question of policy is or may be involved;

(3) The United States is or may be entitled to indemnity or contribution from a third party, and the agency is unable to adjust the third party claim;

(4) The total amount to be paid in all claims or potential claims arising out of the same transaction will or may exceed $200,000;

(5) For any reason, the compromise of a particular claim, as a practical matter, will control the disposition of actual or potential claims arising out of a single incident in which the amount to be paid may exceed $25,000 $200,000; or

(6) Where the United States, an employee, agent, or cost-plus contractor is involved in litigation based on a claim arising out of the same transaction.

(b) Claims requiring consultation with, or approval by the Department of Justice will be forwarded to the Commander, USARCS. The Commander will refer such claims to the Assistant Attorney General, Civil Division, Department of Justice in accordance with Section 14.7, Attorney General Regulations. (See DA Pam 27–162, appendix H.)

**§ 536.82 Reconsideration.**

(a) Original approval or settlement authority.

(1) Reconsideration. An original approval or settlement authority may reconsider the denial of or final offer on a claim under the FTCA upon request of the claimant, the claimant's authorized agent, or the claimant's legal representative.

(2) Settlement correction. An original approval or settlement authority may reopen and correct his or her action on a claim that was previously settled in whole or in part (even where a settlement agreement has been executed) when an error contrary to the mutual understanding of the parties is discovered in the original action (e.g., a claim is settled for $15,000 but the settlement agreement was typed to read $1500 and the error is not discovered until the file is being prepared for payment). If appropriate, a corrected payment will be made. The approval or settlement authority will reopen his or her action on a claim when he or she has reason to believe that a settlement was obtained by means of fraud by the claimant (or claimant's authorized agent or legal representative) and, if substantiated, will correct his or her action. The basis for any correction of an action will be stated in a memorandum which will be included in the file.

(b) A successor approval or settlement authority. (1) Reconsideration. A successor approval or settlement authority may reconsider the denial of or final offer in a claim under the FTCA upon request of the claimant, the claimant's authorized agent, or the claimant's legal representative, only on the basis of fraud, substantial new evidence, errors in calculation or mistake (misinterpretation) of law.

(2) Settlement correction. A successor approval or settlement authority may reopen and correct a predecessor's action on a claim which was previously settled in whole or in part for the same reasons as an original authority, as stated above.

(c) All requests for reconsideration of a denial or final offer by a command claims service or area claims office in which full relief is not granted will be forwarded to the Commander, USARCS for action, with any additional investigative material and legal analysis generated by the request.

(d) A request for reconsideration should indicate fully the legal or factual basis asserted as grounds for relief. Following completion of any investigation or other action deemed necessary for an informed disposition of the request, the approval or settlement authority will reconsider the claim and attempt to settle it by granting such relief as may appear warranted. When further settlement efforts appear unwarranted, the entire file with a memorandum of opinion will be referred through claims channels as outlined in § 536.31. If a higher claims authority is unable to grant the relief requested, he or she will forward the claim with the recommendation to the Commander, USARCS, and inform the claimant of such reference.

(e) A request for reconsideration must be filed prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b). Upon timely filing, the appropriate authority will have 6 months from the date of filing in which to make a final disposition of the request, and the claimant's option under 28 U.S.C. 2675(a) will not accrue until 6 months after the filing of the request. The action on the request will be effected as set forth in § 536.77(i).

(f) Action upon a request for reconsideration by the appropriate authority (either affirming the prior action or granting full or partial relief) constitutes final administrative disposition of a claim. No further requests for reconsideration will be allowed except on the basis of fraud. Attempted further requests for reconsideration on other grounds will not toll the 6-month period provided in 28 U.S.C. 2401(b).

## Subpart E—Claims Involving Government Vehicles and Property Not Cognizable Under Other Law

**§ 536.83 Statutory authority.**

The statutory authority for this subpart is contained in the act of 9 October 1962 (76 Stat. 767, 10 U.S.C 2737). This statute is commonly called the "Nonscope Claims Act." For the purposes of this subpart, a Government installation is a facility having fixed boundaries owned or controlled by the Government, and a vehicle includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land (1 U.S.C 4).

**§ 536.84 Scope.**

(a) This subpart prescribes the substantive bases and special procedural requirements for the administrative settlement and payment, in an amount not more than $1,000, of any claim against the United States not cognizable under any other provision of law for damage or loss of property, or for personal injury or death caused by a member or employee of the DA incident to the use of a U.S. vehicle at any location or incident to the use of other U.S. property on a Government installation.

(b) Any claim in which there appears to be a disputed issue relating to whether the employee was acting within the scope of employment will be considered under subparts C, D, and F of this part. Only when all parties, to include an insurer, agree that there is no "in scope" issue will this chapter be used.

**§ 536.85 Claims payable.**

(a) General. A claim for personal injury, death, or damage or loss of property, real or personal, is payable under this chapter when—

(1) Caused by the act or omission, negligent, wrongful, or otherwise involving fault of a member of the DA or the ARNG, or a civilian employee of the DA or the ARNG—

(i) Incident to the use of a vehicle of the United States at any place.

(ii) Incident to the use of any other property of the United States on a Government installation.

(2) The claim may not be settled under any other claims statute and claims regulation available to the DA for the administrative settlement of claims.

(3) The claim has been determined to be meritorious, and the approval or settlement authority has obtained a

settlement agreement in an amount not in excess of $1,000 in full satisfaction of the claim prior to approval of the claim for payment.

(b) Personal injury or death. A claim for personal injury or death is allowable only for the cost of reasonable medical, hospital, or burial expenses actually incurred and not otherwise furnished or paid by the United States.

(c) Property loss or damage. A claim for damage or loss of property is allowable only for the cost of reasonable repairs or value at time of loss, whichever is less.

**§ 536.86 Claims not payable.**

(a) A claim is not allowable under this chapter that—

(1) Results wholly or partly from the negligent or wrongful act of the claimant or his or her agent or employee. The doctrine of comparative negligence is not applicable.

(2) Is for medical, hospital, and burial expenses furnished or paid by the United States.

(3) Is for any element of damage pertaining to personal injuries or death other than provided in § 536.85(b). All other items of damage; for example, compensation for loss of earnings and services, diminution of earning capacity, anticipated medical expenses, physical disfigurement, and pain and suffering are not payable.

(4) Is for loss of use of property or for the cost of a substitute property; for example, a rental.

(5) Is legally recoverable by the claimant under an indemnifying law or indemnity contract. If the claim is legally recoverable in part, that part recoverable by the claimant is not payable.

(6) Is a subrogated claim.

(b) Examples of claims not allowable under this chapter are as follows:

(1) The claimant has collision insurance covering his or her automobile with a deductible amount of $100. While the claimant is sitting in the vehicle, which is properly parked, it is struck from the rear by an Army truck operated by a DA civilian who had misappropriated the Government vehicle. The claimant sustains personal injuries requiring hospitalization for 6 weeks during which actual medical and hospital expenses are incurred in the amount of $1,200. He or she has no medical or hospitalization insurance. The damage to the vehicle totals $300. The claimant's insurance carrier reimburses him or her $200 for the vehicle damage and becomes subrogated in that amount under the policy terms. The claimant files a claim in the amount of $1,500, alleging $300 for property damage to the automobile and $1,200 for medical and hospital expenses. The claim is allowable in the total amount of $1,000, consisting of $100, the insurance deductible for property damage, and $900 of the medical and hospital expenses. The amount claimed for medical and hospital expenses and for property damage merely constitutes separable interests in a single claim that may not be allowed in an amount in excess of $1,000 under this chapter. The claimant's insurer is not a proper party claimant, and no payment is allowable for the insurer's subrogated interest.

(2) Claimant has medical and hospitalization insurance that entitles him or her to reimbursement of up to $500 for the reasonable cost of medical and hospital expenses incurred for personal injuries. While visiting at an Army installation the claimant is wounded by the negligent discharge of a Government issue caliber .45 pistol by a soldier who had stolen the weapon. The claimant is hospitalized at a civilian hospital and has incurred medical and hospital expenses of $750. The claimant may be paid $250, the amount allowable for reasonable medical and hospital expenses actually incurred after deduction of $500 legally recoverable by him or her under the insurance policy.

**§ 536.87 When claim must be presented.**

A claim may be settled under this regulation only if it is presented in writing within 2 years after it accrues.

**§ 536.88 Procedures.**

So far as not inconsistent with this part, the procedures for the investigation and processing of claims contained in subpart B will be followed.

**§ 536.89 Settlement agreement.**

A claim may not be paid under this part unless the amount tendered is accepted by the claimant in full satisfaction. A settlement agreement is required before payment. (See sections 536.32)

**§ 536.90 Delegation of authority.**

(a) *Settlement authority.* The following are delegated authority to pay up to $1,000 in settlement of claims and to disapprove claims presented in any amount under this chapter:

(1) TJAG.

(2) TAJAG.

(3) The Commander, USARCS, or his designees.

(4) The SJA or chief of the command claims service of the following commands:

(i) USAREUR.

(ii) Eighth U.S. Army, Korea.

(iii) WESTCOM.

(iv) USARSO.

(5) Area claims offices.

(b) *Approval authority.* Claims processing offices with approval authority are delegated authority to approve and pay, in full or in part, claims presented for $1,000 or less and to compromise and pay, regardless of amount claimed, an agreed award of $1,000 or less.

(c) *Exercise of authority.* Authority delegated by this paragraph will not be exercised unless the claims settlement or approval authority has been assigned an office code.

**§ 536.91 Reconsideration.**

(a) An original approval or settlement authority may reconsider the quantum of a claim upon request of the claimant or someone acting in his behalf. In the absence of such a request, an approval or settlement authority may on his or her own initiative reconsider the quantum of a claim. Reconsideration may occur even in a claim that was previously disapproved in whole or in part (even though a settlement agreement has been executed) when it appears that his or her original action was incorrect in law or fact based on the evidence of record at the time of the action or subsequently received. If he or she determines that the original action was incorrect, he or she will modify the action and, if appropriate, make a supplemental payment. If the original action is determined correct, the claimant will be so notified. The basis for either action will be stated in a memorandum included in the file.

(b) An approval or settlement authority may reconsider the applicability of this chapter to a claim upon request of the claimant or someone acting in his behalf, or on his or her own initiative. Such reconsideration may occur even though all parties had previously agreed per § 536.84 when it appears that this agreement was incorrect in law or fact based on the evidence of record at the time of the agreement or subsequently received. If he or she determines the agreement to be incorrect, the claim will be reprocessed under the applicable chapter of this regulation. If he or she determines the agreement to have been correct, that is, that this subpart is applicable, he or she will so advise the claimant. This advice will include reference to any appeal or judicial remedies available under the chapter which the claimant alleges the claim should be processed under.

(c) A successor or higher approval or settlement authority may also reconsider the original action on a claim

under a or b above, but only on the basis of fraud, substantial new evidence, errors in calculation, or mistake (misinterpretation) of law.

(d) A request for reconsideration should indicate fully the legal or factual basis asserted as grounds for relief.

## Subpart F—Claims Arising From Activities of the Army National Guard

### § 536.92 Statutory authority.

(a) The statutory authority for this subpart is contained in the Act of 13 September 1960 (74 Stat. 878, 32 U.S.C. 715), commonly referred to as the "National Guard Claims Act" as amended by Public Law 90–486, 13 August 1968, (82 Stat. 756), Public Law 90–525, 26 September 1968 (82 Stat. 877), Public Law 901–312, 8 July 1970 (84 Stat. 412), and Public Law 93–336, 8 July 1974, and the Act of 8 September 1961 (75 Stat. 488, 10 U.S.C. 2736) as amended by Public Law 90–521, 26 September 1968 (82 Stat. 874) and as amended by Public Law 98564, 20 October 1984.

(b) For purposes of this subpart, the following terminology applies:

(1) ARNG personnel. A member of the ARNG engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, 505, or 709.

(2) Claimant. An individual, partnership, association, corporation, country, State, commonwealth, territory, or a political subdivision thereof, or the District of Columbia presenting a claim and meeting the conditions set forth in section 536.20. The term does not include the U.S. Government, any of its instrumentalities, except as prescribed by statute, or a State, commonwealth, territory, or the District of Columbia, which maintains the unit to which the ARNG personnel causing the injury or damage are assigned. This exclusion does not ordinarily apply to a unit of local government that does not control the ARNG organization involved. As a general rule, a claim by a unit of local government other than a State, commonwealth, or territory will be entertained unless the item claimed to be damaged or lost was procured or maintained by State, commonwealth, or territorial funds.

(3) State. As used in this subpart the term "state" includes self-governing commonwealths and territories of the United States; for example, Puerto Rico and the Virgin Islands.

### § 536.93 Scope.

(a) This subpart is applicable in all places and sets forth the procedures to be followed in the settlement and payment of claims for death, personal injury, or damage, loss, or destruction of property caused by—

(1) Members or employees of the ARNG.

(2) Noncombat activities of the ARNG when engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, 505, or 709, provided such claim is not for personal injury or death of a member of the Armed Forces or Coast Guard.

(3) An employee whose injury or death is incident to service.

(b) A claimant dissatisfied with an administrative settlement under this subpart as the result of activities of the NG of a State, Commonwealth, or Territory is not entitled to judicial relief in an action against the United States. Whether he or she has a legal cause of action or may file an administrative claim against such political entity depends upon controlling local law.

(c) Claims arising out of activities of the ARNG when performing duties at the call of the governor of a State maintaining the unit are not cognizable under this chapter or any other law, regulation, or appropriation available to the Army for the payment of claims. Such claims should be returned or referred to the authorities of the State, for whatever action they choose to take and claimants should be informed of the return or referral. Care should be taken to determine the status of the unit; members at the time the claims incident occurred, particularly in civil emergencies as units called by the governor, are sometimes "federalized" during the call-up. If the unit was federalized at the time the claims incident occurred, the claim will be cognizable under subparts C, D and F or other subparts pertaining to the Active Army.

### § 536.93 Claims payable.

(a) *Tort claims.* All claims for personal injuries, death, or damage to or loss of real or personal property, arising out of incidents occurring on or after 29 December 1981 based on negligent or wrongful acts or omissions, of ARNG personnel activity within the scope of employment, within the United States while engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, 505, or 709 will be processed under the FTCA (subpart D). Such claims arising before 29 December 1981 will, except as modified herein, be processed and settled in accordance with the provisions of subpart C.

(b) *Noncombat activities.* A claim incident to the noncombat activities of the ARNG while engaged in duty or training under 32 U.S.C. 316, 502, 503, 504, 505, or 709 may be settled under this subpart.

(c) *Subrogated claims.* Subrogated claims will be processed as prescribed in § 536.20(b).

(d) *Advance payments.* Advance payments in partial settlement of meritorious claims to alleviate immediate hardship are authorized as provided in subpart B, small claims.

### § 535.95 Claims not payable.

The type of claims listed in § 536.51, as not payable are also not payable under this chapter.

### § 535.96 Claims under other subparts.

(a) Claims within the scope of this subpart that are also cognizable under subparts D, H, J or K will be considered initially under the latter.

(b) This chapter does not apply to any claim that may be settled under an exclusive or specific authorization listed in DA Pam 27–162, chapter 8 (see § 536.76).

### § 536.97 Notification of incident.

Except where claims are regularly paid from State sources; for example, insurance, court of claims, and legislative committee, the appropriate adjutant general will ensure that each incident of the type enumerated in § 536.15 is reported immediately by the most expeditious means to the area claims office in whose geographic area the incident occurs or to a claims processing office designated by the area claims office. The report will contain the following information:

(a) Date of incident.

(b) Place of incident.

(c) Nature of incident.

(d) Names and organizations of ARNG personnel involved.

(e) Names of potential claimants.

(f) A brief description of any damage, loss, or destruction of private property and any injuries or death of potential claimants.

### § 536.98 Investigation.

(a) *When required.* An investigation is required as indicated in § 536.15 except when claims are regularly paid by local sources.

(b) *By whom made.* Area offices, or claims processing offices designated by them, are responsible for the investigation of claims occurring within their assigned geographic areas. The state adjutant general will designate an official or office as point of contact for Army claims personnel and will furnish necessary personnel to conduct or assist in investigations subject to the availability of funds and personnel. (See § 536.7(h). The use of ARNG personnel when available, is authorized. Attention is directed to § 536.19(b) that requires

the use of information from other investigations made previously, particularly military and civilian police reports, reports of survey, line of duty investigations, and collateral air crash investigations.

(c) *Conduct of investigation.* The investigation will be conducted in accordance with subpart B, except that a sample scope of employment format will be added, together with a copy of the orders authorizing the performance of duty by the tortfeasor. Also, where a State has waived immunity or has some other means for paying claims, as through legislative committee or insurance, the claims officer's report will contain a statement as to the nature of the remedy against the State, the extent of insurance coverage, and the status of any claim made. If there is no remedy against the State and no insurance coverage, the claims officer's report will so indicate. If a regular procedure has been established for the processing of claims for a particular jurisdiction as by agreement between local authorities and an appropriate Army headquarters or USARCS, this requirement is waived. Finally, inquiry should be made as to any existing or anticipated claim or lawsuit against or by the driver of the ARNG vehicle or insurer. If a claim or lawsuit has been filed, further inquiry should be made as to probable outcome. This could be accomplished by discussion with the driver and an examination of the driver's insurance policy, which, if obtained, should be included in the file.

**§ 536.99 Claims in which there is a State source of recovery.**

Where there is a remedy against the State, as a result of either waiver of sovereign immunity or liability - insurance coverage, the following procedures apply:

(a) Where the State is insured, direct contact with State or ARNG officials rather than the insurer is desirable. Regular procedures will be established and followed wherever possible. Such procedures should be agreed on by both local authorities and the appropriate claims authorities subject to concurrence by Commander, USARCS. Such procedures will be designed to ensure that local authorities and U.S. authorities do not issue conflicting instructions for processing claims, and whenever possible, and in accordance with governing local and Federal law, a mutual arrangement for disposition of such claims as in paragraph (c) of this section is worked out. Amounts recovered or recoverable by claimant from any insurer (other than claimant's insurer who has obtained no subrogated interest against the United States) will be deducted from the amount otherwise payable.

(b) If there is a remedy against the State or its insurer, the claimant may be advised of that remedy. If the payment by the State or its insurer does not fully compensate claimant, an additional payment may be made. If liability is clear and claimant settles with the State or its insurer for less than the maximum amount recoverable, the difference between the maximum amount recoverable and the settlement normally will be deducted from the payment by the United States.

(c) If the State or its insurer desires to pay less than their maximum jurisdiction or policy limit on a basis of 50 percent or more of the actual value of the entire claim, any payment made by the United States must be made directly to the claimant. This can be accomplished by either having the United States pay the entire claim and have the State or its insurer reimburse its portion to the United States, or by having each party pay its agreed share directly to the claimant. If the State or its insurer desires to pay less than 50 percent of the actual value of the claim, the procedure set forth in paragraph (d) of this section will be followed.

(d) If there is a remedy against the State and the State refuses to make payment, or there is insurance coverage and the claimant has filed an administrative claim against the United States, forward file with Tort Claim memorandum to the Commander, USARCS; include information on the status of any judicial or administrative action the claimant has taken against the State or its insurer. The Commander, USARCS will determine whether the claimant will be required to exhaust his or her remedy against the State or its insurer, or whether the claim against the United States can be settled without such requirement. If the Commander, USARCS, determines to follow the latter course of action, he or she will also determine whether an assignment of the claim against the State or its insurer will be obtained and whether recovery action will be taken. The State or its insurer will be given appropriate notification in accordance with State law necessary to obtain contribution of indemnification.

**§ 536.100 Claims against the ARNG tortfeasor individually.**

The procedures set forth in § 536.29 are applicable. With respect to claims arising before 29 December 1981, an ARNG driver acting pursuant to the authorities cited in § 536.94(a) is not protected by the provisions of the Drivers Act (28 U.S.C. 2670(b)); the driver may be sued individually in State court. When this situation occurs, it should be monitored closely by ARNG authorities. If possible an early determination will be made as to whether any private insurance of the ARNG tortfeasor is applicable. Where such insurance is applicable and the claim against the United States is doubtful validity, final actions will be withheld pending resolution of the demand against the NG tortfeasor. If, in the opinion of the claims approving or settlement authority, such insurance is applicable and the claim against the United States is payable in full or in a reduced amount, settlement efforts will be made either together with the insurer or singly by the United States as in § 536.99(b). Any settlement will not include amounts recovered or recoverable as in § 536.28. If the insurance is not applicable, settlement or disapproval action will proceed without further delay.

**§ 536.101 When claims must be presented.**

A claim may be settled under this subpart only if presented in writing within 2 years after it accrues, except that if it accrues in time of war or armed conflict, or if war or armed conflict intervenes within 2 years after it accrues, and if good cause is shown, the claim may be presented not later than 2 years after war or armed conflict is terminated. As used in this paragraph, war or armed conflict is one in which any Armed Force of the United States is engaged. The dates of commencement and termination of an armed conflict must be established by concurrent resolution of Congress or by determination of the President.

**§ 536.102 Where claims must be presented.**

A claim must be presented to the appropriate Federal agency. Presentment of a written claim to any full time officer or employee of the NG will be considered a receipt. However, the statute of limitations is tolled if a claim is filed with a State agency, the claim purports to be under the NGCA and it is forwarded to the Army within 6 months, or the claimant makes inquiry of the Army concerning the claim within 6 months. If a claim is received by a DA official who is not a claims approval or settlement authority under this regulation, the claim will be transmitted without delay to the nearest approval or settlement authority.

**§ 536.103 Procedures.**

(a) The form of a claim under this Act will be as described in § 536.20 (d) and (e).

(b) So far as they are not inconsistent with this subpart, the procedures set forth in subpart B, settlement procedures, will be followed in processing a claim under this subpart.

(c) The following provisions of subpart C are applicable to claims under this subpart and are hereby incorporated by the following references:

(1) Applicable law (§ 536.55).

(2) Determination of quantum (§ 536.56 through section 536.59 ).

(3) Delegation of authority (§ 536.61).

(4) Claims over $100,000 (§ 536.62).

(5) Settlement procedures (§ 537.63).

(6) Action on appeal (§ 536.64).

(7) Attorney fees (§ 536.66).

**§ 536.104. Settlement agreement.**

Procedures concerning settlement agreements will be in accordance with § 536.32, except that the agreement will be modified to include a State and its NG in most cases. A copy of the agreement will be furnished to State authorities and the individual tortfeasor.

## Subpart G—Claims Under Status of Forces and Other International Agreements

### General

**§ 536.105 Statutory Authority.**

The authority for this subpart is contained in the following:

(a) 10 U.S.C. 2734a as amended, concerning claims arising overseas under international agreements.

(b) 10 U.S.C. 2734b, as amended, concerning claims arising under international agreements in this country.

(c) 10 U.S.C. 2735

(d) 10 U.S.C. 2736, as amended, providing for advance payment of certain claims.

### Claims Arising in the United States

**§ 536.106 Scope.**

(a) This subpart provides procedures and defines responsibilities for the investigation, processing, and settlement of claims arising out of acts or omissions of members of a foreign military force or civilian component present in the United States, or a territory, commonwealth, or possession thereof under the provisions of reciprocal international agreements, which contain claims settlement provisions applicable to claims arising in the United States, such as Article VIII of the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty (DA Pam 27–162, appendix L).

(b) The Sending States under current international reciprocal agreements include Belgium, Canada, Denmark, Federal Republic of Germany, France, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, the United Kingdom, Spain, and SHAPE.

(c) Reference should be made to DA Pam 27–162, appendix L for delineation of what constitutes a foreign military force, a foreign civilian component, and a foreign dependent.

(d) Whenever claims arise involving foreign soldiers training or otherwise stationed in the United States pursuant to bilateral agreements or other arrangements, such as foreign military sales agreements, which contain specific claims provisions, the claims office receiving the claim will report such claims to the Commander, USARCS, for guidance as to the resolution and, if necessary, payment of such claims.

(e) The United States, as a Receiving State, is responsible under some Status of Forces Agreements, for the investigation of incidents, and for the processing of claims, arising from acts or omissions of members or civilian employees of an armed force of a sending state present in the United States. The United States may be liable for partial payment of such claims if they arise incident to the official duties of the sending state's soldier or employee. Article VIII of the NATO SOFA is the most commonly invoked agreement of this sort. It applies to torts committed within the North Atlantic Treaty Area, which includes the continental United States and island possessions north of the Tropic of Cancer (i.e. excludes Puerto Rico, Hawaii and American Samoa). It also applies to claims arising out of acts by military or civilian personnel, regardless of nationality, who are assigned, attached to, or employed by an international headquarters established under the provisions of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty dated August 28, 1952 (e.g. Supreme Allied Command, Atlantic).

(f) Single service responsibility for the processing and settlement of claims cognizable under this section is assigned to DA by DODD 5515.8. The Secretary of the Army hereby designates the USARCS as the Receiving State Office for claims cognizable under this section with authority to settle such claims in accordance with 10 U.S.C. 2734b. (See DA Pam 27–162, appendix L.)

(g) As Sending State forces are considered assimilated into the armed forces of the United States for purposes of the SOFAs, their members are also barred from being compensated by the United States when they are injured incident to their service, *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978). (See also DA Pam 27–162, appendix L for an example of a government-to-government claim bar in these circumstances.)

**§ 536.107 Notification of incidents.**

In order for the United States to properly discharge its claims responsibilities under international agreements, it is essential that the responsible military authorities be notified of all incidents, including off-duty incidents, in which members of a foreign military force or civilian component are involved. Any installation that learns of an incident involving a member of a foreign military force or civilian component which results in personal injury, death, or property damage will notify immediately by the most expeditious means the installation to which such person is assigned or attached. An information copy of such notification will be furnished to the Commander, USARCS. In the event the member is not assigned or attached to any installation within the United States, the Commander, USARCS will be notified. The notification (exempt report, AR 335–15, para 720) will contain so much of the following information as is readily available:

(a) Date of incident.

(b) Place of incident.

(c) Nature of incident.

(d) Names and organization of foreign personnel involved.

(e) Name of potential claimants.

(f) A brief description of any damage, loss, or destruction of property, and personal injuries or death.

**§ 536.108 Liaison with sending State representatives.**

The Commander, USARCS is responsible for maintaining liaison with designated representatives of Sending States as to claims matters under this section, and establishing internal operating procedures.

**§ 536.109 Investigations.**

(a) Immediate investigation of each incident involving a member of a foreign force or civilian component is required in order to ensure that all necessary information, including necessary statements and depositions, is obtained before the foreign personnel involved, either principals or witnesses, depart the United States.

(b) Responsibility for the investigation of an incident rests upon the

commander of the installation to which the member of a foreign force or civilian component is assigned or attached, or if not assigned or attached within the United States upon the Commander, USARCS. He or she is authorized to designate an appropriate agency of the Armed Services for this purpose.

(c) The installation responsible for the investigation will be free to request appropriate assistance from any other installation within the DOD to the end that a reliable and complete investigation of the incident will be accomplished most economically. Such requested assistance may be for an investigation of the entire incident, or it may cover only part of the investigation; for example, it may be a statement from one witness. Normally such requests will be made of an installation having claims responsibility under the appropriate departmental regulation and nearest the place of the occurrence. In a case involving an aircraft, such request will normally be made of an installation that also has the capability of investigating air accidents giving due regard to the type of aircraft.

(d) The investigation will be made in accordance with the regulations of the department of which the installation is a part. Also, information will be obtained as to whether the claimant is a member of a foreign force or civilian component, or dependent of such a member or employee. If so, the following will be listed: (1) Any benefits the claimant may be entitled to from his or her own government whether he or she has applied, or intends to apply, for such benefits.

(2) The value of any benefits to which the claimant may be entitled, which he or she may have received, or both.

(e) The investigating officer will arrange with the commanding officer of the foreign unit to which a member of a foreign force or civilian component is assigned, or the immediate superior of such member, to obtain from such member the pertinent information and required reports. If the member is assigned or attached to a United States organization or installation, information and reports will be obtained in accordance with the procedure applicable to United States personnel.

(f) Notwithstanding the provisions of department regulations, a copy of the report of investigation will be forwarded to the Commander, USARCS immediately upon completion.

**§ 536.110 Claims procedures.**

(a) *Place and time of filing.* A claim should be filed with the commanding officer of the United States military installation nearest the place where the incident occurred, but may be filed at any other such installation, within two years of its accrual. Immediately upon receipt, a copy will be forwarded to Commander, USARCS. The claim and supporting documents will conform to the regulations of the department of which the place of filing is a part. Claims filed with a sending State official within 2 years of their accrual will be accepted as timely if received by a U.S. claims office (§ 536.5) before the passage of a total of 2½ years from the date of accrual.

(b) *Processing of claims.* A claim normally will be processed by the installation that first investigated the incident from which it arose in accordance with the pertinent departmental regulations. The commanding officer of an installation with which a claim is filed may by direct communication ascertain whether the incident from which it arose was investigated by another installation, and, if so, may transmit the claim for further processing to that installation. Upon completion of investigation, the claim file will be forwarded to the Commander, USARCS.

(c) *Official duty claims.* Pursuant to 10 U.S.C. 2734b, claims generated by the sending State personnel, while engaged in the performance of official duties, are settled by a person designated in § 536.111 in the manner provided for claims generated by personnel of the armed forces of the United States, that is, under the MCA (subpart C), the FTCA (subpart D) or the Army Maritime Claims Settlement Act (subpart H). The Commander, USARCS, will obtain scope of employment determinations from sending State officials under the conditions set forth in Article VIII, NATO SOFA. Payments made are subject to pro rata reimbursement by the sending State (paragraph 5, Article VIII, NATO SOFA (DA Pam 27–162, appendix L)).

(d) *Exgratia claims.* Claims arising from off-duty activities of sending State personnel are, after investigation, processing, and evaluation, referred by the Commander, USARCS to sending State officials for a determination as to whether an exgratia payment will be offered (paragraph 6, Article VIII, NATO SOFA (DA Pam 27–162, appendix L)).

**§ 536.111 Settlement authority.**

The Commander, USARCS, or designees, are delegated sole authority to settle claims under this subpart.

**§ 536.112 Advance payments.**

Advance payments in partial settlement of meritorious claims to alleviate immediate hardship are authorized as provided in subpart B of this part, advanced payments.

**§ 536.113 Litigation.**

Officials designated by departmental regulations as responsible for reporting the initiation of legal proceedings involving their department will take the following action upon the commencement of legal proceedings:

(a) Report the initiation of the proceeding by electrical message to the Litigation Division, Office of TJAG, submitting the information required by departmental regulation for reports of commencement of proceedings, with a copy to Commander, USARCS.

(b) Notify the proper United States Attorney and furnish him or her with copies of all process and pleadings.

(c) Forward by fastest means available to the Litigation Division, Office of TJAG, three copies of all process, pleadings, and related papers.

(d) Unless otherwise directed by TJAG, prepare an investigative (litigation) report in the manner prescribed by departmental regulations and submit three copies to Litigation Division, Office of the TJAG, AR 27–40; AFR 110–3; Navy JAG Manual, chapter 13.

**§ 536.114 Assistance to foreign forces.**

(a) In order that claims cognizable under this section will be treated as nearly as possible as if they arose from activities of United States personnel, all possible assistance will be provided to commanding officers of foreign units and to members thereof.

(b) The commanding officer of an installation at which a foreign unit is stationed will furnish to the commanding officer of the foreign unit copies of regulations and forms relating to claims, and, when applicable, will provide instructions for the members of the unit with respect to the pertinent State laws and reporting of accidents.

(c) The commanding officer of an installation to whom a request for information or assistance is made by foreign personnel or to whom a report of an incident is made will provide, to the extent permitted by security regulations, the requested information or assistance.

(d) When circumstances permit, assistance in meeting local requirements will be rendered to the foreign personnel involved at the scene of an incident by the commanding officer of the installation to which the incident was reported. The commanding officer of an installation at which a foreign unit is stationed should request that local law enforcement agencies follow procedures applicable to incidents

involving military personnel of the United States in any incident involving foreign personnel.

**Claims Against the United States Arising Overseas**

**§ 536.115 Scope.**

(a) This section provides guidance on claims against the United States which are based on acts of our soldiers or employees within the scope of their employment and which arise in countries for which there is an international agreement requiring a foreign government (i.e., receiving state) to adjudicate and pay the claims subject to partial reimbursement by the United States.

(b) Claims by foreign inhabitants based on acts of members of our forces which are outside the scope of their official duties may be payable under the Foreign Claims Act (chapter 10) but are usually not adjudicated by receiving states under most international agreements. These non-scope claims will be processed under the provisions of subpart J.

**§ 536.116 Claims procedures.**

(a) Claims provisions in Status of Forces Agreements providing for receiving state adjudication have been held to be the exclusive remedy for claims against the United States, preempting any remedy that would otherwise be available under other United States claims statutes, such as the Foreign Claims Act or the Public Vessels Act (*Aaskov* v. *Aldridge*, 695 F. Supp. 595 (D.D.C. 1988)).

(b) SOFA provisions for receiving state adjudication of claims against the United States usually refer to claims by "third parties" against members of the force or civilian component. This clearly includes claims by tourists or business travelers from the United States as well as inhabitants of foreign countries. Depending on how the receiving state interprets the class of proper claimants under the SOFA claims provisions, the receiving state may also adjudicate claims by dependents of our forces. Chiefs of command claims services responsible for claims arising in countries with SOFA or other treaty provisions requiring adjudication of claims against the United States by a receiving state will ensure their tort claims personnel are aware of the receiving state's policy on the issue of who are proper claimants under the treaty provisions.

(c) Where SOFA provisions provide for receiving state adjudication of claims, the time limit for filing such claims is often substantially less than the two years that would otherwise be allowed under the FCA or MCA. For example, the Defense Cost Office in Germany requires that a claim be filed within 90 days of the date it accrues. Command claims services will ensure that all claims personnel in their area of responsibility: (1) Receive annual training on the receiving state's claims procedures, to include the applicable time limits, procedures and location of the appropriate receiving state claims office or agency;

(2) Screen all new claims and inquiries about claims to identify claimants who must file with the receiving state;

(3) Ensure that all such claimants are informed of this requirement and the applicable time limit.

(d) All foreign inhabitants who have claims against the United States which are the responsibility of the receiving state (i.e., based on acts within scope of duties of employees or members of U.S. forces and not otherwise excluded by the treaty) will be required to file the claim with the appropriate receiving state office. Those U. S. inhabitants whose claims would otherwise be cognizable under the Military Claims Act (chapter 3) and who are deemed by the receiving state to be proper claimants under the SOFA claims provisions must also file with the receiving state. However, if they fail to do so, their claim may be considered under subpart C, for good cause, with the permission of the Commander, USARCS. Claims for which a foreign country is responsible under a SOFA or similar agreement will not be paid under subpart J or subpart C without prior approval of the Commander, USARCS or the senior JA in country (§ 536.52(a)(3) and 536.152(c)).

(e) A claim filed and adjudicated by a receiving state under a SOFA or other international agreement claims provision may be considered under other claims provisions of this regulation only if the receiving state denied the claim on the basis that it was not cognizable under the treaty or agreement provisions. Where a claimant has filed a claim with a receiving state and received payment, such payment will be the claimant's final and exclusive remedy against the United States. If the claim is denied on the merits by the receiving state, that action will also be the claimant's final and conclusive remedy against the United States.

**§ 536.117 Responsibilities.**

(a) The Commander, USARCS, is responsible for—

(1) Providing policy guidance to command claims services concerning SOFA or other treaty reimbursement programs implementing 10 U.S.C. 2734a.

(2) Monitoring the reimbursement system to ensure that programs are in place for the proper verification and certification of reimbursement claims.

(3) Monitoring funds expended for reimbursements to foreign governments.

(b) Command claims services within whose jurisdiction SOFA or other treaty provisions providing for a claims reimbursement system are in force and where DA has been assigned single-service responsibility for the foreign country seeking reimbursement (see § 536.159) are responsible for—

(1) Establishing a program for the verification, certification, and reimbursement of claims. A copy of the procedures implementing the program will be provided to the Commander, USARCS.

(2) Providing the Commander, USARCS, with budget estimates or reimbursements in addition to the reports required by § 536.242.

(3) Providing the Commander, USARCS, with statistical information each month in which payments are made as to the number of individual claims reimbursed, the total amount paid by the foreign government, and the total amount reimbursed by the United States.

(4) Providing the Commander, USARCS, with a quarterly report showing total reimbursements paid during the quarter for maneuver damage and tort claims (broken out by major categories of damage as determined by the Commander, USARCS) and an update on major issues or activities that could impact on the operation or funding of the reimbursement system.

**§ 536.118 Reimbursements for nonappropriated funds.**

(a) Reimbursements for claims generated by the operations of nonappropriated fund activities will be paid using nonappropriated funds (NAF) (see subpart L).

(b) Command claims services will provide the Commander, USARCS, with statistical information each month, if appropriate, as to the number of NAF claims processed and the amounts to be reimbursed by NAFs.

**§ 536.119 Reimbursement for Coast Guard activities.**

Upon request of the Secretary of Transportation, or designee, any payments made relating to Coast Guard-generated claims covered by 10 U.S.C. 2734a(c) may be reimbursed or paid to the foreign government concerned by a command claims service out of its

reimbursement expenditure allowance, subject to reimbursement from the Department of Transportation (10 U.S.C. 1734a(d)).

## Subpart H—Maritime Claims

### General

**§ 536.120 Statutory authority.**

Administrative settlement or compromise of admiralty and maritime claims in favor of and against the United States by the Secretary of the Army, or designee, is authorized by the Army Maritime Claims Settlement Act (10 U.S.C. 4801–04, 4806, as amended).

**§ 536.121 Related statutes.**

The Army Maritime Claims Settlement Act is supplemented by the following statutes under which suits in admiralty may be brought: The Suits in Admiralty Act (46 U.S.C. 741–752); the Public Vessels Act (46 U.S.C. 781–790); an act Extending the Admiralty and Maritime Jurisdiction (46 U.S.C. 740). Similar maritime claims settlement authority is exercised by the Department of the Navy under 10 U.S.C. 7365 and 7621–23 and by the Department of the Air Force under 10 U.S.C. 9801–04 and 9806.

### Claims Against the United States

**§ 536.122 Scope.**

Title 10, United States Code, section 4802, provides for the settlement or compromise of claims for—

(a) Damage caused by a vessel of, or in the service of, the DA or by other property under the jurisdiction of the DA;

(b) Compensation for towage and salvage service, including contract salvage, rendered to a vessel of, or in the service of, the DA or to other property under the jurisdiction of the DA; or

(c) Damage caused by a maritime tort committed by any agent or employee of the DA or by property under the jurisdiction of the DA.

**§ 536.123 Claims exceeding $500,000.**

Claims against the United States settled or compromised in a net amount exceeding $500,000 are not payable hereunder, but will be investigated and processed under this section and, if approved by the Secretary of the Army, will be certified to Congress.

**§ 536.124 Claims not payable.**

A claim is not allowable under this section that—

(a) Is for damage to, or loss or destruction of property, or for personal injury or death, resulting directly or indirectly from action by the enemy, or by U.S. Armed Forces engaged in armed conflict, or in immediate preparation for impending armed conflict.

(b) Is for the personal injury or death of a member of the Armed Forces of the United States or a civilian employee incurred incident to his or her service.

(c) Is for the personal injury or death of a Government employee for whom benefits are provided by the FECA (5 U.S.C. 8101–8150).

(d) Is for the personal injury or death of an employee, including nonappropriated fund employees, for whom benefits are provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901).

(e) Has been made the subject of a suit by or against the United States, except as provided in § 536.127(b).

(f) Arises in a foreign country and was considered by the authorities of a foreign country and final action taken thereon under Article VIII of the NATO SOFA, Article XVIII of the Japanese Administrative Agreement, or other similar treaty or agreement, if reasonable disposition was made of the claim.

(g) Is based upon the exercise or performance or the failure to exercise or to perform a discretionary function or duty whether or not the discretion is abused, provided that the United States Court of Appeals for the jurisdiction in which the claim arises has not specifically refused to incorporate the discretionary function exception into the Suits in Admiralty Act (e.g. United States Court of Appeals for the Fourth Circuit).

(h) Is presented by a citizen or government agency, or a corporation controlled by a citizen or government agency, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and, at the time of the incident, was friendly to the United States.

**§ 536.125 Claims under other laws and regulations.**

(a) Claims of DA personnel and civilian employees of DOD including military and civilian officers and crews of Army vessels, for damage to or loss of personal property occurring incident to their service will be processed under the provisions of subpart K.

(b) Claims that are within the scope of this section and also within the scope of subpart J may be processed under subpart J when specific authority to do so has been obtained from the Commander, USARCS. The request for such authority should be accompanied by a copy of the report of the incident by the Marine Casualty Investigating Officer, or other claims investigator.

**§ 536.126 Subrogation.**

(a) An insurer will be recognized as a claimant under this section to the extent that it has become subrogated by payment to, or on behalf of, its assured, pursuant to a contract of insurance in force at the time of the incident from which the claim arose. An insurer and its assured may file a claim either jointly or separately. Joint claims will be asserted in the names of, and must be signed by, or on behalf of, all parties; payment then will be made jointly. If separate claims are filed, payment to each party will be limited to the extent of such party's undisputed interest.

(b) For the purpose of determining authority to settle or compromise a claim, the payable interests of an insurer (or assurers) and the assured represent merely separable interests, which interests in the aggregate must not exceed the amount authorized for administrative settlement or compromise.

(c) The policies set forth in paragraphs (a) and (b) of this section with respect to subrogation arising from insurance contracts are applicable to all other types of subrogation.

**§ 536.127 Limitation of settlement.**

(a) The period of effecting an administrative settlement under the Army Maritime Claims Settlement Act is subject to the same limitation as that for beginning an action under the Suits in Admiralty Act; that is, a 2-year period from the date the cause of the action accrued. The claimant must have agreed to accept the settlement, and it must be approved for payment by the Secretary of the Army, or other approval authority, prior to the end of such period. The presentation of a claim, or its consideration by the DA, neither waives nor extends the 2-year limitation period and the claimant should be so informed in accordance with paragraph (c), of this section.

(b) In the event that an action has been filed in a U.S. district court before the end of the 2-year statutory period, an administrative settlement may be negotiated by the Commander, USARCS with the claimant, even though the 2-year period has elapsed since the cause of action accrued, provided the claimant obtains the written consent of the appropriate office of the Department of Justice charged with the defense of the complaint. Payment may be made upon dismissal of the complaint.

(c) When a claim under this section, notice of damage, invitation to a damage survey, or other written document

indicating an intention to hold the United States liable is received, the receiving installation, office, or person, will immediately forward such document to the Commander, USARCS. The USARCS claims office receiving notice of the claim will promptly advise the claimant or potential claimant in writing of the comprehensive application of the time limit.

(d) Where a claim under this section for $25,000 or less is presented to a Corps of Engineers or other designated area claims office (see §§ 536.128(c)) and 536.132(c) and thus may be appropriate for action by that office pursuant to the delegation of authority set forth in § 536.128, the receiving Corps of Engineer office will promptly advise the claimant in writing of the comprehensive application of the time limit on the Army's authority to settle the claim as well as the fact that the claim does not toll the statute of limitations for filing suit. (See § 536.21(b).)

(e) Claimants are not required to file an administrative claim six months prior to filing suit except for those claims where maritime jurisdiction is based on the Act Extending the Admiralty and Maritime Jurisdiction (46 U.S.C. 740) (i.e. damage or injury on land resulting from an act on navigable waters). However, even in those cases, the filing of an administrative claim does not toll the two year statutory limit for filing suit nor extend the authority of the Army to settle a claim. Any such claim filed within six months of the running of the statute of limitations should be brought to the attention of USARCS immediately and every reasonable effort should be made to complete final agency action before the running of the two year limit.

(f) *Limitation of liability*. Under the provisions of the Limitation of Shipowners' Liability Act, 46 U.S.C. 181–188, the United States may be able, in cases alleging injury or loss due to negligent operation of a vessel, to limit our liability to the value of the vessel after the accident. To take advantage of this law, the United States must file an action in federal district court within six months of receiving written notice of a claim. Therefore, USARCS must be notified within 10 workdays of the receipt of any maritime claim arising in the United States or on the high seas out of the operation of an Army vessel, to include pleasure craft owned by the United States. The Claims Service will coordinate with Litigation Division, OTJAG or the Chief Counsel, COE and the Department of Justice on whether a limitation of liability action will be filed.

**§ 536.128 Approval authority.**

(a) The Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or the designee of the Secretary may approve any settlement or compromise of a claim under this chapter subject only to the statutory limits (presently $500,000).

(b) TJAG, TAJAG and the Commander, USARCS or his designee within USARCS are delegated authority to settle ( i.e. deny or approve payment in full or in part) any claim under this chapter regardless of the amount claimed, provided that any amount awarded does not exceed $100,000 and that the claimant signs an appropriate settlement agreement.

(c) Chiefs of command claims services, heads of Corps of Engineers area claims offices and heads of other area claims offices designated by the Commander, USARCS, are delegated authority to deny claims under this chapter presented in an amount not exceeding $25,000. They may also pay in full or compromise any claim where the amount to be paid does not exceed $25,000, provided the claimant is willing to accept the payment and executes an appropriate settlement agreement.

(d) Only the authorities designated in paragraph a, above may deny or make a final offer on a claim demanding more than $25,000. If a claim cannot be settled within the authority of the head of an area claims office or the chief of a command claims service responsible for investigating a claim, it will be forwarded to USARCS through appropriate channels with a claims memorandum of opinion recommending disposition.

(e) Meritorious claims arising from civil works activities of the Corps of Engineers will be paid from Corps of Engineers funds.

**Claims in Favor of the United States**

**§ 536.129 Scope.**

(a) Title 10, United States Code, section 4803, provides for agency settlement or compromise of claims for damage to—

(1) DA accountable properties of a kind that are within the admiralty jurisdiction of a district court of the United States.

(2) Claims for damage caused by a vessel or floating object to property under the jurisdiction of the DA or property for which the DA has assumed an obligation to respond in damages, where the net amount payable to the United States does not exceed $500,000.

(b) Title 10, United States Code, section 4804, provides for the settlement of compromise of claims in any amount for salvage services (including contract salvage and towage) performed by the DA. Claims for salvage services are based upon labor costs, per diem rates for the use of salvage vessels and other equipment, and upon repair or replacement costs of materials and equipment damaged or lost during the salvage operation. The sum claimed is intended to compensate the United States for operational costs only, reserving, however, the right of the Government to assert a claim on a salvage bonus basis in accordance with commercial practice, in appropriate cases.

(c) The United States has three years from the date a maritime claim accrues under this section to file suit against the responsible parties. The Army's authority to settle or compromise a suit under this section terminates when the statute of limitations has run. Efforts to compromise a claim under this section should not extend more than two years past the date the claim accrues unless it is clear that an administrative settlement is likely. As a general rule, affirmative claims which are likely to be resolved through litigation should be referred to the Department of Justice within two years of the date the claims accrue.

**§ 536.130 Claims exceeding $500,000.**

Maritime claims in favor of the United States, except claims for salvage services, may not be settled or compromised under this section at a net amount exceeding $500,000 payable to the United States. However, all such claims otherwise within the scope of this section will be investigated in accordance with the procedures in subpart B and reported to the Commander, USARCS. The Commander, USARCS will forward the claim to the Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or other designee of the Secretary who will then certify it to Congress.

**§ 536.131 Civil works activities.**

Rights of the United States to fines, penalties forfeitures, or other special remedies in connection with the protection of navigable waters, the control and improvement of rivers and harbors, flood control, and other functions of the Corps of Engineers involving civil works activities are not dealt with in this section. However, claims for money damages that are civil in nature, arising out of civil works activities of the Corps of Engineers and otherwise under this section, for which

an adequate remedy is not available to the COE, may be processed under this section.

**§ 536.132 Delegation of authority.**

(a) The Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or other designee of the Secretary may compromise an affirmative claim by the United States under this subpart subject only to the statutory limit (presently $500,000) on the amount to be received (10 U.S.C. 4803(a)(2)).

(b) TJAG, TAJAG and the Commander, USARCS or his designee within USARCS may settle, or compromise, and receive payment on a claim by the United States under this subpart if the amount to be received does not exceed $100,000. They may also terminate collection of claims for the convenience of the government in accordance with the standards specified by the Department of Justice (see 4 CFR parts 103 and 104), regardless of the amount claimed.

(c) Chiefs of command claims services, the Chief Counsel, Corps of Engineers, heads of Corps of Engineers area claims offices, and heads of other area claims offices designated by the Commander, USARCS may receive payment in full or compromise any claim by the United States under this subpart provided: (1) The amount of the government's claim does not exceed $100,000, and

(2) The amount to be received does not exceed $25,000. The authority delegated in this paragraph to Corps of Engineers claims offices is subject to such limitations as may be imposed by the Chief Counsel, Corps of Engineers.

(d) The head of any claim office may assert and receive payment for the full amount of a claim not exceeding $100,000 by the United States under this subpart.

**§ 536.133 Demands.**

(a) It is essential that demands for payment or notice of intention to make such demands be made as soon as possible following receipt of information of damage to Army property where legal liability to respond is present or possibly present. Except in cases falling under § 536.132(b), copies of the initial demand/notice of intention to make demand letters, as well as copies of subsequent correspondence will be promptly provided to the Commander, USARCS, who will monitor the progress of such claims.

(b) Where, in response to any demand made by a field claims office, a respondent denies liability, fails to respond within a reasonable period, or offers a compromise settlement, the file will be promptly forwarded to the Commander, USARCS, except in cases where proposed compromise settlement is deemed acceptable and the claim is otherwise within the authority delegated in § 536.132(b).

**Investigations and Reports**

**§ 536.134 Procedure.**

Claims under this subpart will be investigated and reported in accordance with subpart B of this part, AR 55–19 or other applicable regulations.

**§ 536.135 Reports.**

A copy of the report of a marine casualty investigation disclosing the basis for a claim under section II or III of this chapter will be furnished to the Commander, USARCS within 60 days after the day on which the marine casualty occurred or after notice of such casualty. An interim report will be forwarded if the investigation has not been completed within the 60-day period. The report will contain original signed statements of all witnesses and other original documentary evidence to the extent practicable.

**§ 536.136 Form of claim.**

(a) A demand letter may initiate a claim. Formalization of a claim may be accomplished at any time before consummation of the settlement or compromise. It is preferable that claims under section II of this chapter be submitted on SF 95; however, the submission of a special form, in view of commercial practice, is not required. The reporting of a maritime casualty under § 536.135 will not be deferred in anticipation of the receipt of a claim.

(b) Claims of foreign nationals will be stated in the currency of the country in which the casualty occurred, or in the currency of the nationality of the claimant if other than the country of the casualty.

## Subpart I—Claims Under Article 139, Uniform Code of Military Justice

**§ 536.137 Statutory authority.**

The authority for this subpart is Article 139, UCMJ (10 U.S.C. 939), which provides for redress for property willfully damaged or destroyed, or wrongfully taken, by members of the armed forces of the United States.

**§ 536.138 Purpose.**

This subpart sets forth the standards to be applied and the procedures to be followed in the processing of claims for damage, loss, or destruction of property owned by or in the lawful possession of an individual whether civilian or military, a business, a charity, or a State or local government, where the property was wrongfully taken or willfully damaged by military members of DA. Claims cognizable under other claims statutes may be processed under this subpart.

**§ 536.139 Effect of disciplinary action.**

Administrative action under Article 139 and this subpart is entirely separate and distinct from disciplinary action taken under other sections of the UCMJ or other administrative actions. Because action under Article 139 and this chapter requires independent findings on issues other than guilt or innocence, the mere fact that a soldier was convicted or acquitted of charges is not dispositive of a claim under Article 139.

**§ 536.140 Claims cognizable.**

Claims cognizable under Article 139, UCMJ, are limited to—

(a) Claims for property willfully damaged. Willful damage is damage which is inflicted intentionally, knowingly, and purposefully without justifiable excuse, as distinguished from damage caused inadvertently or thoughtlessly through simple or gross negligence. Damage, loss, or destruction of property caused by riotous, violent, or disorderly acts, or by acts of depredation, or through conduct showing reckless or wanton disregard of the property rights of others may be considered willful damage.

(b) Claims for property wrongfully taken. A wrongful taking is any unauthorized taking or withholding of property, not involving the breach of a fiduciary or contractual relationship, with the intent to temporarily or permanently deprive the owner or person lawfully in possession of the property. Damage, loss, or destruction of property through larceny, forgery, embezzlement fraud, misappropriation, or similar offense may be considered wrongful taking.

**§ 536.141 Claims not cognizable.**

Claims not cognizable under this subpart and Article 139 include—

(a) Claims resulting from negligent acts.

(b) Claims for personal injury or death.

(c) Claims resulting from acts or omissions of military personnel acting within the scope of their employment.

(d) Claims resulting from the conduct of Reserve component personnel who are not subject to the UCMJ at the time of the offense.

(e) Subrogated claims, including claims by insurers.

**§ 536.142 Limitations on assessments.**

(a) Time Limitations. To be considered, a claim must be submitted within 90 days of the incident out of which the claim arose, unless the special court-martial convening authority (SPCMCA) acting on the claim determines that good cause has been shown for the delay.

(b) *Limitations on amount.* If the General Court-Martial Convening Authority (GCMCA), or designee, acting on the claim determines that an assessment against a soldier in excess of $10,000 for a single incident is meritorious, he or she will assess the pay of that soldier in the amount of $10,000 and forward the claim to the Commander, USARCS with his or her recommendation as to the additional amount that should be assessed.

(1) A SPCMCA has authority to approve a pay assessment not to exceed $5,000 on a single incident and deny a claim in any amount.

(2) A GCMCA, or designee, has authority to approve a pay assessment in an amount not to exceed $10,000 on a single incident.

(3) Only the Commander, USARCS, or designee, has authority to approve a pay assessment in an amount greater than $10,000 on a single incident.

(c) *Direct damages.* Assessments are limited to direct damages for the loss or damage to property. Indirect, remote, or consequential damages may not be considered under this chapter.

**§ 536.143 Procedure.**

Area claims offices and claims processing offices with approval authority are responsible for publicizing the Article 139 program and maintaining a log for Article 139 claims presented in their areas (see DA Pam 27–162, paragraph 10–6). Area claims offices and claims processing offices with approval authority are required to monitor action taken on Article 139 claims and ensure that time requirements are met. If assessment action on a particular claim will be unduly delayed, the office may consider the claim under 31 U.S.C. 3721 and chapter 11 of this regulation if it is otherwise cognizable under that authority. The office will counsel the claimant to repay any overpayment if the Article 139 claim is later successful (see § 516.163(d)(1).

(a) *Form of a claim and presentment.* A claim must be presented by the claimant or his or her authorized agent orally or in writing. The claim must be reduced to writing, signed, and for a definite sum in U.S. dollars within 10 days after oral presentment. (See § 536.20(d)(1)(i))

(b) *Action upon receipt of a claim.* Any officer receiving a claim will forward it within 2 working days to the SPCMCA over the soldier or soldiers against whom the claim is made. If the claim is made against soldiers under the jurisdiction of more than one such convening authority who are under the same general court-martial convening authority, the claim will be forwarded to that general court-martial convening authority, who will designate one SPCMCA to investigate and act on the claim as to all soldiers involved. If the claim is made against soldiers under the jurisdiction of more than one SPCMCA at different locations and not under the same general court-martial convening authority, the claim will be forwarded to the SPCMCA whose headquarters is closest to the situs of the incident, who will investigate and act on the claim as to all soldiers involved. If a claim is made against a member of one of the other Military Services, the claim will be forwarded to the commander of the nearest MACOM of that Service.

(c) *Action by the SPCMCA.* (1) If the claim appears to be cognizable, the SPCMCA will appoint an investigating officer within 4 working days of receipt of a claim. The investigator will use the procedures of this chapter supplemented by the procedures of AR 15–6, chapter 4, applicable to informal investigations. The claims officer of a command, if he or she is a commissioned officer, may be appointed as the investigating officer.

(2) If the claim is not made against a person who is a member of the armed forces of the United States at the time the claim is received, or if the claim otherwise does not appear to be cognizable under Article 139, the SPCMCA may refer it for legal review (see paragraph (e) of this section) within 4 working days of receipt. If, after legal review, the SPCMCA determines that the claim is not cognizable, he or she may take final action disapproving the claim (see paragraph (f)) without appointing an investigating officer.

(d) *Action by the investigating officer.* The investigating officer will provide notification to the soldier against whom the claim is made.

(1) If the soldier indicates a desire to make voluntary restitution, the investigating officer may, with the convening authority's concurrence, delay proceedings until the end of the next pay period to accomplish this. If the soldier makes payment to the claimant's full satisfaction, the claim will be dismissed.

(2) In the absence of full restitution, the investigating officer will determine whether the claim is cognizable and meritorious under the provisions of Article 139 and this chapter and the amount to be assessed each offender. This amount will be reduced by any restitution accepted by the claimant from an offender in partial satisfaction. Within 10 working days or such time as the SPCMCA may provide, the investigating officer will make findings and recommendations and submit these to the SPCMCA.

(3) If the soldier is absent without leave so that he or she cannot be provided with notification, the Article 139 claim may be processed in the soldier's absence. If an assessment is approved, a copy of the claim and memorandum authorizing pay assessment will be forwarded by transmittal letter to the servicing finance and accounting office (FAO) for offset input against the soldier's pay account. In the event the soldier is dropped from the rolls, the servicing FAO will forward the assessment documents to Commander, Defense Finance and Accounting Services, ATTN: Military Pay Operations, Indianapolis, Indiana 46249.

(e) *Legal review.* The SPCMCA will refer the claim to the area claims office or claims processing office servicing his or her command to review for legal sufficiency and advice. This will be either after completion of the investigating officer's report or subsequent to the SPCMCA's decision that the claim is clearly not cognizable (§ 536.143(c)(2)). That office will furnish within 5 working days or such time as the SPCMCA will provide a written opinion as to—

(1) Whether the claim is cognizable under the provisions of Article 139 and this subpart.

(2) Whether the findings and recommendations are supported by evidence.

(3) Whether there has been substantial compliance with the procedural requirements of Article 139, this subpart, and AR 15–6.

(4) Whether the claim is clearly not cognizable (see section 536–143(c)(2)) and final denial action can be taken without appointing an investigating officer.

(5) If the investigator recommends an assessment more than $5,000, the Judge Advocate/claims attorney will forward the packet to the head of the area claims office for the legal review. Within 5 working days, the head of the area claims office will forward the packet, with recommendations, to the GCMCA for approval of an assessment not to exceed $10,000. If the recommended assessment is over $10,000, the head of the area claims office will then forward

the packet to the Commander, USARCS for final approval of the assessment.

(f) *Final action.* After considering the advice of the legal advisor, the approval authority will disapprove or approve the claim in an amount equal to or less than the amount recommended by the investigating officer up to $10,000. The approval authority will notify the claimant, and any soldier subject to his or her jurisdiction, of the determination and the right to request reconsideration. (See § 536.144.) A copy of the investigating officer's findings and recommendations will be enclosed with the notice. The approval authority will then suspend action on the claim for 10 working days pending receipt of a request for reconsideration unless he or she determines that this delay will result in substantial injustice. The approval authority will direct the servicing finance officer for the soldier against whom assessments are approved to withhold such amount from the soldier not to exceed $10,000. (See § 536.142(b)). For any soldier not subject to the approval authority's jurisdiction, the approval authority will forward the claim to that commander who does exercise special court-martial jurisdiction over the soldier for collection action.

(g) *Assessment.* Subject to any limitations provided in appropriate regulations, the servicing finance officer will withhold the amount directed by the approval authority and pay it to the claimant. The assessment is not subject to appeal and is conclusive on any finance officer. If the servicing finance officer finds that the required amount cannot be withheld because he or she does not have custody of the soldier's pay record or because the soldier is in a no pay due status, the servicing finance officer will promptly notify the approval authority of this in writing.

(h) *Post settlement action.* After action on the claim is completed, the claims office servicing the command which took final action will retain the original claim file and forward a complete copy of the claim file to the SPCMCA. The article 139 claim will be filed locally, IAW the Modern Army Record Keeping System (MARKS). If a claim for the same incident is filed UP AR 27–20, chapter 11, a copy of the article 139 claim will be incorporated into the chapter 11 claim file.

(i) *Remission of indebtedness.* Title 10, United States Code, section 4837(d), which authorizes the remission and cancellation of indebtedness of an enlisted person to the United States or its instrumentalities, is not applicable and may not be used to remit and cancel indebtedness determined as a result of action under Article 139.

**§ 536.144 Reconsideration.**

(a) *General.* Although Article 139 does not provide for a right of appeal, either the claimant or a soldier whose pay is assessed may request the SPCMCA or a successor in command to reconsider the action. A request for reconsideration will be submitted in writing and will clearly state the factual or legal basis for the relief requested. The SPCMCA may direct that the matter be reinvestigated.

(b) *Reconsideration by the original SPCMCA.* The original SPCMCA may reconsider the action so long as he or she occupies that position, regardless of whether a soldier whose pay was assessed has been transferred. The original SPCMCA may modify it if he or she determines that the action was incorrect, subject to paragraph (d) of this section. However, the SPCMCA should only modify the action on the basis of fraud, substantial new evidence, errors in calculation, or mistake of law.

(c) *Reconsideration by a successor in command.* Subject to paragraph (d) of this section, a successor in command may only modify an action on the basis of fraud, substantial new evidence, errors in calculation, or mistake of law apparent on the face of the record.

(d) *Legal review and action.* Prior to modifying the original action, the SPCMCA will have the claims office render a legal opinion and fully explain the basis for modification as part of the file. If a return of assessed pay is deemed appropriate, the SPCMCA should request the claimant to return the money, setting forth the basis for the request. There is no authority for repayment from appropriated funds.

(e) *Disposition of files.* After completing action on reconsideration, the SPCMCA will forward the reconsideration action to the claims office who will then file the action in accordance with § 536.143(h).

## Subpart J—Claims Cognizable Under the Foreign Claims Act

### General

**§ 536.145 Statutory authority.**

The authority for this subpart is contained in the following statutes:

(a) 10 U.S.C. 2734 as amended, commonly referred to as "The Foreign Claims Act."

(b) 10 U.S.C. 2734a as amended, commonly referred to as "The International Agreement Claims Act."

(c) The Act of 8 September 1961 (10 U.S.C. 2736), as amended.

(d) Act of 4 March 1923 (36 U.S.C. 121, 138b).

**§ 536.146 Scope.**

(a) This subpart implements the FCA and authorizes the administrative settlement of claims of inhabitants of a foreign country, or by a foreign country or a political subdivision thereof, against the United States for personal injury or death or property damages caused outside the United States, its territories, commonwealths, or possessions by military personnel or civilian employees of the DA, or claims which arise incident to noncombat activities of the Army.

(b) Claims resulting from the activities, or caused by personnel of another military department, service, or agency of the United States may also be settled by Army foreign claims commissions as authorized by this subpart.

(c) Claims arising from acts or omissions of employees of nonappropriated fund activities may also be settled by Army foreign claims commissions pursuant to this subpart if otherwise applicable, but are payable from nonappropriated funds (subpart L).

**§ 536.147 Claims cognizable under other subparts.**

(a) *Subparts C and E.* Claims within the scope of the FCA, which otherwise would be cognizable under subpart E will be considered first under this subpart. Claims by foreign inhabitants covered by the FCA may not be paid under the provisions of subpart C (see 10 U.S.C. 2733(b)(2)).

(b) *Subpart I.* Consideration may be given to first settling under subpart I, any claim which is also within the scope of the FCA. However, if the settlement of the claim under subpart I will cause identifiable hardship to the claimant, procedures of this subpart will be used.

(c) *Subpart K.* Claims cognizable under this chapter, which are also cognizable under subpart K, will be considered first under the latter subpart.

(d) *Subpart H.* Claims that may be settled under chapter 8 may be settled under this chapter only when specifically authorized by the Commander, USARCS. (See § 536.125(b).)

**§ 536.148 Claims provisions of treaties and agreements.**

When a foreign government has assumed responsibility for settling claims against the United States pursuant to Article VIII, NATO—SOFA, or other similar treaty or agreement, any claim presented to U.S. authorities will

be forwarded to the appropriate United States sending State Office, or similar office, for referral to the foreign government. The investigation by U.S. authorities of claims cognizable under a SOFA will normally be limited to securing evidence from U.S. sources.

**§ 536.149 Presentation of claims.**

A claim may not be allowed under this subpart unless it is presented within 2 years after it accrues. Such presentation may be made to United States authorities or to a foreign government in accordance with Article VIII, NATO—SOFA or other applicable treaty or agreement.

**§ 536.150 Form of claims.**

(a) A claim normally will be presented in writing. A report of the incident to the authorities stated in § 536.149 by the claimant or agent requesting compensation is an adequate presentation. Under unusual circumstances, a claim presented orally by the claimant to U.S. authorities may be considered acceptable. An oral claim must be reduced to writing, however, not more than 3 years after the date on which it accrues. The written claim must state the time, place, and nature of the incident; the nature and extent of damage, loss, or injury; and the amount of compensation claimed.

(b) A claim will be stated in the currency of the country where the incident occurred, or the country where the claimant was an inhabitant at the time of the incident. The U.S. dollar equivalent of a foreign currency, computed at the time the claim is filed and based on the annual Foreign Currency Fluctuation Account exchange rate (where applicable), will determine whether a foreign claims commission has monetary jurisdiction to settle the claim. (See § 536.149.)

(c) Claims commissions and command claims service will coordinate informally with the Chief, Special Claims Branch, USARCS to determine whether it is necessary to comply with the mirror file requirements of § 536.21 (c) and (d), for any claim cognizable under this subpart in which the amount claimed is greater than $50,000 and a foreign government is not responsible for adjudication under a SOFA or other agreement.

**§ 536.151 Claimants.**

(a) *General.* (1) In personal injury or property damage cases, a claimant must have been an inhabitant of a foreign country at the time of the incident and not otherwise excluded as a claimant. In a wrongful death case, the proper claimants are those who are entitled by the law of the country where the incident occurred to bring a claim for the decedent's death, and the decedent must have been an inhabitant of a foreign country at the time of the incident and not otherwise excluded as a claimant. However, it is not necessary that the claimant in personal injury and property damage cases, or the decedent in a death case, be a citizen of, or have legal domicile in the foreign country, to establish that he or she is an inhabitant thereof.

(2) A corporation or other organization doing business in a foreign country on a permanent basis may qualify as a proper claimant although organized under U.S. law.

(3) United States citizens residing overseas may be proper claimants provided it is established that they actually are inhabitants of a foreign country (see paragraph 7–4c(1)(a), DA Pam 27–162) and are not otherwise excluded.

(4) The government of a foreign country and political subdivisions thereof are proper claimants unless waiver provisions of applicable international agreements exclude such claims.

(b) *Claimants excluded.* (1) A national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States or of any country allied with such enemy country, is excluded as a claimant, unless the appropriate foreign claims mission considering the claim or the responsible military commander, determines that the claimant is, and at the time of the incident was, friendly to the United States.

(2) United States military personnel and civilian employees of the U.S. Government or its agencies and instrumentalities and their dependents, who are normally residents of the United states and who, at the time of the incident giving rise to the claim, are residing in a foreign country primarily because of their own or their sponsor's duty or employment status, are not foreign inhabitants and are excluded from coverage under the Foreign Claims Act.

(i) Foreign born spouses, children and other dependent family members of such military personnel and United States employees are also deemed to be inhabitants of the United States and excluded from coverage under this chapter if they have resided with their sponsor in the United States and are now overseas primarily because of their sponsor's duty assignment.

(ii) Children born to or adopted by a member of the force or civilian component who has not been reassigned to the United States since the date of the birth or adoption, are deemed to be inhabitants of the United States and excluded from coverage under this chapter from the time they are born or adopted. However, children born or adopted overseas will be deemed to be foreign inhabitants if there is clear evidence that they are not a member of the sponsor's household and are not residing overseas primarily because of the sponsors duty assignment. For example, a child born or adopted overseas would be deemed to be a foreign inhabitant if the child continued to reside overseas with the other parent after their military or civilian employee sponsor returns to the United States or is transferred to another foreign country on permanent change of station orders. (See paragraph 7–4c, DA Pam 27–162.

(iii) In the case of a spouse married overseas to a member of the armed forces or a U.S. civilian employee, the spouse continues to be a foreign inhabitant until he or she moves with the sponsor to another foreign country or to the United States.

(iv) Parents or other relatives who are financially dependent on a member of the military or civilian employee, but are not members of the household, continue to be foreign inhabitants. If they are members of the sponsor's household they lose foreign inhabitant status once they have resided in the United States or another foreign country with the sponsor.

(3) Other residents of the United States, or its territories, commonwealths, or possessions who are visiting, touring, or employed overseas, but not inhabitants of a foreign country, are excluded.

(c) *Insurers or other subrogees.* (1) Under this subpart the property claim of an insured, but not that of a subrogee, may be considered. This precludes consideration of the claim of an insurer subrogated by operation of law or the terms of a policy of insurance for payments made by it to or for its insured. However, an insured party will not be required to exhaust a remedy against an insurer, which the insured obtained by payment of a premium to that insurer, prior to payment of a property damage claim under this chapter.

(2) Further, no claim or any part thereof, the amount of which has been recovered or is reasonably recoverable from workmen's compensation, health insurance, social security, or any indemnifying law or indemnity contract, may be paid.

(3) Provisions of paragraphs (c) (1) and (2) of this section are intended to

preclude any payment that does not go to and remain with the injured party claimant.

(4) If the application of paragraph (c)(2) of this section would impose severe hardship upon an individual, the claim should be forwarded to Commander, USARCS, who is authorized to make exceptions in individual cases upon presentation of adequate justification.

**§ 536.152 Claims payable.**

(a) A claim for death, personal injury, or loss or damage to property may be allowed under this chapter if it resulted from a negligent or wrongful act or omission of any of the following categories of personnel regardless of whether the act or omission was within the scope of their employment—

(1) Military personnel of the United States.

(2) Civilian employees of a military department or the Department of Defense who are U.S. citizens. Claims generated by U.S. citizens who are employees of a nonappropriated fund activity who are paid with non-appropriated funds will be paid in accordance with the provisions of this subpart and subpart L from nonappropriated funds.

(3) Other civilian employees who are not U.S. citizens and were recruited or transferred from a country other than the one in which they are employed and where the incident occurred.

(b) Claims based on the negligent or wrongful acts of the following categories of employees will be paid under this subpart only if the act was within the scope of their employment—

(1) Civilian employees who are not U.S. citizens, who were recruited in the country in which they are employed, and where the incident occurred. Claims arising from the operation of U.S. Armed Forces vehicles or other equipment by the employees described in the preceding sentence, however, may be paid, even though the employees are not acting within the scope of their employment, provided the employer or owner of the vehicle or other equipment would be liable under local law in the circumstances involved.

(2) Officers or civilian employees of the American Battle Monuments Commission, acting within the scope of employment. Claims generated by such personnel will be paid from American Battle Monuments Commission appropriations.

(3) Certain Red Cross volunteers meeting the criteria set forth in AR 40–3, paragraph 2–42.

(c) A claim may be settled under this subpart if it arises from non-combat activities (see glossary). Activities incident to combat, whether in time of war or not, are excluded.

(d) Property for the loss or damage of which claims may be settled under this subpart includes—

(1) Real property used and occupied in connection with training, field exercises, or maneuvers. An allowance may be made for the use and occupancy of real property arising out of trespass or other tort, even though claimed as rent. Real estate claims founded upon contracts are processed under the provisions of AR 405–15.

(2) Personal property bailed to the Government under an agreement, express or implied, unless the owner has expressly assumed the risk of damage or loss.

**§ 536.153 Claims not payable.**

A claim may not be allowed under this subpart that—

(a) Results from action by an enemy or results directly or indirectly from an act of the armed forces of the United States in combat, except if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

(b) Is purely contractual in nature.

(c) Is one for which a foreign country is responsible under Article VIII NATO—SOFA, or other similar treaty or agreement. (See § 536.148). However, if a foreign country refuses to recognize legal responsibility for the claim, or to consider it under applicable treaty provisions, the senior Army JA in country or, where the estimated value of the claim is within USARCS authority, the Commander, USARCS, may authorize a foreign claims commission to consider the claim.

(d) Arises from private or domestic obligations as distinguished from Government transactions.

(e) Is based solely on compassionate grounds. (See DA Pam 27–162, paragraph 8–4.)

(f) Is a bastardy claim.

(g) Arises from the operations of a nonappropriated fund activity, unless generated by military personnel performing assigned duties (subpart L).

(h) Is for the personal injury or death of a member of the armed forces of the United States incurred incident to service. (See § 536.25.)

(i) Is for the personal injury or death of a Government employee for whom benefits are provided by the FECA (5 U.S.C. 8101–8150).

(j) Is for the personal injury or death of an employee, including nonappropriated fund employees, for whom benefits are provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et. seq.).

(k) Is for the personal injury or death of any employee for whom benefits are provided under workmen's compensation type laws or regulations, including local law or custom, in cases where contribution is made or insurance premiums paid directly or indirectly by the United States on behalf of the injured employee. If, in the opinion of a foreign claims commission the claim should be considered payable; (e.g. injuries did not result from the normal risk of employment or adequate compensation is not payable under workmen's compensation laws,) the file will be forwarded with recommendations through claims channels to the Commander, USARCS, who may authorize payment of an appropriate award. The Commander, USARCS, also may specify that all or any part of any compensation received by the claimant from workmen's compensation sources, as above, will be deducted from the award to claimant. The claim of an insurance carrier subrogee who has received premiums paid directly or indirectly by the United States on behalf of the injured employee, however, is not payable.

(l) Is for taking of property by technical trespass, such as the overflight of aircraft or a taking contemplated by the Fifth Amendment to the U.S. Constitution, as distinguished from common law trespass. (See AR 405–15, para 2c, and DA Pam 27–162, paragraphs 8–46 and 8–75).

(m) Is for reimbursement for medical, hospital, or burial expenses furnished at the expense of the United States.

(n) Is for patent or copyright infringement. (See AR 27–60.)

(o) Is for war trophies, or articles intended directly or indirectly for persons other than the claimant or members of his or her immediate family such as articles acquired to be disposed of as gifts or for sale to another, voluntarily bailed to the Army, or for precious jewels and other articles of extraordinary value voluntarily bailed to the DA. The preceding sentence is not applicable to claims involving registered or insured mail. No allowance will be made for any item when the evidence indicates that the acquisition, possession, or transportation thereof was in violation of DA directives.

(p) Is for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property or interests therein by and for the DA, except as authorized by section

536.152(c)(1). Real estate claims founded upon contract are generally processed under AR 405–15. (See DA Pam 27–162, paragraph 8–46.)

(q) Is not in the best interests of the United States or is contrary to public policy, general principles of equity, or the basic intent of the FCA. Examples are claims by inhabitants of unfriendly countries, claims by or based on injury or death of individuals considered to be unfriendly to the United States, or claims for property losses resulting directly or indirectly from illegal activities of the claimant, such as drug dealing, black marketing, or illegal loan sharking. When a claim is considered to be not payable for the reasons stated in this paragraph, the issue will be presented to the Commander, USARCS for determination of the applicability of this exclusion.

(r) Arises from the activities of the Panama Canal Commission.

(s) Is based upon an act or omission of a member or employee of the Army, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid. However, this exception should not be used without prior approval of the Commander, USARCS.

(t) Is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency, or a member or employee of the Army, whether or not the discretion involved is abused. However, this exception should not be used without prior approval of the Commander, USARCS.

(u) Arises in respect to the assessment or collection of any tax or custom duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(v) Is a claim for which a remedy is provided by the Suits in Admiralty Act (46 U.S.C. 741–752) or the Public Vessels Act (46 U.S.C. 781790), or cognizable under subpart H, unless specifically authorized by the Commander, USARCS. (See § 536.147(d).)

(w) Is a claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading With the Enemy Act (50 U.S.C. App, sections 1–31). (See DA Pam 27–162, paragraph 8–8d.)

(x) Is for damages caused by the imposition or establishment of a quarantine by the United States.

(y) Results wholly from the negligent or wrongful act of the claimant or his or her agent. Claims involving comparative negligence are not barred by this provision.

(z) Arises out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(aa) Is for damages caused by the fiscal operations of the DA, the Treasury, or by regulation of the monetary system.

**§ 536.154 Compensation.**

(a) In determining an appropriate award, the law and custom of the country where the incident occurred will be used to determine what elements of damages are payable and which individuals are entitled to receive compensation. However, where the claimant is an inhabitant of another foreign country and only temporarily in the country where the incident occurred, the quantum of certain elements of damages, such as lost wages and future medical care, may be calculated based on the law and economic conditions in the country of the claimant's permanent residence. Punitive damages and interest will not be allowed. Court costs, attorney fees, bail, costs of filing a claim, and similar charges also are not allowed.

(b) Local law or custom pertaining to contributory or comparative negligence and to joint tortfeasors will be applied.

**§ 536.155 Computation of amount.**

(a) The amount allowed will, to the extent possible, be apportioned among claimants as prescribed by local law.

(b) After appropriate compensation for the total damages suffered has been computed, any payment claimant has received from the tortfeasor, or any joint tortfeasor, will be deducted. This includes amounts collectible from a tortfeasor's or joint tortfeasor's insurance company or amounts paid by any other third party.

(c) *Deductions for insurance.* (1) Normally there will be deducted from any award the amount of any applicable insurance coverage recovered or an amount that can be reasonably expected to be recovered and which has been or will be paid to the claimant. In this regard, every effort will be made to monitor the insurance aspect of the case and encourage direct settlement between the claimant and the insurer. (See § 536.151(c)(1).)

(2) When efforts under paragraph (c)(1) of this section are of no avail or it otherwise is determined that an insurance settlement will not be reasonably available for application to the award, settlement may be accomplished without making a deduction. In such cases, an assignment of the insured's rights against the insurer will be obtained and, in appropriate cases, reimbursement action will be instituted against the insurer under applicable procedures.

(3) If the reason that an insurance settlement is not available is due to insolvency or bankruptcy of the insurer, no award will be made until prior consent has been obtained from the Commander, USARCS. In this event, a report on a bankruptcy will be forwarded without delay setting forth all pertinent information including the alleged reasons for the bankruptcy and the facts concerning the licensing of the insurer.

(d) Settlements will be stated in the appropriate foreign currency. To determine the proper approval authority, the settlement or the claimed amount (in claims where a settlement cannot be reached) will be converted to the U.S. dollar equivalent (based on the annual Foreign Currency Fluctuation Account exchange rate, where applicable) on the date of the commission's action.

(e) Payment will be made in the currency of the country in which the incident occurred or where the claimant resided at the time of the incident. However, if the claimant resides in another foreign country at the time of payment, payment in an amount equivalent to that which would have been paid under the preceding sentence may be made in the currency of that third country.

(f) No more than 20% of the total cost of an award to the United States may be paid as attorney fees or as a fee by any representative. This fee limitation should be made a part of all settlement agreements.

(g) In appropriate cases, a commission or other approval authority can require a structured settlement with periodic or deferred payments if it is feasible to make such arrangements in the country where the claimants reside. Such settlements are especially appropriate on claims of minors. In cases where the time, duration, amount or need for any element of future damages is uncertain, the part of the award for such damages may be paid into a reversionary trust with the reversion to the United States.

**Foreign Claims Commissions**

**§ 536.156 Appointment and functions.**

(a) Claims cognizable under this section will be referred to a foreign claims commission for processing regardless of the amount claimed. The commander senior Judge Advocate of a command having a command claims service will appoint necessary foreign

claims commissions to action claims arising within his or her geographic area jurisdiction, and on claims arising in another geographic area jurisdiction that are transferred by agreement between the commanders involved. The senior Judge Advocate may delegate this authority to commander or chief of the command claims service.

(b) All other commissions will be appointed by the Commander, USARCS, to act on any claims referred to the commission regardless of where the claim arose. Commissions appointed by the Commander, USARCS, for units based in CONUS may act on any claim arising out of the operations of their unit. Any claims commission operating in or adjudicating claims arising out of an area within the jurisdiction of a command claims service will comply with the legal and procedural guidance of that service.

(c) A commission may operate as an integral part of a command claims service that will determine the cases to be assigned to it, furnish necessary administrative services, and establish and maintain its records. Where a commission does not operate as a part of a command claims service, it may operate as a part of the office of a division, corps or higher command SJA, who will perform the foregoing functions.

(d) Any appointing authority may relieve a commission appointed by him or her. One copy of each order concerning appointment, relief, or change of responsibility of a commission will be forwarded without delay to the Commander, USARCS.

(e) Normally, the claims commission is responsible for the investigation of all claims referred to it, using the procedures in subpart B, Investigation, and any local procedures established by the appointing authority or command claims service responsible for the area in which the claim arose. The chief of a command claims service can request assistance on claims investigation in their geographical areas from units or organizations other than the claims commission. The Commander, USARCS can do likewise for any claim referred to a commission appointed under his authority.

(f) When a foreign claims commission intends to deny a claim, award less than the amount claimed, or recommend an award less that the amount claimed but in excess of its authority, it will notify the claimant, the claimant's authorized agent, or the claimant's legal representative, in writing by the means most likely to ensure receipt by the claimant, of its intended action on the claim and the legal and factual basis for that action. The purpose of this notice is to give the claimant an opportunity to object to the commission's action and state the reasons for the objection before final action on the claim. Where the commission intends to award the amount claimed or to recommend to higher authority an award equal to the amount claimed, this procedure is not necessary.

(1) This notice should be given at least 30 days prior to final action by the commission, except for small claims processed under the provisions of subpart B, Small Claims.

(2) If the commission proposes to make a partial award or to recommend a partial award to higher authority, a settlement agreement should be enclosed with the notice. If the commission is recommending an award in excess of its authority, the agreement should indicate that the recommendation is contingent upon approval by higher authority. Claimants will be advised they may either accept the commission's action by returning the signed settlement agreement or, if they are dissatisfied with the commission's action or recommendation, they may submit a response in writing stating the factual or legal reasons why they believe the commissions proposed action is incorrect.

(3) A commission may alter its initial decision based on the claimant's response or proceed with its intended action. If the claimant's response raises a general policy issue, the commission may request an advisory opinion from the Commander, USARCS while retaining the claim for final action at its level.

(4) Upon completion of its evaluation of the claimant's response, the commission will notify the claimant of its final decision and advise the claimant that its action is final and conclusive by law (10 U.S.C. 2735), unless the final decision is a recommendation for payment above its authority. In that case, the commission will forward any response submitted by the claimant along with the commission's claims memorandum of opinion to the approval authority and will notify the claimant accordingly.

(5) Every reasonable effort should be made to negotiate a mutually agreeable settlement on meritorious claims. When an agreement can be reached, the notice and response provisions above are not necessary. If the commission recommends an award in excess of its authority, the settlement agreement should indicate that its recommendation is contingent upon approval by higher authority.

**§ 536.157 Composition.**

A foreign claims commission normally will be composed of either one or three members. Alternate members of three-member commissions may be appointed where circumstances require and be substituted for regular members for specific cases by order of the appointing authority. The appointing orders will clearly state who is designated the president of a three-member commission. Two members of a three-member commission will constitute a quorum, and the commission decision will be determined by majority vote.

**§ 536.158 Qualification of members.**

A member of a foreign claims commission normally will be either a commissioned officer or a claims attorney. At least two members of a three-member commission must be JAs or claims attorneys. In exigent circumstances, a qualified non-lawyer employee of the armed forces may be appointed to a foreign claims commission subject to prior approval by the Commander, USARCS. Such approval may be granted only upon a showing of the employee's status and qualifications and adequate justification of the need for such appointment (for example, lack of legally qualified personnel). The commission will be limited to employees who are citizens of the United States. An officer, claims attorney, or employee of another armed force will be appointed a member of an Army foreign claims commission only if approved by the Commander, USARCS.

**§ 536.159 Delegation of authority.**

(a) One-member commission. Unless otherwise restricted by the appointing authority, a one-member foreign claims commission that is a JA or a claims attorney may consider and pay appropriate claims presented in any amount provided a mutually agreed settlement can be reached in an amount not over $15,000 or disapprove any claim presented in an amount not over $15,000. In no case will the jurisdictional limit of $15,000 be used to unfairly reduce payment of a claim meritorious in an amount over $15,000. Any other one-member foreign claims commission may consider and pay, in full or in part, claims presented in an amount not exceeding $2,500 that it considers meritorious.

(b) Three-member commission. A three-member commission may take the following actions on a claim properly before the commission, unless otherwise restricted by the appointing authority.

(1) Disapprove a claim presented in any amount. Where a claim presented in

any amount over $50,000 is disapproved, the commission, after final action has been taken, will forward to the appointing authority the written notice to the claimant required by § 536.157(f), any response by the claimant and its notice of final action on the claim.

(2) Approve and pay, in full or in part, a claim filed in any amount which is adjudicated by the commission as meritorious in an amount not exceeding $50,000. For claims in excess of $50,000 in which the commission approves payment of an award for $50,000 or less, the commission, after taking final action, will forward to the appointing authority the written notice to the claimant required by § 536.157(f), any response by the claimant and its notice of final action.

(3) Recommend an award in excess of $50,000. The commission will comply with the notice and comment provisions of § 536.157(f), and forward the claim to the approval authority under cover of a claims memorandum of opinion. Recommendations for awards in excess of the commissions authority will be sent through any command claims service responsible for the area in which the claim arose and, in the case of recommendations for awards in excess of $100,000, through the Commander, USARCS.

(4) In any case where no claim exceeds $50,000 but the total amount to be awarded on all claims arising out of the same incident exceeds $100,000, no action will be taken to make payment until a claims memorandum of opinion (see section 536.22) on the incident has been forwarded and reviewed by the Commander, USARCS or his designee.

(c) TJAG, TAJAG and the Commander, USARCS or his designee at USARCS may approve and pay, in whole or in part, any claims so long as the amount of the award does not exceed $100,000; may disapprove any claims, regardless of either the amount claimed or the recommendation of the commission forwarding the claim; or, if a claim is forwarded to USARCS for approval of payment in excess of $50,000, may refer the claim back to the commission or to another commission for further action.

(d) Payments in excess of $100,000 will be approved by the Secretary of the Army, the Assistant Secretary of the Army (Financial Management) as designee of the Secretary or other designee.

(e) Following approval, where required, and receipt of an agreement by the claimant accepting the specific sum awarded by the commission, the claim will be processed for payment in the appropriate currency. The first $100,000 of any award will be paid from Army claims funds. The excess will be reported to the Claims Division, GAO, 441 G Street, NW., Washington, DC 20548–9100, together with the documents listed in § 536.35(b).

(f) The chief of an overseas command claims service may delegate to a one-member commission the responsibility for the receipt, processing, and investigation of any claim, regardless of amount, except those required to be referred to a receiving state office for adjudication under the provisions of a treaty concerning the status of our forces in the country where the claim arose. If, after investigation, it appears that action by a three-member commission is appropriate, the one-member commission should send the claim to the three-member commission with a complete investigation report to include a discussion of the applicable local law and a recommendation for disposition.

**§ 536.160 Advance payments.**

(a) Advance payments pursuant to 10 U.S.C. 2736, as amended, in partial payment of meritorious claims to alleviate hardship are authorized under the conditions and procedures provided in subpart B, advance payments. However, no advance payment is authorized if the incident occurs in a foreign country which, pursuant to the NATO-SOFA or other similar treaty or agreement, is responsible for the settlement of claims arising therein. An advance payment may be made in a nonscope claim.

(b) The SJA of a command having a command claims service, or chief of a command claims service, is authorized to approve an advance payment under this section.

## Subpart K—Personnel Claims and Related Recovery Actions

### General

**§ 536.161 Authority.**

31 U.S.C. 3721, formerly 31 U.S.C. 240–243, as amended by PL 97–226, 28 July 1982 (the Act); DODD 5515.10, 17 June 1965, with C 1, 6 July 1965 destruction of personal property of military personnel or civilian employees incident to their service, and recovery from carriers, warehouse firms, and other third parties responsible for such loss, damage, or destruction.

**§ 536.162 Delegation of authority.**

(a) Settlement authority. (1) The statutory limit of $40,000 in settlement of claims and to disapprove claims regardless of the amount claimed:

(i) TJAG.

(ii) TAJAG.

(iii) The Commander, USARCS, or the Chief, Personnel Claims and Recovery Division.

(2) The following area delegated authority to pay up to $25,000 in settlement of claims and to disapprove claims regardless of the amount claimed:

(i) The SJA and, subject to limitations imposed by him or her, the chief of the command claims service of the following commands:

(A) USAREUR.

(B) Eighth U.S. Army, Korea.

(C) USARSO.

(ii) Heads of area claims offices designated under section 536.5(b)(1) and (2), (subject to the provisions of section 536.5(f).

(b) Approval authority. Heads of claims processing offices with approval authority are delegated authority to pay up to $10,000 in settlement of claims.

(c) Office code. Authority delegated by this paragraph will not be exercised unless the claims settlement or approval authority has been assigned an office code.

(d) Engineer area claims offices are not delegated approval or settlement authority under this subpart and will forward any such claims to the area claims office for the geographic area in which the engineer office is located.

(e) If a claims adjudicated amount is in excess of the monetary jurisdiction of the claims office, the JA/claims attorney will approve and pay the claim up to the delegated authority of that office. Mark the outside of the file "PRIORITY" and forward it with all documentation (to include computer disk, paper screen and memorandum of opinion) to the next higher claims authority for additional payment.

**§ 536.163 Scope.**

(a) This subpart prescribes the substantive bases and special procedural rules for the administrative settlement of claims against the United States submitted by the Active Army, ARNG, and USAR personnel, and civilian employees of DOD and DA for damage to or loss of personal property incident to their service. This subpart also sets forth procedures for the administrative recovery from responsible third parties for loss, damage, or destruction of such personal property. The underlying Act is a gratuitous payment statute; claims thereunder do not sound in tort even though some tort concepts are used in the adjudication of claims under this subpart. Further, the Act is not designed to make the United States a total insurer of the personal property of proper claimants.

(b) The maximum amount that may be paid for any loss or damage arising from a single incident is limited by the Act as amended by Public Law 100–565, 31 October 1988, to $40,000. The maximum limit of $40,000 is specifically limited to losses of personal property occurring after 31 October 1988, and to losses resulting from evacuations or from hostile acts directed against the United States or its officers and employees. A maximum limit of $25,000 is applicable to losses of personnel property occurring after 28 July 1982 and before 1 November 1988.

(c) Any claim within the scope of this subpart, which otherwise would be cognizable under the MCA and subpart C; the FTCA and subpart E; the Act of 9 October 1962 (10 U.S.C. 2737) and subpart E; the NGCA and subpart F; the Maritime Claims Settlement Act and subpart H; or the FCA and subpart J will first be considered under this subpart.

(1) If not payable under this subpart, the claim will be considered under the other chapters prior to any disapproval. Particular attention should be given to the nature of the claim; many alleged "unusual occurrences" are actually torts, either by employees or by individuals in their private capacities. While some incidents may not seem common to those experiencing them, an "unusual occurrence" is defined as an occurrence beyond the normal risk associated with day-to-day living and working. An unusual occurrence does not involve a reasonably foreseeable consequence of normal human activity. For example, having a vehicle hit by a golf ball while driving by a golf course or struck by an unknown vehicle in a parking lot is a reasonably foreseeable consequence of driving a vehicle.

(2) If a claim cognizable under this subpart arises from an incident resulting in personal injury, no payment or emergency partial payment will be made under this chapter until an investigation completed in accordance with §§ 536.19 and 536.20 has been conducted. The Commander, USARCS, Chief, Personnel Claims and Recovery Division, or the chief of a command claims service may waive this requirement. Prior to payment the investigation must establish that the incident was not caused by the negligence of the claimant or an agent of the claimant. An example of such an incident would be a fire in quarters that results in an injury to a soldier's family member and was presumably caused by faulty wiring, but might have been caused by the claimant's negligence.

(3) Any claim within the scope of this subpart which is also cognizable under Article 139 will first be considered under subpart I. If settlement of the Article 139 claim will be unduly protracted, the claim may be settled under this chapter and the claimant counseled to repay any overpayment if payment is later received under the provisions of subpart I.

(d) Any claim cognizable under this subpart that is primarily the result of fault or negligence of a Government contractor other than a common carrier or warehouse firm will first be referred to the contractor or his or her insurer for settlement in accordance with DA Pam 27–162, paragraph 2–6.

**§ 536.163 Claimants.**

(a) A claim may be presented under this subpart only by—

(1) A member of the Active Army.

(2) A member of the USAR or the ARNG who is engaged in inactive duty for training or in active duty training.

(3) A civilian employee of DA; a civilian employee of the ARNG funded under 32 U.S.C. 709; a civilian employee of the DOD who is not an employee of the Department of the Navy or the Department of the Air Force; or a continental wage scale, local wage scale, and other foreign national local civilian employees. (See DODD 5515.10.) However, the claims of a DOD dependent school teachers and Defense Commissary Agency civilian employees will be settled by the Service operating the installation where that school teacher/Commissary Agency employee is employed.

(4) The authorized agent or legal representative of paragraphs (a) (1) through (3) of this section. However, any claim presented by a claims preparation service or other hired agent must be signed and ratified by the proper claimant to preclude assignment of claims, regardless of whether the claimant has executed a power of attorney.

(5) The survivors of paragraphs (a) (1) through (3) of this section in the following order of precedence:

(i) Spouse.

(ii) Child or children.

(iii) Father or mother, or both.

(iv) Brothers or sisters, or both.

(b) A member of another U.S. Armed Force may present a claim to an Army claims office for loss of or damage to personal property incident to his or her service. Any such claim will be investigated and processed short of adjudication under the provisions of this chapter. The completed file will contain all required supporting documents, including evidence in support of the amount claimed and documents facilitating recovery from a carrier, insurer, or other third party. Such claims will be forwarded direct to the nearest legal office of the service concerned for settlement. However, Marine personnel claims should be forwarded directly to the Commandant of the Marine Corps (MHP–40), Headquarters, United States Marine Corps, Washington, DC 20380–0001.

(c) Claims of civilian employees of nonappropriated fund activities for damage to or loss of personal property incident to their service will be processed in accordance with this chapter and subpart L, with payment made only from nonappropriated funds.

(d) Subrogees, assignees, conditional vendors, and similar third parties are not proper claimants under this chapter, and their claims are barred from payment. Further, claims for losses of subrogees and similar third parties are barred from consideration or payment under other chapters when the property owner could have presented a cognizable claim for loss under the provisions of this chapter.

(e) Personnel who do not fall within one of the categories listed in a above (such as Red Cross employees, foreign military personnel, United Services Organization personnel, or employees of Government contractors, including technical representatives) are not proper claimants under this chapter, and their claims are barred.

(f) Claimants who are absent without leave (AWOL) will have any pending claim denied once they are dropped from the rolls (DFR). The denial letter will be mailed to the claimant's last known civilian address.

**§ 536.165 Claims cognizable.**

The following are nonexclusive examples of categories of damage to or loss of property that may be considered by claims approval and settlement authorities as having been sustained incident to service. Note that a loss unconnected with the performance of duty, particularly a loss occurring outside of normal duty hours, would often not be deemed incident to a civilian employee's service, even though the same loss might be deemed incident to a soldier's service. This is particularly true if the civilian employee is a local foreign national employee. A claims approval or settlement authority will ask the Chief, Personnel Claims and Recovery Division, USARCS for an advance opinion prior to adjudicating a claim that is deemed incident to service but does not fall within one of the following categories:

(a) Losses in quarters or other authorized places. Damage to or loss of property by fire, flood, hurricane, or other unusual occurrence, or by theft or

vandalism may be considered, while located at—

(1) Quarters, wherever situated, which are assigned to the claimant or otherwise provided in kind by the Government.

(2) Quarters outside the United States, which are occupied authority but are neither assigned to the claimant nor otherwise provided in kind by the Government. However, a claim is not cognizable when the claimant is—

(i) A civilian employee who is a local inhabitant.

(ii) A U.S. citizen hired as a civilian employee while residing abroad or after moving to a foreign country as part of the household of a person who is not a proper party claimant.

(iii) A family member residing outside the United States while the soldier is stationed in a different country.

(iv) A local inhabitant of a U.S. territory who is in that territory at the time of a loss when he or she is in the ARNG either Full Time-National Guard Duty (AGR) or on active duty under title 10, or in the USAR on active duty for any reason.

(3) Any place of lodging wherever situated, such as a hotel, motel, guest house, transit billet or other place, when occupied by claimant while in the performance of temporary duty or similar authorized military assignment of a temporary nature.

(4) Any warehouse, office, hospital, baggage holding area, or other place authorized or apparently authorized by the government for the reception or storage of personal property.

(b) Transportation losses. Damage to or loss of property incident to transportation or storage pursuant to orders or in connection with travel under orders or in performance of military duty may be considered, if not the result of a mechanical or structural defect. This includes property in the custody of—

(1) A common or contract carrier or any other commercial concern, either pursuant to a Government Bill of Lading (GBL), Government contract, or the commuted rate method (Joint Travel Regulation (JTR) Vol II, paragraph C8001(4)). With respect to mobile homes, it is the owner's responsibility to place the mobile home and its tires, tubes, frame, and other parts in fit condition and to load the mobile home to withstand the stress of normal transportation, at his or her own expense, prior to shipment.

(2) An agent or agency of the Government, to include property mailed at Government expense in the custody of the U.S. Postal Service.

(3) The claimant or appropriate personnel while the claimant is traveling in a private or public vessel, vehicle, aircraft, or other conveyance in performance of military duty.

(4) The claimant or appropriate personnel while the claimant is traveling aboard a military vessel, aircraft, or vehicle in performance of military duty or pursuant to orders authorizing travel, including travel pursuant to leave orders on a space available basis.

(c) Losses due to enemy action, evacuation, hostile acts, or public service. Damage to or loss of property may be considered which is a direct result of—

(1) Enemy action, or threat thereof; combat, guerrilla, or other belligerent activities, whether or not the United States was involved; or unjust confiscation by a foreign power or its nationals of property belonging to soldiers or U.S. national civilian employees.

(2) Acts of mob violence, terrorist attacks, or other hostile acts directed against the United States or its officers and employees.

(3) Action by the claimant in an attempt to quiet a civil disturbance or alleviate a public disaster.

(4) Efforts by the claimant to save a human life or Government property.

(5) Evacuation from a foreign country on the recommendation or order of competent authority. This subsection provides payment for property belonging to soldiers and civilian employees and their command-sponsored dependents, with entitlement to shipment at Government expense, which is abandoned during an evacuation and not recovered, or damaged by an incident of political unrest or hostile act prompting or following such evacuation.

(d) Loss of money delivered to a Government agent. Loss of funds neither applied as directed by the owner nor returned may be considered when the funds were delivered to and accepted by Government personnel authorized or apparently authorized to receive them for such purposes as safekeeping; deposit in savings deposit program; transmission by personal transfer account; purchase of U.S. bonds or postal money orders; or conversion into military payment orders, Government checks, or into another kind of currency.

(e) Vehicle losses. Vehicles are defined to include automobiles, motorcycles, mopeds, utility trailers, camping trailers, trucks with mounted camper bodies, motor homes, boats, boat trailers, bicycles, and aircraft. Mobile homes and other property used as dwelling places are not considered vehicles. Damage to or loss of vehicles and property properly stored or contained therein may be considered when—

(1) Used in the performance of military duty, if such use was authorized or directed for the convenience of the Government and provided—

(i) The travel did not include commuting to or from the permanent place of duty and,

(ii) The loss or damage did not arise as a result of a mechanical or structural failure of the vehicle during such usage.

(2) Shipped to, from, or between an overseas area or areas at Government expense in accordance with paragraph (b) of this section, provided the loss or damage did not arise as a result of mechanical or structural failure of the vehicle during such shipment.

(3) Located at quarters or place of lodging as defined in paragraphs (a)(1), (2), and (3) of this section, which for the purposes of this paragraph includes garages, carports, driveways, assigned parking spaces, and lots specifically provided and used for the purpose of parking at one's quarters, provided that the loss or damage is caused by fire, flood, hurricane, or other unusual occurrence, or by theft or vandalism. There is a presumption that vehicle theft or vandalism occurs off the military installation and is generally not compensable. Claims for theft or vandalism to vehicles (including property stored inside a vehicle) are only payable when a claimant proves that the theft or vandalism occurred while the vehicle was located at his or her authorized or assigned quarters (for example, a military police report indicates broken glass from the window is on the driveway).

(4) Located other than at quarters on a military installation, provided that the loss or damage is caused by fire, flood, hurricane, or other unusual occurrence. The term "military installation" is used broadly to describe any fixed land area, wherever situated, controlled, and used by military activities or the DOD. A vehicle that is properly on the installation should be presumed to be incident to the claimant's service unless the application of such a presumption would be unreasonable under the particular circumstances, such as visiting a fellow soldier on another military installation while on leave.

(f) Clothing and articles being worn. Damage to or loss of clothing and articles being worn while on a military installation or in the performance of military duty may be considered, provided such loss was caused by fire,

flood, hurricane, or other unusual occurrence, or by theft. Spilling battery acid, paint or similar substances on clothing, or breaking eyeglasses during physical training is not an unusual occurrence.

(g) Personal property held as evidence. Deprivation of property held as evidence may be considered when, after taking all circumstances into consideration, the temporary loss of the property will work a grave hardship on the claimant who is a victim of a crime.

(h) On-post robberies. Claims for losses due to theft from the person on a military installation by the use of force, violence, or threat to do bodily harm may be considered. If cognizable under Article 139, the claims should be considered under subpart I.

**§ 536.166 Claims not cognizable.**

The following are examples of types and categories of property losses for which compensation will not be allowed:

(a) Property lost or damaged as a result of claimant's negligence. Property damaged or lost, in whole or in part, as a result of any negligence or wrongful act of the claimant, the claimant's spouse or family member, or any agent or employee of the claimant acting in the scope of employment, is not compensable. Negligence may be defined as failure to exercise the degree of care that a reasonable and prudent person would have exercised under the same circumstances.

(b) Property damaged or lost while located at quarters within the United States that were occupied by the claimant but were neither assigned nor otherwise provided in kind by the Government.

(c) Intangible property. Loss of property that has no extrinsic and marketable value but is merely representative or evidence of value, such as non-negotiable stock certificates, promissory notes, bonds, bills of lading, warehouse receipts, insurance policies, baggage checks, and bank books, is not compensable. Similarly, a claimant may not be compensated for the inability to use non-refundable tickets or recover lease or utility deposits. Loss of a thesis, or other similar item, is compensable only to the extent of the out-of-pocket expenses incurred by the claimant in preparing the item such as the cost of the paper or other materials. No compensation is authorized for the time spent by the claimant in its preparation or for supposed literary value.

(d) Incidental expenses and consequential damages. The Act and this chapter authorize payment for loss of or damage to personal property only. Except as provided in § 536.165, consequential damages or other types of loss or incidental expenses (such as loss of use, interest, carrying charges, cost of lodging or food while awaiting arrival of shipment, attorney fees, telephone calls, cost of transporting claimant or family members, inconvenience, time spent in preparation of claim, or cost of insurance premiums) are not compensable.

(e) Real property. Damage to real property is not compensable. In determining whether an item is considered to be an item of personal property, as opposed to real property, normally, any movable item is considered personal property even if physically joined to the land.

(f) Articles acquired or held for sale or disposition by other commercial transactions on more than an occasional basis, or for use in a private profession or business enterprise.

(g) Enemy property or war trophies.

(h) Property acquired, possessed, or transported unlawfully or in violation of local law or competent regulations or directives. This includes loss or damage to vehicles not properly registered or insured in compliance with local law or competent regulations or directives.

(i) Loss of money in any amount during shipment or storage with baggage or household goods. This includes coin collections.

(j) Property stored at a commercial facility for the convenience of the claimant and at his or her expense.

(k) Substantial fraud. The head of an area claims office may completely deny a claim that he determines to be substantially tainted by fraud.

(l) Not a proper claimant. See §§ 536.164 and 536.165(a)(2).

**§ 536.167 Time prescribed for filing.**

(a) No claim may be paid under this subpart unless it is presented in writing within 2 years after it accrues. A claim is presented when it is received at a U.S. military establishment, not when it enters the mails. For purposes of this chapter, a claim accrues at the time of the incident causing the loss or damage, or at such time as the loss or damage is or should have been discovered by the claimant through the exercise of due diligence. In the case of multiple deliveries on the same Government Bill of Lading, the claim accrues for those later received items when they are delivered. The claim filed for the initial damage will be amended to reflect the subsequently claimed items. If personal property remains in storage after the expiration date of legal entitlement to storage at Governmental expense, a claim normally accrues on such expiration date.

(b) If a claim accrues in time of war or armed conflict in which the Armed Forces of the United States are engaged, or if such a war or armed conflict intervenes within 2 years after the claim accrues, and if good cause is shown, then the claim may be presented not later than 2 years after the war or armed conflict is terminated. A claims office may telephonically obtain the authority to grant additional time to file a claim, from the Chief, Personnel Claims and Recovery Division. If good cause for delay in filing is not established, the intervention of war or armed conflict, in itself, will not permit payment of a claim presented later than 2 years after accrual. Pursuant to the provisions of Public Law 96–446 (94 Stat 1967), periods of captivity are excluded in computing the 2-year statute of limitations.

(c) If a proper party claimant is notified that his or her personal property in non-temporary storage has sustained partial damage, the statute of limitations does not begin to run until the claimant has an opportunity to ascertain the extent of the loss, or the claimant's entitlement to Government shipment or storage expires, whichever occurs sooner. However, the claimant is expected to exercise due diligence in attempting to ascertain the extent of the loss. Moreover, when a proper party claimant is notified that his or her personal property in non-temporary storage at government expense has sustained complete destruction or loss, the statute of limitations begins to run when this notification is received.

**§ 536.168 Form of claim.**

Claims personnel will date-stamp, log in and consider as a personnel claim any writing received at a U.S. military establishment if it constitutes a demand for compensation for loss of or damage to personal property. Claims personnel will not return such writing to the claimant without action as "lacking documentation" and may only consider it abandoned in accordance with § 536.234(a). For claims cognizable under this chapter, a demand need not be for a specified sum of money. However, the claimant must complete and submit DD Form 1842 and DD Form 1844 (List of Property and Claim Analysis Chart) as a condition precedent to payment of the claim. Claimants will be required to complete only one DD Form 1842 and DD Form 1844 and to provide only one copy of supporting documentation. A demand on carrier, warehouse firm, insurer, or other third party is not considered a claim against

the United States. Submission of DD Form 1840R (Notice of Loss or Damage) to the claims office does not constitute presentment of a claim. If, however, a claimant alleges that he or she filed a claim, and the evidence shows that within the 2-year period the claimant visited a claims office of one of the Armed Forces with an apparent desire to obtain compensation, it may be presumed in absence of evidence to the contrary, that the claimant, in fact, submitted a claim.

**§ 536.169 Presentation.**

(a) A claim should, if practicable, be submitted in writing to the claims office serving the Active Army installation where the claimant is stationed, or nearest to the point where the loss or damage occurred, or where investigation of the facts and circumstances can most conveniently be made. ARNG and USAR personnel will not file claims with their unit but with the nearest Active Army installation. If submission in accordance with the foregoing is impracticable under the circumstances, the claim may be submitted in writing to the commander of any installation or establishment of the Armed Forces who will forward the claim to the appropriate Army claims office for processing. To constitute a filing under this regulation, a claim must be presented in writing to an agency of one of the military departments other than the National Guard or a Reserve Component.

(b) The claimant is responsible for substantiating ownership or possession, the fact of loss or damage, and the value of property, especially for expensive items. The claimant is also responsible for promptly discovering and reporting loss whenever failure to do so would prejudice either effective investigation of the claim or effective recovery action from a third party. Failure to do so may result in reduction of the amount allowable or denial of the claim in accordance with § 536.181(a).

**Evaluation, Adjudication, and Settlement of Claims**

**§ 536.170 Policy.**

(a) The prompt, fair disposition of claims of soldiers and civilians, consistent with the protection of the interests of the Government, is necessary to maintain morale and to prevent financial hardship. Claims approval and settlement authorities should exercise reasonable discretion in the consideration of claims to achieve this goal.

(b) The small claims procedures (subpart B of this part, small claims) applicable to claims that may be settled by payment of $1,000 or less without extensive investigation should be used to the maximum extent feasible. When this procedure is used, every reasonable effort should be made to settle the claim within the shortest possible period, usually one working day. However, the small claims procedure should not be used when additional investigation is necessary to develop the facts required for an informed disposition of the claim regardless of the amount claimed.

(c) Within the DA, personnel claims will not be transferred except as authorized by the USARCS or a command claims service. (See DA Pam 27–162, paragraph 2–55.)

(d) When it is necessary to disapprove a claim or to allow a sum less than the amount claimed, the claimant must be informed either orally or in writing of the factual or legal basis for the decision. The file must reflect that this explanation was provided to the claimant.

(e) When a claimant refuses to provide information concerning private insurance coverage, the JA may assume, in the absence of evidence to the contrary, that the claimant had private insurance covering the entire loss and disapprove the claim.

**§ 536.171 Preliminary findings required.**

Prior to allowing or recommending the allowance of compensation for the loss, damage, or destruction of property, the approval or settlement authority will make the following findings:

(a) The claimant is a proper party claimant.

(b) The evidence substantiates the fact of ownership or possession of the personal property involved and the fact of loss, damage, or destruction as alleged.

(c) The loss, damage, or destruction of the property involved was sustained incident to the claimant's military service or employment.

(d) The type of property claimed and the amount or quantity claimed was reasonable or useful under the attendant circumstances for the claimant to have used or possessed incident to military service or employment.

(e) There is no bar to the allowance of compensation for the type of property involved, or for the type of loss, damage, or destruction providing the basis of the claim.

(f) The claimant certified that no part of the loss is covered by insurance. If private insurance covers any part of the loss, the claimant must first settle with the insurance company. See § 536.181(b)(5). (Coverage under most personal property insurance carried by service personnel includes items lost or missing, destroyed, or damaged by water while in custody of a public carrier.)

**§ 536.172 Guides for computing amounts allowable.**

(a) For claims of losses incident to service processed under this subpart or subpart L, the Commander, USARCS, will periodically publish an Allowance List—Depreciation Guide specifying rates of depreciation and maximum payments applicable to categories of property. The Allowance List—Depreciation Guide will be binding on all Army claims personnel. (See § 536.9(f).) For claims for losses incident to service processed under this subpart or subpart L, no payment will be made on an item or category of items in excess of the maximum payment in effect at the time the claim arose, except as provided in § 536.174(b).

(b) The Commander, USARCS will promulgate additional guides, references, and tables to assist in computing allowable compensation under this chapter. (See DA Pam 27–162, chapter 2.)

**§ 536.173 Ownership or custody of property.**

Compensation may be allowed even though the property was not in the actual possession of the claimant at the time of the damage or loss. Compensation may also be allowed even though the property was not owned by the claimant, provided it was lawfully under his or her dominion and control. However, compensation will not be allowed for damage or loss to personal property transported to accommodate another, other than the claimant's family members, nor will compensation for damage or loss to a vehicle loaned to a claimant be allowed unless both the claimant and the owner are proper party claimants. A vehicle registered in the name of the claimant or a spouse is not deemed, as between them, to be loaned. When a vehicle is subject to a lien, the vehicle is not deemed to be loaned merely because the title is in the name of the lien-holder.

**§ 536.174 Determination of compensation.**

(a) A claim may be allowed only for the amount and quantity of personal property considered reasonable or useful for the claimant to have used or possessed under the attendant circumstances, incident to his or her service or employment. In determining the reasonableness or utility of types and quantities of property included in a claim cognizable under this chapter, an approval or settlement authority will give consideration to the claimant's

living conditions, family size, social obligations, and need to have more than average quantities, as well as the circumstances attending acquisition or possession of the property and the manner of damage or loss.

(b) The maximum amounts allowable for specific types and categories of personal property listed in The Allowance List—Depreciation Guide constitute a determination of amount of quantity deemed reasonable or useful. A maximum allowance per item indicates that the allowance for a single item of the type or category of property involved will not exceed that amount. A maximum allowance per claim indicates that the total allowance for all items of the listed type or category is limited to that amount. Where both a maximum amount per item and per claim are applicable, the total allowance for all items will be limited to the maximum per claim, which will reflect the allowance of not more than the maximum per item for any individual item. To avoid application of these maximum allowances, a soldier or civilian employee may obtain additional protection on shipments by requesting full replacement protection or increased value protection. The Chief, Personnel Claims and Recovery Division, USARCS may waive the maximum in a particular case for good cause shown.

(c) Compensation allowable for an item of personal property will not exceed the actual value of the item at the time of its loss, damage, or destruction. Guidance on determining the base figure for actual value, using replacement costs, estimates, or the Table of Adjusted Dollar Value, is provided in DA Pam 27–162, chapter 2. Because soldiers are permitted to replace items missing or destroyed during PCS moves from the Overseas Post Exchange Catalog, even when ordering from this catalog is not otherwise permitted, such items may be valued using this catalog.

(d) In adjusting a base figure to determine actual value, standard yearly rates of depreciation have been established for the types and categories of items that have generally recognized periods of useful life; standard flat rates of depreciation have been established for certain kinds of items that decrease in value primarily as the result of the fact they are no longer new and unused, but which do not continue to depreciate on a yearly basis since they are not subject to fixed periods of useful life. (See Allowance List—Depreciation Guide.) However, if personal inspection of damaged property indicates that it was in better than average condition prior to damage, a lesser rate of depreciation should be applied. Similarly, if the evidence indicates that an item was in poor condition at time of damage, a higher rate of depreciation is appropriate. Variations from the established rates of depreciation will be fully explained. The following rules are to be observed in computing the depreciation applicable to any item:

(1) Normally no depreciation is to be charged against goods during periods of storage. However, this does not mean that deductions cannot be taken for other reasons, such as a reduction in the market value of an item because of changes in style or obsolescence.

(2) Do not depreciate an item which is less than six months old (including an item subject to flat rate depreciation) except clothing and other rapidly depreciating articles which may be subject to considerable use in such a short period of time. Calculate yearly depreciation from the date an item is originally acquired to either the date of pickup (for shipment or storage claims), or to the date the property was lost or damaged (for other personnel claims). If the claimant acquired a used item, then the claimant should use either the date the original owner acquired the item and the original purchase price, or the claimant's purchase price and date he or she purchased the item. In accordance with the Allowance List—Depreciation Guide, compute yearly depreciation in 12 month increments (e.g., 6–17 months equals one year), excluding the month the property was acquired and the month that the property was picked up, lost or damaged.

(3) No item will be depreciated by more than 75 percent.

(4) No depreciation is charged against genuine antiques, objects of art, and collector's items, except for repair of portions thereof, such as upholstery, which requires periodic replacement or repair. For the purpose of this rule, a "souvenir" is not considered a collector's item.

(e) Compensation normally allowed for an item damaged beyond economic repair is the actual value at the time of destruction. However, if an item has not been totally destroyed and any part remains useful and has a salvage value, and that part is to be retained by the claimant, the allowance will be the value at time of destruction less the ascertained value of the salvageable part. If the claimant does not wish to retain any salvageable part of a destroyed item, he or she may be allowed the full value at the time of the destruction with no deduction for salvage value, provided the claimant turns in the salvageable part to the Defense Reutilization and Marketing Office prior to payment of the claim or holds the item for turn-in to the carrier (see DA Pam 27–162, paragraph 2–44). If the item is turned in to the Defense Reutilization and Marketing Office, a receipt for the property, DD Form 1348–1 (DOD Single Line Item Release/Receipt Document), will be included in the file of the paid claim. If the staff or command JA determines that salvageable items are valued at $25.00 or less, he or she may advise the claimant to dispose of them other than by turn-in and this decision will be noted on the chronology sheet. In certain situations it may be necessary for the claims office to assist the claimant to arrange for disposition of the property.

(f) If, after payment of a claim, an approving or settlement authority discovers that the payment was erroneous because the claimant misrepresented the quality, quantity, age, condition, or replacement or repair cost of items, or other facts necessary to the adjudication of the claim, the approval or settlement authority may recalculate the amount allowed and arrange for recoupment of the erroneous amount paid. However, this procedure should be used sparingly, with doubts resolved in favor of the claimant. The procedure is independent of any other action taken against the claimant.

(g) In determining allowable amounts, cents will be rounded off to the nearest whole dollar on each line item. Drop amounts under 50 cents and increase amounts from 50 to 99 cents to the next dollar. Thus, $1.49 becomes $1.00 and $2.50 becomes $3.00.

**§ 536.175 Cognizable incidental expenses.**

(a) *Expenses incident to repair or replacement.* In addition to actual value, the cost of obtaining estimates of repair necessary to substantiate amounts claimed for damaged property may be considered, provided the action of the claimant in contracting for the estimates appears reasonable under the circumstances or was specifically directed by the approval or settlement authority. However, when the cost of an estimate can be applied toward the bill due upon completion of repairs, the cost of the estimate will not be allowed, whether or not the claimant chooses to have the repair done.

(b) *Replacement of certain documents.* The fee charged for replacing certain necessary documents such as marriage licenses, driver's licenses, passports, or birth certificates may be allowed when these documents are lost or destroyed.

(c) *Sales tax and drayage.* Sales tax and drayage (including postage or

handling charges to mail an item or replacement part) can be allowed up to $50 per claim prior to the actual cost being incurred. However, payment in excess of $50 will require the claimant to substantiate that the cost has been incurred.

**§ 536.176 Property recovered.**

(a) *Before approval.* Do not pay claims for missing property if the missing property is located before the claim is approved. Only the transit related damage will be cognizable. As an exception to this rule, compensation may be allowed for necessary items that were missing for an unreasonable time after the expected arrival date and were replaced by claimant prior to the items being located. Necessary items are those that are basic to the operation of a household. If compensation is allowed under the above exception, the claimant will disclaim in writing further interest and ownership in such items in accordance with paragraph (b)(2) of this section.

(b) *After approval.* If missing property is located after the claim is approved for payment, the claimant will normally be advised of his or her option to—

(1) Accept any or all of the items located and remit the amount already allowed for such items to the United States. In certain circumstances, the claimant will not have an option: The Chief, Personnel Claims and Recovery Division, USARCS or his designee can require the claimant to accept any or all of the items and remit the amount allowed; or

(2) Disclaim in writing further interest and ownership in the property and retain the amount approved for payment. If, however, the approval or settlement authority determines that any of the recovered property is substantially different in quality, price, or value from the property claimed, the approval or settlement authority may require the claimant to return the amount allowed for such property and accept the property.

**§ 536.177 Companion claims.**

When two or more claims arising from the same incident are, by reason of differences in amounts within the jurisdiction of different approval or settlement authorities, action will be withheld on these claims until the authority having jurisdiction over the largest claim has determined that the claims arising out of the incident are cognizable, unless the claims lesser in amount are clearly cognizable and meritorious.

**§ 536.178 Emergency partial payments.**

(a) Frequently a claimant is in immediate need of funds to replace damaged or destroyed property. An emergency partial payment up to $2,000 is authorized under the following circumstances: (1) A hardship situation exists that can be alleviated by providing immediate funds for the repair or replacement of certain property lost or damaged; and

(2) A claim has been presented.

(3) The approval or settlement authority determines that the claim is clearly payable under this chapter, in an amount exceeding the amount of the proposed emergency payment.

(b) The approval or settlement authority can approve an emergency partial payment on any claim that meets the above criteria. If the adjudicated amount exceeds the approval or settlement authority's delegated monetary amount, pay up to the delegated amount (less the emergency payment), mark the outside of the file "PRIORITY" and transfer it with all documentation (to include computer disk, paper screen and memorandum of opinion) to the next higher claims authority for additional payment.

(c) Prior to making any emergency payment, the authority approving such payment normally will obtain an executed partial acceptance agreement from the claimant or his or her representative. Only the Chief, Personnel Claims and Recovery Division, USARCS or his designee can authorize emergency partial payments above $2,000. The authority requesting an emergency partial payment above $2,000 can coordinate telephonically with USARCS.

**§ 536.179 Personnel claims memorandum.**

(a) A personnel claims memorandum of opinion will be included in the file of each personnel claim disapproved; forwarded for adjudication, disapproval, or reconsideration; or forwarded with a recommendation that there be a deviation from the Allowance List or other established policy.

(b) A personnel claims memorandum of opinion will be signed by the Claims JA. It will be routed through any intervening settlement authority, addressed to the settlement authority who will take final action (for example, a disapproval would be addressed to the SJA of an area claims office, and a reconsideration would be addressed to the Commander, USARCS). The memorandum will be sufficiently detailed to explain fully and support the action taken or recommended. (See DA Pam 27–162, paragraph 2–551 for further instructions.) It will be arranged as follows: (1) Claimant's name and address.

(2) Date and place the incident occurred giving rise to the claim.

(3) Amount of claim, the date it was filed, and the date reconsideration was requested.

(4) Subparts the claims were considered under, and a brief description of the incident or of the issues raised by the claimant on reconsideration.

(5) Facts.

(6) Opinion.

(7) Recommended action.

**§ 536.180 Reconsideration.**

A claim will be reconsidered under the conditions listed below. Reconsiderations normally require additional investigation and review. This additional information will be documented in the file. An approval or settlement authority—

(a) May always reconsider his or her action if the original action was in error or is incorrect based on new facts. This may be pursuant to either a claimant's oral request for reconsideration or as a result of any post-settlement review conducted on the claims file. Note that while the original approving or settlement authority may consider a claimant's "oral" request for reconsideration, claims personnel should advise claimants that a higher settlement authority will not act on an oral request until the claimant presents it in writing in accordance with paragraph (b) of this section. The basis for any change will be reflected in the file.

(b) Must reconsider a claim upon the written request of the claimant or someone acting on his or her behalf. The claimant must clearly state the factual or legal basis for relief. However, the reconsideration process must be considered not as an adversarial process, but rather as an opportunity for the approval or settlement authority to continue a dialogue with the claimant. Every effort should be made to develop the claimant's version of the facts. A claim will be reconsidered even if a settlement agreement has been executed.

(1) The original approval or settlement authority will modify the original action if he or she determines that the original action was incorrect or is incorrect based on new evidence. The basis for any change will clearly be reflected in the file.

(2) A successor or higher approval or settlement authority will only modify the original action on the basis of fraud, substantial new evidence, mistake (misinterpretation) of law or regulation,

or an error in calculation. The basis for any change will clearly be reflected in the file.

(3) An approval or settlement authority can take final action on a request for reconsideration if he or she informs the claimant in writing that the claimant—

(i) Is aware of the right to have the file reviewed by USARCS; and

(ii) Will accept the additional payment as full relief on the claim; and

(iii) Knows that if the offer is not satisfactory, the check will still be issued (and can be cashed without prejudicing his or her right to reconsideration); and

(iv) The file will be forwarded to USARCS for final review.

(4) If the approval or settlement authority does not grant additional relief, or the claimant does not wish to accept an additional payment as full relief, or the claimant does not respond by the suspense date, the JA/claims attorney will issue any offered payment and will forward the claim through any intervening area claims office or command claims service to USARCS for final action. As an exception, the Commander U.S. Army Claims Service, Europe (USACSEUR), can take final action on any reconsideration request forwarded there by a subordinate office so long as it does not involve approving a waiver of a maximum allowance. The Commander, USACSEUR, will include a complete copy of the final action and will forward the file to the Commander, USARCS.

(c) The approval or settlement authority should consider 60 days from the settlement date a reasonable time to either submit a written request for reconsideration or provide an intent to file a reconsideration request. The claimant will receive written notification of this time limit. Any reconsideration where denial is recommended because it was not timely filed will be forwarded according to paragraph (b)(4) of this section. The Chief, Personnel Claims and Recovery Division may grant relief on untimely requests for reconsideration on the basis of substantial new evidence, fraud, mistake of law, or mathematical miscalculation. In appropriate situations, he may deny relief if the filing delay precluded acquiring additional facts.

**§ 536.181 Judge advocate procedures responsibilities.**

(a) *Reductions for inaction.* (1) The JA will ensure that, when a demand on a carrier or other third party (other than a private insurer (see paragraph (a)(2) of this section) is required (see recovery from third party) and the claimant's failure, absent good cause, to provide notice or perform other required actions materially prejudices effective recovery action with respect to all or part of the loss, the amount otherwise allowable under this chapter will be reduced by the amount of the anticipated recovery so affected on an item-by-item basis.

(2) When a claimant fails to provide timely notice to perfect a claim against his or her private insurer, the amount allowed, absent good cause, the claim will be denied. In determining whether a claimant has good cause for failing to provide timely notice to a private insurer, the JA will, in addition to the considerations in paragraph (a)(3) of this section, determine whether the claimant (or agent) had knowledge of the requirement and willfully neglected to provide notice. See § 536.170(f) for cases where a claimant refuses to provide information concerning private insurance.

(3) Good cause is determined as follows:

(i) When a claimant fails to provide timely notice to a carrier, warehouse firm, or private insurer, settlement and approval authorities may waive reduction action for good cause only when one of the following circumstances directly contributed to the claimant's failure to give timely notice:

(A) Officially recognized absence (for example TDY and off post training exercises) resulting in claimant's absence from official duty station for a significant portion of the notice period;

(B) Hospitalization of claimant for a significant portion of the notice period; or

(C) Substantiated misinformation concerning notice requirements given to the claimant by government personnel.

(ii) Requests for good cause waivers under circumstances other than those in paragraph (a) of this section may be granted only by the Commander, USARCS, or designee.

(4) Prior to taking reduction action, the JA will ensure the claimant is provided an opportunity to explain the circumstances of his or her failure to take appropriate action, and that the claim file is documented to show the claimant was afforded this opportunity and the result provided. The chronology sheet in the file will contain an explanation of the JA's decision regarding reduction or the lack thereof.

(b) *Information and assistance to claimants.* Claims personnel will—

(1) Furnish the necessary claims forms (DD Form 1842 and DD Form 1844) to any individual who indicates, in person or by letter, that he or she desires to be compensated for loss or damage to personal property incident to service.

(2) Furnish instructions and advice as to the evidence required to substantiate the claim, assist in the completion of claim forms, and help with the procurement of evidence in support of the loss and the amount claimed.

(3) Assure that the description of the items and the damage shown on DD Form 1844 are sufficiently detailed to permit verification of the purchase price and replacement price or repair cost of the item claimed.

(4) Inform a claimant of the time limits within which a claim must be filed in order to be considered.

(5) Inform all claimants that they must file and settle with their private insurance companies before the JA/claims attorney will approve a claim for payment under this chapter. Claimants who state they have no insurance will be asked to certify that fact and the written statement will be included in the claim file. The claimant will be required to submit proof of final action by the insurer. Claims personnel will examine each claim after an insurance settlement and determine if prior settlement by the insurer (including excess valuation coverage) is more advantageous to the claimant. A claims JA/attorney may decide to approve a claim for payment under this subpart without a claimant first settling with his or her insurance in exceptional cases where an insurance company improperly refuses to pay a claim or the JA determines the claimant has good cause (see § 536.181(a) (2) and (3).

(6) Advise a claimant to notify the JA of any offer of settlement or denial of liability by any third party, and to secure the JA's written consent before executing a release or acceptance of any such offer.

(7) Take an active and continuing role in publicizing claims information to soldiers and their families.

(c) *Other actions.* The JA will ensure that—

(1) DD Form 1840R is dispatched to the appropriate third party within 75 days of delivery of goods, that a copy of the DD Form 1840 and 1840R is dispatched to the destination transportation office, in appropriate cases, and that a signed and dated copy is maintained and incorporated into any claim filed. (See DA Pam 27–162, paragraph 2–55.)

(2) The servicing transportation office is directed to inspect damaged property in appropriate cases. (See DA Pam 27–162, paragraph 2–41.)

(3) The DD Form 1844 is completed (amount allowed column, remarks

column, and where appropriate, either or both columns for exceptions) prior to settling the claim.

(4) All documents written in a foreign language are translated into English, either verbatim or in summarized form.

(5) Unearned freight charges are deducted for property which carriers lose or irreparably damage. (See DA Pam 27–162, paragraph 3–27.)

(6) A claims office representative will periodically attend local transportation office outbound briefings to ensure that appropriate information is being disseminated to soldiers.

(7) Inspections by claims office personnel are conducted in appropriate cases (large claim, reconsideration, fraudulent claim) and incorporated into the file.

(d) *Financial.* The JA will properly manage claims funds. This includes—

(1) On a monthly basis, reconcile recovery accounts with the servicing finance and accounting office (FAO) to ensure moneys are being properly deposited into the correct account;

(2) On a monthly basis, reconcile expenditure accounts with the servicing FAO to ensure that FAO expenditures match claims office expenditures; and

(3) Ensuring expenditures are from current fiscal year accounts.

**§ 536.182 Finality of settlement.**

Except as provided in § 536.180(b), the settlement of a claim is final and conclusive for all purposes (31 U.S.C. 3721(k)).

**Recovery From Third Party**

**§ 536.183 Scope.**

(a) The Army Carrier Recovery Program involves the supervising and pursuing of administrative settlements of all claims in favor of the Government against third parties arising from claims settled under the preceding sections of this chapter. The Program includes making and issuing policies, procedures, and instructions pertaining to recovery action.

(b) The term third parties as used in this section, refers to all types of contractors, carriers, and insurers of personal property.

**§ 536.184 Duties and responsibilities.**

(a) Field claims approval and settlement authorities are responsible for local implementation of the Army Carrier Recovery Program and will ensure that—

(1) Proper notice is provided to third parties (see DA Pam 27162, paragraph 2–55).

(2) Claims are processed so that relevant time limitations on pursuing recovery demands are met, particularly the 6-year statute of limitations set forth in 28 U.S.C. 2415(a). In overseas areas, statute of limitations relevant to locally procured tenders and contracts will be observed.

(3) Servicing transportation offices provide supporting documentation and perform necessary inspections in a timely manner.

(4) Claims files include complete, legible documentation needed to support recovery action, including a copy of the itemized breakdown prepared by the claimant's insurer when appropriate.

(5) Third party liability is correctly calculated in accordance with DA Pam 27–162, chapter 3, and is reflected on all copies of the DD Form 1844.

(6) Written demands for reimbursement are prepared against appropriate third parties, and demands are dispatched locally or forwarded for centralized recovery within 30 days of settlement (see § 536.196). If this 30-day standard is not met or no demand is prepared because liability will not be pursued, claims personnel will explain the basis for this on the claims chronology sheet. Note, however, that files will not be forwarded for centralized recovery prior to the 21st day after settlement in order to afford the claimant an opportunity to request reconsideration.

(7) Unearned freight letters are prepared when required by DA Pam 27–162, paragraph 3–27, and are either included in files forwarded for centralized recovery or are dispatched locally after settlement with the carrier.

(8) Settlement offers from third parties are accepted or rejected within 30 days of receipt.

(9) Checks received are kept in a locked container in accordance with AR 37–103, and are hand-carried to the servicing finance and accounting office within 24 hours of acceptance.

(10) Claims files for which a third party fails to satisfy its liability are forwarded to USARCS or to contracting officers for offset as appropriate (see DA Pam 27–162, paragraph 3–26).

(11) Include demand packets for all claim files forwarded to USARCS due to incidents of bankruptcies.

(b) The Commander, USARCS, is responsible for the general administration of the Army Carrier Recovery Program and for the Army Centralized Recovery Program. The Commander, USARCS, will ensure that field claims offices comply with paragraph (a) of this section, and will also ensure that—

(1) Demands for reimbursement received for centralized recovery are reviewed for correctness and dispatched within 7 days of receipt.

(2) Within 30 days of receipt, checks matched to files are accepted and hand-carried to the servicing finance and accounting office (within 24 hours of acceptance) or are rejected and returned to the third party.

(3) Checks which cannot be matched to files are recorded and kept in a locked cabinet in accordance with AR 37–103.

(4) Unearned freight letters are dispatched after settlement with the carrier.

(5) Offset action, or other collection action as appropriate, is initiated against any carrier or other third party that fails to satisfy its liability.

(6) Field claims offices are promptly directed to forward files of bankrupt third parties to USARCS to protect the Government's interests.

(7) Records are maintained of non-temporary storage contractors who default on their contractual obligations, and of incidents that occur in non-temporary storage warehouses, in order to pursue liability as appropriate.

(c) The Chief, U.S. Army Claims Service, Europe, and the Chief, U.S. Armed Forces Claims Service, Korea, will—

(1) Assume the responsibilities outlined in paragraphs (b)(1) through (b)(5) of this section on claims forwarded for European or Korean centralized recovery (see DA Pam 27–162, paragraph 3–22), except that offset actions requiring action by DFAS will be forwarded to USARCS.

(2) Review each POV shipment file forwarded for recovery action against the European inland carrier for potential liability within 45 days of receipt. If negotiations with a POV contractor result in an impasse, USACSEUR will arrange for dispatch of a contracting officer's final decision within 30 days.

**§ 536.185 Determination of liability.**

A prima facie case against a third party is established when evidence shows delivery of an item in good condition to the third party, return of the items in a damaged condition or non-return, and the amount of damage or loss.

**§ 536.186 Exclusions of liability.**

The third party is not always held responsible even though a prima facie case is established. The burden of proof will be on the third party to show that loss or damage was caused by one of the excepted conditions that relieves it of liability. The following exceptions emphasize or add to conditions stated in the various third party rate tenders:

(a) Inherent vice of the article. To be used as an exclusion of liability, the third party must establish not just the general tendency of an item to be damaged in transit, but that the damage was due solely to that propensity.

(b) Infestations by mollusks, arachnids, crustaceans, parasites, or other types of pests, fumigation, or decontamination when not the fault of the third party.

(c) Pre-existing damage indicated on the inventory.

(d) Mechanical failure of an appliance unless there is evidence of external damage or unless it can be clearly shown that the mechanical failure was caused by the third party.

(e) Loss or damage that occurs while the shipment was in the custody and/or control of the Government.

(f) Any item for which timely notice has not been provided to the third party.

(g) Any loss or damage not presented to the third party within the 6-year statute of limitations for filing claims.

**§ 536.187 Limits of liability.**

(a) *Carriers.* (1) Liability of Through Government Bill of Lading (TGBL) or International Through Government Bill of Lading (ITGBL) carriers for household goods shipments is as stated on the GBL. The TGBL carrier may be liable for the full depreciated value of the claim or the current replacement cost of items, without application of depreciation, if the owner purchased replacement cost protection (RCP), also known as "full replacement protection". (See DA Pam 27–162, paragraph 2–51.) For the purpose of computing weight, each piece or package shipped constitutes one article. Any article taken apart or "knocked down" for handling constitutes one article. Individual article weights are listed in the Joint Military—Industry Table of Weights in DA Pam 27–162, Table G–1.

(2) Liability of ITGBL carriers for hold baggage shipments (Codes 7, 8, and J) is normally 60 cents per pound times the gross weight per container (or current contract liability). Excess valuation or RCP is not available on such shipments. (See DA Pam 27–162, paragraph 3–11.)

(3) Liability of domestic freight carriers of household goods shipments is generally stated to be 10 cents per pound per article on the GBL. Excess valuation or RCP is not available on such shipments. For the purpose of computing weight under this type of shipment, each packed item (such as a dish) constitutes one item or article. (Also see DA Pam 27–162, paragraph 3–15.)

(4) Liability of commercial airlines is stated on the GBL. Excess valuation or RCP is not available on such shipments. (See DA Pam 27–162, paragraph 3–17.)

(b) *Non-temporary storage (NTS) contractors.* The contract for storage of household goods is the Basic Ordering Agreement, which is governed by DOD 4500.34–R, chapter 2–I. Under this agreement (DOD 4500.34–R, app H), an NTS contractor is liable for a maximum of $50.00 per inventory line item. (As an exception to this rule, regardless of the way a rank is listed on the inventory, only one charge of $50.00 can be applied when liability is calculated.) The contractor may be liable to the full extent of the declared value if the owner purchased an insurance policy from the warehouse firm. No liability can be pursued against the NTS contractor when goods are given out to a carrier unless an exception sheet was prepared by the carrier showing any differences as to shortages or overages or the condition of items.The exception sheet must be signed and dated by a representative of the warehouse to be valid.

(c) *Packing and containerization contractors.* A local contractor is liable for loss or damage in the amount of 60 cents per pound (or current contract liability) times the weight per article as stated in the liability clause of the contract. Each shipping piece or package constitutes one article. Excess valuation or RCP is not available on such shipments.

(d) *Mobile home carriers.* Liability is governed by the applicable rate tariff, rate tender, declared valuation, or personal property government bill of lading (PPGBL) as stated in DOD 4500.34–R, appendix E, and generally is the full cost of repairs for damage incurred during transit. In addition to the exclusions listed in paragraph 11–26, a mobile home carrier is excused from liability when the carrier has introduced substantial proof that a latent structural defect (one not detectable during the carrier's preliminary inspection) caused the loss or damage.

(e) *Liability limit.* Except for claims involving mobile home carriers, excess valuation or RCP, the liability of any third party is limited to the least amount of the following:

(1) Weight liability or NTS inventory line item maximum.

(2) Amount paid by DA.

(3) Depreciated value of an item (if the third party bases an offer of settlement on the Joint Military/Industry Depreciation Guide in DA Pam 27–162, app G, Table G–2.)

**§ 536.188 Settlement procedures in recovery actions.**

(a) *Offers of settlement.* An offer of settlement or tender of payment from a third party should be carefully examined giving due regard to all factors involved. When such consideration shows the offer or tender to be appropriate, it may be accepted. When the offer or tender does not appear appropriate, further correspondence should be initiated with the third party to clarify the issues.

(b) *Prior acceptance of settlement by owner.* DA is not bound by the owner's acceptance of a settlement from a third party where the acceptance was procured through fraud, duress, collusion, mistake of fact, or misrepresentation. In such circumstances, when a claim is filed, all correspondence with the third party must be included in the file and further recovery action should be taken where the prior settlement is inadequate.

(c) *Establishment of timely notice.* (1) *Handled by one third party only.* Where one third party had responsibility for the shipment from pickup to delivery, written exceptions on DD Form 1840 (Notice of Loss or Damage ) is evidence that items in the shipment were lost or damaged when delivered. However, a clear delivery receipt (DD Form 1840) is only prima facie evidence of a good delivery and may be rebutted by submission of DD Form 1840R, listing all later discovered loss or damage. The DD Form 1840R must be dispatched within 75 days of delivery; the date of dispatch is the controlling date. However, the normal 75-day limit for reporting additional damage on DD Form 1840R may be extended by the claimant's hospitalization or officially recognized absence under the Joint Military-Industry Agreement on Loss and Damage Rules (DA Pam 27–162, appendix E, sec II). Implementation dates for the use of this form and details regarding its use are found in DA Pam 27–162, paragraph 3–4. On claims for household goods delivered prior to these implementation dates, timely notice is established by exceptions noted at delivery on DD Form 619–1 (Statement of Accessorial Services Performed), or on the inventory if dated and signed by a representative of the third party. Timely notice also includes DD Form 1840, or a letter or other document noting loss or damage dispatched to the third party within 45 days of delivery.

(2) *Handled by two or more third parties.* Each time custody of the property changes hands, the inventory will be annotated to show any overage, shortage, and damage found. In the case

of pickup by a carrier from a NTS contractor, an exception sheet must be prepared and be acknowledged by the warehouse firm to reflect any changes in the condition of the goods.

**§ 536.189 Payment to the claimant beyond the statutory limit.**

When payment of the statutory limit is made on a claim determined to be meritorious in a greater amount after the application of individual and category maximum allowances, USARCS will apply amounts recovered from a carrier or contractor to compensate the claimant to the extent of the difference between the statutory limit and the amount that would have been paid but for the statutory limit. However, when an insurer has paid any portion of the value of the items involved, USARCS will apply the procedure in section § 536.190(b). Any additional recovery monies available will be paid out under § 536.190(b), if applicable.

**§ 536.190 Reimbursements to claimants and insurers from money received.**

USARCS is responsible for pursuing recovery on all claims paid under this subpart that involve payment of the statutory limit, increased released valuation purchased by the member, replacement cost protection, and/or private insurance. When forwarding these files to USARCS, the field office should identify them by writing in red on the front upper left corner of the file, "IRV," "RCP," or "STATUTORY LIMIT."

(a) *Reimbursement to a claimant.* Only USARCS may reimburse claimants on files which are required to be forwarded to USARCS for centralized recovery. In cases where a JA/claims attorney allowed payment of a claim before settling with private insurance, a command claims service, area claims office, or claims processing office with approval authority may always make a supplemental payment to a claimant when the claimant's private insurer paid more on an item than did the Government. If a claimant has not been fully compensated, he or she can receive a supplemental payment up to the adjudicated value of the claimant's loss under the following circumstances: (1) When the adjudicated value of the loss on an item exceeds an item or category maximum and the amount collected exceeds the amount paid on the claim, the claimant will be paid the adjudicated value to the extent that the amount recovered exceeds the amount paid.

(2) When the adjudicated value of the loss on an item exceeds an item or category maximum and the claimant has purchased increased valuation protection or other depreciated value coverage, the claimant will be paid up to the amount of the additional coverage to the extent that this does not exceed the adjudicated value on that item or category.

(3) When the value of the loss on an item exceeds DA's payment and the claimant has purchased RCP, the claimant will be paid up to the amount of the additional coverage to the extent that this does not exceed the value determined for that item.

(b) *Reimbursement to insurers by USARCS only.* When a claimant has purchased an insurance policy covering the shipment or storage of property and the insurance company pays any portion of the value of items lost or damaged, the insurance company is entitled, to the extent of its payment, to reimbursement of a pro rata share of the amount recovered on such items.

(c) *Reimbursement of recovery money to a carrier, warehouse or contractor.* If a claims office or contracting office determines that recovery or offset against a carrier, contractor or warehouse was improper, the claims office will forward a request (with appropriate justification) to the Chief, Personnel Claims and Recovery Division, USARCS, who will authorize a refund as necessary.

**§ 536.191 Recovery action against a claimant.**

A claimant is entitled to the benefit of any additional coverage purchased (such as private insurance, excess valuation, or RCP) on an item-by-item basis as described in DA Pam 27–162, paragraph 2–50. If a claimant is compensated by a third party on an item and is also compensated by DA pursuant to this subpart, the claimant is entitled to retain only the portion of the payment that represents the total adjudicated value of the item, without regard to a limitation on payment due to application of a maximum allowance. If a claimant is compensated twice and the total exceeds the amount the claimant is entitled to retain, prompt action to recover the excess will be taken in accordance with DA Pam 27–162, paragraph 2–55m.

**§ 536.192 Claims arising from packing and containerization contract shipments.**

Field claims offices will process to completion recovery actions on all packing and containerization contract shipments against the delivering contractor unless private insurance is involved. (See § 536.190.)

**§ 536.193 Claims caused by stevedoring contractors.**

(a) The "Liability and Insurance" clause used in stevedoring and related services contracts provides in pertinent part that the contractor is liable to the Government for loss or damage to personal property (including POV's), caused in whole or in part, by his or her negligence or fault and that the amount determined by the contracting officer will be withheld from payments otherwise due the contractor.

(b) Claims offices processing claims against the Government under this paragraph for loss, damage, or destruction of personal property of any kind (including POV's) caused in whole or in part by the negligence of a contractor will, when final recovery action is complete, forward the claim file directly to the Commander, USARCS. Claims offices processing a claim involving a POV will obtain an affirmative statement from the claimant as to whether settlement is also being processed directly with the contractor or has already been received from the contractor. Normally, a settlement with the contractor bars further claim against the Government. (But see § 536.186(b).) The procedures for processing POV recovery actions against stevedores are in § 536.195.

**§ 536.194 Claims arising from intra-theater shipments.**

Unless private insurance or payment of the statutory limit is involved (see § 536.190)—

(a) Recovery action under a European intra-theater tender or a delivering direct procurement method contract will be assembled and forwarded to U.S. Army Claims Service, Europe, APO AE 09166–5346.

(b) Recovery action under a Korean intra-theater tender or a delivering direct procurement method contract will be assembled and forwarded to U.S. Armed Forces Claims Service, Korea, APO SF 96301 AP 96205–0084.

(c) Other recovery action against a delivering third party not involving shipment under a Through Government Bill of Lading will be processed by the field claims office to completion in accordance with DA Pam 27–162, chapter 3.

**§ 536.195 Claims against ocean carriers.**

No demand will be made directly on an ocean carrier operating under a Military Sealift Command contract by individual claimants or by field claims offices.

(a) *POVs*—(1) *Payment less than $100.* A POV shipment file will be closed and no recovery action taken when the

amount paid for the damage is less than $100. However any file involving loss of items from vehicles will continue to be processed regardless of the amount paid.

(2) *Payment from $100–1,999.* For POV claims paid for any amount between $100 and $1,999, and if there is evidence of ocean carrier liability, the entire claim file will be forwarded to Military Sealift Command, Atlantic, by transmittal letter prepared in the format shown in DA Pam 27–162, figure 3–18. However, if there is evidence of liability attributable to the inland shipment of POVs in Europe, the entire claim file will instead be forwarded to the U.S. Army Claims Service, Europe, ATTN: AEUTN–PCR, APO AE 09166–5346.

(3) *Payment $2,000 or more*—(i) *Non-European claims offices.* If the amount paid on a POV shipment claim is $2,000 or more, or if it appears that the POV was dropped or was mishandled severely in shipment, claims personnel will prioritize recovery action and handle the larger claims first. Claims personnel will—

(A) Assert a demand against the responsible contractor if an outport contractor, stevedore, or inland transporter damaged the vehicle; or

(B) Forward the claim to USACSEUR for recovery if the damage occurred while the POV was in the custody of a European outport, stevedore, or inland shipment contractor; or

(C) Close the file and forward it for retirement if the POV was damaged while in the custody of government personnel; or

(D) Forward the claim to the Military Sealift Command if the damage occurred while the vehicle was in the custody of the ocean carrier (ship) or if claims personnel cannot determine where the damage occurred.

(ii) *European claims offices.* If the amount paid on a POV shipment claim is $2,000 or more, claims personnel will prioritize assembly of the file and will forward it to USACSEUR for recovery action 21 days after the claim is paid.

(b) *Personal property other than vehicles (for example, household goods).* After payment of a claim involving personal property other than POV's, the entire claim file will be forwarded, in duplicate, directly to the Commander, USARCS, for recovery action as appropriate.

**§ 536.196 Centralized recovery program procedures.**

After settlement of a claim under this chapter (including direct procurement method (DPM) or intra-theater shipments (only if private insurance is involved), and all mobile home claims), requiring centralized recovery processing as determined by the Commander, USARCS, the office paying the claim will forward the file to USARCS within 30 days. (See also § 536.184(a)(6).) All such claims where recovery action is anticipated will include legible documentation and will be assembled as described below.

(a) The following documents will be affixed to the left inside cover (opposite the side bearing complete name and file number of claimant) in descending order:

(1) *First.* An unsealed envelope addressed to the appropriate third party along with the demand packet which should include the following documents: (i) Original DD Form 1843 (Demand on Carrier/Contractor). (See DA Pam 27–162, paragraph 3–20.)

(ii) Copy of DD Form 1164 (Service Order for Personal Property) if applicable.

(iii) Copy of DD Form 1844. (See DA Pam 27–162, paragraph 3–19.)

(iv) Copy of DD Form 1841 (Government Inspection Report) if available.

(v) Copies of all repair estimates.

(vi) Copies of all other supporting documents deemed appropriate.

(vii) Copy of DD Form 1840/1840R.

(2) *Second.* If applicable, an unearned freight packet consisting of the original letter requesting deduction of unearned freight charges with a copy of the GBL, DD Form 1843, and DD Form 1844 attached thereto.

(3) *Third.* Copy of DD Form 1843.

(4) *Fourth.* If applicable, GBL and/or DD Form 1164.

(5) *Fifth.* Documents of timely notice as described in section 536.188(c).

(6) *Sixth.* DD Form 1844.

(7) *Seventh.* If applicable, DD Form 1841.

(8) *Eighth.* Repair estimates, paid bills, replacement costs, appraisals, and so forth.

(9) *Ninth.* Any other documents appropriate to support the claim against the third party.

(10) *Tenth.* Locally approved or adopted chronology sheets will be the last document attached to the left inside cover of the file.

(b) The following documents will be affixed to the right inside cover in descending order:

(1) *First.* All remaining copies of the DA Form 3 (Individual Claims Data Report) (except the organizational file copy retained by the forwarding claims office), or a print-out of the automated Individual Claims Report, as applicable.

(2) *Second.* A copy of the letter to USAFAC requesting deduction of unearned freight charges, if applicable.

(3) *Third.* Certified copy of the voucher from the servicing finance and accounting office, showing the amount paid the claimant.

(4) *Fourth.* DD Form 1842.

(5) *Fifth.* If applicable, paperwork regarding private insurance settlements.

(6) *Sixth.* All inventories.

(7) *Seventh.* All other documents, such as request for exception sheet, orders, turn-in slips, witness statements, and correspondence.

(c) See DA Pam 27–162, paragraph 3–21, for further guidance.

**§ 536.197 Offset actions.**

(a) *Offset actions against GBL carriers.* Only USARCS may process offset actions against GBL carriers. (See DA Pam 27–162, paragraph 3–26.)

(b) *Offset actions against NTS contractors.* When an NTS contractor is liable and a satisfactory settlement cannot be reached, the claims office will forward the file to the Regional Storage Management Office (RSMO) responsible for administering the Basic Ordering Agreements for storage in that geographic area. (See DA Pam 27–162, paragraph 3–26.).

(c) *Offset against packing and containerization contractors.* When any claims office determines that a packing and crating contractor is liable and a satisfactory settlement cannot be made, a copy of the complete claim file will be forwarded by letter to the local contracting office administering the contract, requesting offset action. The contracting officer will conduct a careful review of the claim file and will make a determination on the issue of contractual liability on the information contained in the file and on personal findings of fact in accordance with the contract involved. (Also see DA Pam 27–162, paragraph 3–26.)

(d) Title 4 CFR 102.3(b)(2) affords a carrier or contractor certain procedural rights prior to offset. A JA/claims attorney will certify to the contracting office that the Army has complied with 4 CFR 102.3 if requested to do so. The JA/claims attorney will give the carrier/contractor: (1) written notice of the nature and amount of the debt, and the agency's intention to collect by offset if the debt isn't paid. The DD Form 1843 or demand letter provides this notice.

(2) the opportunity to inspect and copy agency records pertaining to the debt if requested.

(3) the opportunity to obtain review within the agency if the carrier/contractor requests this. If requested, the JA/claims attorney will review the file prior to offset. No oral hearing is required.

(4) the opportunity to enter into a written agreement with the agency to repay the debt. A carrier/contractor will normally be allowed 45 days to follow up a settlement offer with a check. If a satisfactory check is not received within the 45 days, the JA/claims attorney should offset the carrier/contractor without delay.

(e) In accordance with 4 CFR 102.3(b)(5), the head of an area claims office or claims processing office may effect offset prior to completion of any or all of the procedures in paragraph d above if failure to promptly offset would substantially prejudice the Government's ability to collect the debt.

**§ 536.198 Compromise or termination of recovery actions.**

Subject to the limitations contained in this chapter, the Commander, USARCS, is delegated authority to compromise or determine collection action on claims against third parties in accordance with the provisions of 31 U.S.C. 3711.

**§ 536.199 Terms and abbreviations.**

Definitions of terms and a glossary of abbreviations frequently used in recovery actions are in DOD 4500.34–R, in the definitions section, beginning at page XXXIV.

**§ 536.200 Required references.**

Each claim office will maintain copies of the following references for recovery purposes:

(a) DA Pam 27–162.

(b) Personal Property Traffic Management Regulation (DOD 4500.34–R).

(c) Domestic and mobile home personal property carrier approvals.

(d) ITGBL personal property carrier approvals by area/code.

(e) Local packing and containerization contracts.

## Subpart L—Nonappropriated Fund (NAF) Claims

### Claims Against NAF Activities

**§ 536.201 General.**

This subpart sets forth the procedures to be followed in the settlement and payment of claims by employees of nonappropriated fund activities for the loss of or damage to personal property incident to their employment, and for claims generated by the acts or omissions of the employees of such funds.

**§ 536.202 Claims by employees for losses incident to employment.**

Claims by employees for the loss of or damage to personal property incident to employment will be processed in the manner prescribed by subpart K and will be paid from nonappropriated funds in accordance with § 536.207.

**§ 536.203 Claims generated by the acts or omissions of employees.**

(a) *Processing.* Claims arising out of acts or omissions of employees of nonappropriated fund activities will be processed and settled in the manner specified for similar claims against the United States except that payment will be made from nonappropriated funds in accordance with AR 215–1, and section § 536.207. Relevant procedural requirements of pertinent subparts of this part, as stated below, will be followed except as provided in §§ 536.206 and 536.207. However, when the NAFI is protected by a commercial insurer, for example, flying and parachute clubs, the claim will be referred to the insurer as outlined in paragraph (e) of this section.

(1) Claims arising within the United States, its territories, commonwealths, or possessions. Such claims will be processed in the manner prescribed by subparts C, D or E as appropriate.

(2) Claims arising outside the United States, its territories, commonwealths, or possessions. Such claims will be processed in accordance with the provisions of applicable SOFA or in the manner prescribed by subparts C, D or E as appropriate.

(b) *Reporting and investigation.* Such claims will be investigated in accordance with subpart B of this part and AR 215–1.

(1) *Reporting.* All incidents involving personal injury, death, or property damage resulting from falls, falling objects, or accidents of like nature, occurring in post exchanges, bowling lanes, officers and noncommissioned officers open messes, or other facilities located on land or situated in a building used by an activity of the DA that employs personnel compensated from nonappropriated funds, should be reported immediately to the officer in charge of the nonappropriated fund activity concerned. The report should be made by the employee who initially received notice of the incident, regardless of the fact that the individual involved denies sustaining personal injury or property damage. Upon receipt of the report of the incident, the officer in charge of the nonappropriated fund activity concerned will transmit the report to the installation or other appropriate claims officer for investigation.

(2) *Investigation.* (i) As soon as practicable in the investigation of a claim generated by a nonappropriated fund activity, a determination will be made as to whether the claim is cognizable under this section.

(ii) Claim files that relate to claims determined to be cognizable under this section will be marked with the symbol "NAF" immediately following the claimant's name to preclude erroneous payment from appropriated funds. This symbol will also be included in the subject line of all correspondence.

(iii) *Claims exceeding $15,000.* When a claims approval or settlement authority receives a claim against a nonappropriated fund activity, other than the Army and Air Force Exchange Service (AAFES), that exceeds $15,000, he or she will forward a copy to both USARCS and the Army Central Insurance Fund, HQDA, ATTN: CFSC-RM-I, room 1240, 2461 Eisenhower Avenue, Alexandria, VA 22331–0508. A copy of all tort claims against AAFES will be forwarded to Headquarters, AAFES, ATTN: General Counsel, P.O. Box 660202, Dallas, TX 75266–0202.

(iv) *Customer complaints.* Customer complaints other than at AAFES activities will be settled under the provisions of AR 215–1 rather than under the provisions of this section. AAFES generated complaints will be handled in accordance with Exchange Service Manual 57–2.

(v) *Commercial insurance.* (A) Normally a claims investigation under subpart B will not be conducted but the claims officer will refer the claim to the insurer and furnish copies as indicated in paragraph (c) of this section. Assistance will be furnished to the insurer as needed. Copies of any other required investigations may be furnished to the insurer.

(B) The status of the claim will be ascertained at key intervals to ensure that progress is being made, negotiations are proper, and to close the file. The Commander, USARCS will be advised of any problems.

(C) If requested by either insurer or NAFI officials, the appropriate claims authority will assist in or conduct negotiations.

(D) Where NAFI vehicles are required to be covered by insurance in foreign countries, the insurer will process the claim. However, if the insurer refuses to settle the claim in timely manner or is insolvent, the claim may be processed under subpart J procedures where applicable.

**§ 536.204 Persons generating liability.**

Claims resulting from the acts or omissions of the following classes of persons are cognizable under this section: (a) Civilian employees of nonappropriated fund activities whose

salaries are paid from nonappropriated funds.

(b) Active duty military personnel while performing off-duty part-time work and for which they are compensated from nonappropriated funds.

(c) A claims approval or settlement authority will ask the Commander, USARCS for an advisory opinion prior to settling any claim where the person whose conduct generated the claim does not clearly fall within the above listed categories.

**§ 536.205 Claims payable from appropriated funds.**

Claims payable from appropriated funds will not be considered under this section or paid from nonappropriated funds. Such claims include those resulting from—

(a) Acts or omissions of military personnel while performing assigned military duties in connection with nonappropriated activities.

(b) Acts or omissions of civilian employees paid from appropriated funds in connection with nonappropriated activities.

(c) Negligent maintenance of a facility used by a nonappropriated fund activity but for which the command concerned is responsible.

(d) Temporary use of a nonappropriated fund facility by an appropriated fund activity.

(e) Operation of Government vehicles dispatched from motor pools on authorized missions for nonappropriated fund activities when the driver is a member or civilian employee of the DA.

**§ 536.206 Settlement.**

(a) *Settlement.* Claims cognizable under this section and processed under subparts C, D, E, J or K will be settled by claims authorities authorized to settle claims under those chapters subject to the same monetary limitations and limitations on denial authority, except that TJAG, TAJAG, and the Commander, USARCS, or designee, may settle such claims without regard to monetary limitations.

(b) *Finality of settlement.* The determination of a claims settlement authority on a claim cognizable under this section is final and conclusive. However, a claim processed under subpart C may be appealed in accordance with § 536.51(d), and claims processed under subparts D, E, J or K may be reconsidered in accordance with the paragraphs concerning reconsideration in those subparts.

**§ 536.207 Payment.**

(a) *Transmission for payment.* When a claim for loss of or damage to household goods or hold baggage shipped or stored by an AAFES or NAFI employee is considered under this section and determined to be meritorious in whole or in part, the approval or settlement authority will transmit the entire claims file to the appropriate disbursing office (see paragraph (b) of this section) for payment. When any other claim is considered under this section and determined to be meritorious in whole or in part, the approval or settlement authority will transmit to the appropriate disbursing office the original and one copy of—

(1) The claim form.

(2) The action by the approval or settlement authority.

(3) The settlement agreement, if required by subpart B.

(b) *Disbursing offices.* Normally, claims settled under this section will be transmitted for payment as indicated below.

(1) Claims over $2,500 generated by AAFES activities will be transmitted to Headquarters, Army and Air Force Exchange Service, ATTN: Comptroller Division, Insurance Branch, P.O. Box 660202, Dallas, TX 75266–0202.

(2) Claims not over $2,500 generated by AAFES activities will be transmitted to the Army-Air Force Exchange Service, OSC-FA-CLAIMS, P.O. Box 650405, Dallas, TX 76265–0405.

(3) Claims over $100 generated by other nonappropriated fund activities will be transmitted to The Army Central Insurance Fund, ATTN: CFSC-RM-I, Room 1240, 2461 Eisenhower Avenue, Alexandria, VA 22331–0508. When transmitting household goods or hold baggage shipment claims for payment, forward the entire claims file so ACIF can pursue carrier recovery. Use the "NF" claims database transaction code.

(4) Claims not over $100 generated by other nonappropriated fund activities will be transmitted to that nonappropriated fund activity responsible for payment from its funds. (See AR 215–1, paragraph 13–24a.)

(c) *Reimbursement to foreign countries.* Reimbursement to a foreign country of the United States pro rata share of a claim paid under an international agreement will be made from nonappropriated funds.

(d) *Evidence of payment.* When a claim settled under this section is transmitted to a disbursing office for payment, the approving or settlement authority will request the appropriate disbursing office to return evidence of the date and amount of payment.

## Claims Involving Persons Other Than NAF Employees

**§ 536.208 Claims arising from activities of nonappropriated fund contractors.**

These claims should be disposed of in a manner similar to that set forth in DA Pam 27–162, paragraphs 8–42, 8–43, and 8–47. Post exchange concessionaires are independent contractors and are required to obtain workmen's compensation coverage under local law for their employees and public liability insurance governing their operations. If a dispute arises as to whether such insurance is available or applicable, the claim should be forwarded to Headquarters, AAFES, ATTN: General Counsel, P.O. Box 660202, Dallas, TX 75266–0202, prior to processing under the preceding chapters.

**§ 536.209 Non-NAFI RIMP claims.**

The RIMP is administered by the U.S. Army Community and Family Support Center under the provisions of AR 215–1. Non-NAFI RIMP claims are not cognizable under any other provision of this regulation. However, except as otherwise provided in this section, Non-NAFI RIMP claims are subject to the same requirements that apply to other tort claims. USARCS carefully monitors all such claims to ensure proper investigation and resolution.

**§ 536.210 Claims cognizable.**

(a) Non-NAFI RIMP claims can arise from the activities of—

(1) Members of recreational NAFIs or authorized users of NAF recreational property, while using such property, except real property, in the manner and for the purposes authorized by DA regulations and the charter, constitution, and bylaws of the particular NAF activity. This category of persons generally has been limited to members and users of recreational facilities such as flying clubs organized as NAFIs and craft shops. This category does not include customers of exchanges, snack bars, motion picture theaters, or similar facilities. Whether a claim based on an act or omission of a member or authorized user of other types of NAF activities, such as officers' messes, would be cognizable under this paragraph depends on the facts and circumstances involved, including the degree of participation by the member or authorized user in the activities of the fund. Claims arising from the use of NAF property, as defined in this paragraph, are not cognizable under the FTCA or MCA, since the use of such recreational property is by individuals not considered to be employees of the

Army or NAFI acting within the scope of their office or employment.

(2) Family child care (FCC) providers, authorized members of the provider's household, and approved substitute providers while care under the FCC program is being provided in the manner prescribed in AR 608–10, except as excluded below. Such claims are generally limited to injuries to or death of children receiving care under the FCC program which are caused by the negligence of such individuals. Claims arising from the transportation of such children in motor vehicles and claims involving loss or damage of property are not cognizable.

(b) Although Non-NAFI RIMP claims do not involve employees of the United States, a claim under this section that is listed in § 536.51 of this part is not payable. For example, a soldier injured on a post golf course when hit by a golf cart operated by an authorized user is barred by the incident-to-service exclusion from recovering under this section.

(c) A claims approval or settlement authority will ask the Commander, USARCS for an advisory opinion prior to settling any Non-NAFI RIMP claim where the person whose conduct generated liability does not clearly fall within the above listed categories. Such authorities may also ask, through the Commander, USARCS, for an advisory opinion from the U.S. Army Community and Family Support Center prior to settling any claim arising under paragraph (a)(2) of this section, where it is not clear that the injured or deceased child was receiving care within the scope of the FCC program.

(d) The total payments for all claims (including derivative claims) arising as a result of injury to or death of any one person are limited to $500,000 for each incident. Continuous or repeated exposure to substantially the same or similar general harmful activity or conditions is treated as one incident for purposes of determining the limit of liability.

**§ 536.211 Procedures.**

(a) *Reporting.* All Non-NAFI RIMP claims (regardless of the amount claimed) and incidents that could give rise to Non-NAFI RIMP claims will be reported to USARCS and the ACIF immediately.

(b) *Investigation.* Field claims offices are responsible for the investigation of Non-NAFI RIMP claims. Such investigations will be closely coordinated with program managers responsible for the activity generating the claim. Close coordination with USARCS is required, and USARCS will maintain mirror files of the investigation of all actual and potential claims.

(c) *Payment.* Non-NAFI RIMP claims will be transmitted to The Army Central Insurance Fund, ATTN: CFSC-RMB-I, Room 1240, 2461 Eisenhower Avenue, Alexandria, VA 22331–0508 for payment.

(d) *Commercial insurance.* The provisions of § 536.203(e) (1) through (3) are also applicable to claims arising under this section, except that in claims involving FCC providers, a claims investigation will be conducted regardless of the presence of commercial insurance.

**§ 536.212 Delegation of authority.**

(a) *Settlement authority.* TJAG, TAJAG, and the Commander, USARCS, or designees, are authorized to settle or deny Non-NAFI RIMP claims regardless of the amount claimed.

(b) *Approval authority.* (1) The SJA and, subject to limitations imposed by him or her, the chief of the command claims service of the commands listed below are delegated authority to approve, in full or in part, Non-NAFI RIMP claims presented in the amount of $25,000 or less, and to approve such claims regardless of the amount claimed provided an agreed settlement of $25,000 or less is accepted in full satisfaction of the claim, but only when the total value of all settlements, claims, and potential claims arising out of a single incident does not exceed $25,000.

(i) USAREUR.

(ii) Eighth U.S. Army, Korea.

(iii) USARSO.

(2) Area claims offices are delegated authority to approve, in full or in part, Non-NAFI RIMP claims presented in the amount of $15,000 or less, and to approve such claims regardless of the amount claimed provided an agreed settlement of $15,000 or less is accepted in full satisfaction of the claim, but only when the total value of all settlements, claims, and potential claims arising out of a single incident does not exceed $25,000.

(3) The above authorities are not delegated authority to deny or make a final offer on claims under this section. Claims requiring such action will be forwarded to the Commander, USARCS, with an appropriate recommendation.

(c) The decision of a settlement or approval authority on a Non-NAFI RIMP claim is final and conclusive and is not subject to reconsideration or appeal.

## Subpart M—Affirmative Claims

### General

**§ 536.213 Authority.**

(a) *Federal statutory authority.* (1) The Federal Claims Collection Act (31 U.S.C. 3711), as amended by the Debt Collection Act of 1982 and Public Law 101–552 (15 November 1990). The Federal Claims Collection Act states that Federal agencies will try to collect all claims of the United States for money or property. Among other things, it provides a basis for agencies to recover for damage to Government property.

(2) Federal Medical Care Recovery Act (42 U.S.C. 2651–53) (hereinafter "FMCRA"). The FMCRA provides for the recovery of the reasonable value of medical care furnished by the United States on account of injury or disease incurred under circumstances creating tort liability upon some third person. The FMCRA is implemented by Executive Order 11060 and 28 CFR part 43; the Federal Claims Collection Standards (DA Pam 27–162, appendix M) also apply, as appropriate. However, some procedures appropriate for liquidated debts may not be appropriate for unliquidated claims.

(3) 10 U.S.C. 1095. 10 U.S.C. 1095 provides authority for military health care facilities to collect the reasonable cost of health care from health insurance and medicare supplemental policies. As amended by Public Law 101–510 (5 November 1990), this statute provides claims offices with additional authority to assert claims against automobile insurers for care provided in an MTF on or after that date.

(b) *Other authority.* (1) State Workers' Compensation laws.

(2) State hospital lien laws.

(3) Contract rights under terms of insurance policies including medical payment coverage, uninsured and underinsured coverages, and no-fault.

(4) State automobile no-fault laws.

**§ 536.214 Recovery judge advocate/attorney.**

(a) *General.* A JA or claims attorney (designated per § 536.6) assigned responsibility for asserting affirmative claims may be designated as a recovery judge advocate (RJA) or recovery attorney, as appropriate. This designation may be in addition to or in lieu of designation as a claims JA or claims attorney, depending on the local command needs and available personnel. When assertion of affirmative claims is a full-time responsibility of an attorney or JA, the table of distribution and allowances (TDA) position title can also reflect the recovery function.

(b) *Designation.* (1) The chief of a command claims service, an area claims office, or a claims processing office with approval authority may designate an RJA or recovery attorney for all or part of the area of responsibility assigned to the service or office. All designations will be in writing. A command claims service may withhold designation authority within its area of operations or place reasonable restrictions on such designation by subordinate offices through appropriate command directives.

(2) The Commander, USARCS will designate RJAs and recovery attorneys for areas not within the responsibility of a command claims service or area claims office.

**§ 536.215 Purpose and policy.**

(a) This subpart prescribes procedures for the administrative determination, assertion, collection, settlement, and waiver of claims in favor of the United States for damage to, loss, or destruction of Army property, and for the recovery of the reasonable value of medical care furnished or to be furnished by the United States, under the statutes cited in § 536.213. Sound governmental policy in the collection of claims of the United States for money or property requires aggressive agency collection action. Responsible officials within DA will ensure that personnel asserting claims are properly trained and supported to take timely and effective action.

(b) The chapter does not apply to the following:

(1) Claims between Federal agencies. If such a claim cannot be resolved by negotiation, it should be referred to GAO.

(2) Maritime claims under subpart H.

(3) Affirmative actions for nonmonetary relief (for example, evictions, specific performance, and injunctive relief).

(4) Claims arising out of tax aspects of a contract, or other transaction or activity involving either nonappropriated or appropriated funds.

(c) The senior Judge Advocate of a command having a command claims service, or the commander, USACSEUR, will prescribe procedures for implementing single service claims responsibility under DODD 5155.8 and for implementing any provision in a treaty or international agreement that limits or provides special methods for asserting claims in favor of the U.S. With the concurrence of the Commander, USARCS, the senior JA of a command having a command claims service, or the commander, USACSEUR, is authorized to modify the procedures in this chapter to accommodate special circumstances. The SJA will provide the Chief, Personnel Claims and Recovery Division, with a copy of all published guidance.

**§ 536.216 Delegation of authority.**

Claims offices may accept the full amount asserted on an affirmative claim. In addition—

(a) TJAG; TAJAG; the Commander, USARCS; and the Chief, Personnel Claims and Recovery Division, USARCS, may compromise or terminate collection action on a property damage claim asserted for $100,000 or less; and may compromise, waive or terminate collection action on a medical care claim asserted for $100,000 or less.

(b) The senior JA of a command having a command claims service, or the commander, USACSEUR, may compromise, waive or terminate collection action on a medical care or property damage claim asserted for $100,000 or less.

(c) Unless authority is withheld by the Commander, USARCS or the chief of a command claims service, the head of an area claims office may: (1) compromise up to $25,000 of the amount asserted on a property damage or medical care claim asserted for $40,000 or less (see § 536.229(b)).

(2) Terminate collection action on a property damage or medical care claim asserted for $25,000 or less when further collection efforts are not feasible (see paragraph 14–19c); or waive a medical care claim asserted for $25,000 or less when collection in any amount will result in undue hardship to the injured party (see § 536.229(d)).

(d) The head of an area claims office may delegate authority to a claims processing office to: (1) compromise up to $20,000 of the amount asserted on a property damage or medical care claim asserted for $40,000 or less (see § 536.229(d)).

(2) Terminate collection action on a property damage or medical care claim asserted for $20,000 or less when further collection efforts are not feasible (see paragraph 14–19c); or waive a medical care claim asserted for $20,000 or less when collection in any amount will result in undue hardship to the injured party (see § 536.229(d)).

(e) The head of an area claims office or a claims processing office, or the chief of a command claims service, may redelegate up to $20,000 of his or her authority to an RJA.

(f) In determining whether a settlement authority has authority to compromise, terminate, or waive a claim, consider the medical costs for all parties injured in a single incident as a single assertion; and consider the total value of Government property damaged or destroyed in a single incident as a single assertion.

(g) Only the Department of Justice (DOJ) may approve claims involving: (1) Compromise, termination, or waiver of a medical care or property damage claim asserted for more than $100,000.

(2) Settlement actions previously referred to DOJ.

(3) Settlement where a third party has filed suit against the United States or the injured party for the same incident which gave rise to the claim of the United States.

(h) The commander, USARCS, or the Chief, Personnel Claims and Recovery Division, in consultation with the Department of Justice, will approve all claims involving unusual circumstances, a new point of law which may serve as a precedent, or a question of policy.

**§ 536.217 Basic considerations.**

(a) The Federal Claims Collection Standards. The Federal Claims Collection Standards (4 CFR parts 103 and 104, reprinted in DA Pam 27–162, appendix M), prescribe standards for compromising and litigating property damage claims, and provide general guidance for compromising and litigating medical care claims.

(b) *Time limitations*—(1) *Property damage claims.* Claims asserted under the Federal Claims Collection Act for damage to Government property are founded in tort and must be brought within three years after the action "first accrues" (28 U.S.C. 2415b).

(2) *Medical care claims asserted under the FMCRA or 10 U.S.C. 1095.* Claims asserted under the FMCRA or against an automobile liability insurer under 10 U.S.C. 1095 are also founded in tort and must be brought within three years after the action "first accrues" (28 U.S.C. 2415b). Although no court has ruled on this issue, claims asserted under 10 U.S.C. 1095 against a no-fault or PIP insurer are presumably founded in a contract "implied in law"; if so, they must be brought within six years (28 U.S.C. 2415a).

(3) *Computing the statute of limitations.* Normally, a medical care claim "first accrues" on the initial date of treatment, and a property damage claim accrues on the date that the property was damaged. However, in computing the statute of limitations, 28 U.S.C. 2416(c) excludes the period of time before a U.S. official charged with the responsibility to act in the circumstances knows or should know that there is a basis for a claim. See *United States* v. *Hunter*, 645 F.Supp

758, 760 (N.D.N.Y. 1986). For example, the three year statute of limitations would not begin to run on most medical care claims paid by CHAMPUS at least until the date on which CHAMPUS received the bill from the provider.

(4) *Medical care claims asserted under state law.* Claims asserted against an insurer on a third party beneficiary theory or against a state workers' compensation fund must be brought within the applicable state statute of limitations which can range from one to six years. Normally, the statute of limitations would begin to run when the injury occurred, rather than the date of initial treatment.

(c) *Applicable law.* Federal law does not define what constitutes a tort. Unless the RJA can properly apply the law of another jurisdiction under conflict of law rules, the RJA will apply the law of the state or country where an incident occurred in determining whether the Government has a cause of action founded in tort.

(d) *Concurrent claims.* (1) Claims for damage to Army property and claims for medical care arising from the same incident will be processed under the section applicable to each. However, efforts should be made to include all medical care and property damage claims in a single demand against a third party or insurance company. Settlement agreements will be drafted so that settlement and release of one claim shall not prejudice settlement of the remaining claim.

(2) If the incident giving rise to a claim in favor of the United States also gives rise to a potential claim against the United States, the claim in favor of the Government will be asserted and processed only by a claims approval or settlement authority who has jurisdiction to take final action on the claim against the Government.

**§ 536.218 Claims against certain prospective defendants.**

(a) *U.S. Government agencies.* RJAs will not assert a claim against any department, agency or instrumentality of the United States. A self-insured NAFI, whether revenue producing, welfare or sundry, is considered an "agency or instrumentality of the United States"; a private association is not.

(b) *Property damage assertions against soldiers and employees.* The report of survey system (chapter 13, AR 735–5) is the primary mechanism for collecting from a civilian employee or a soldier (including an AR or NG soldier) for damage to government property. Report of survey procedures should normally be used whenever applicable. AR 735–5 requires claims offices to assert property damage claims against soldiers and employees in two instances: (1) *Damage caused by POV's.* Pursuant to paragraph 14–30, AR 735–5, if a report of survey approving authority assesses liability against a soldier or civilian employee for negligently damaging Government property using a POV, and the soldier or employee does not make restitution, the approving authority will forward the approved report of survey to the claims office. The RJA will assert a demand against the soldier or employee's liability insurance for the full value of the damage. If the soldier or employee does not have insurance, the RJA will return the action for the approving authority to withhold a month's pay from the soldier or employee.

(2) *Exhaustion of collection remedies.* Pursuant to paragraph 14–4b(7), AR 735–5, if an F&AO has exhausted all administrative mechanisms, including IRS offset, for collecting amounts assessed under a report of survey from a soldier, ROTC cadet or employee, the F&AO may refer the action to the servicing claims office for recovery action under the Federal Claims Collection Act. The RJA will assert such claims and initiate litigation if appropriate.

(c) *Medical care assertions against soldiers, employees, family members, and retirees*—(1) *Acting within scope of employment.* The RJA will not assert a medical care claim against a tortfeasor who is a civilian employee or service member (including a reserve component member) acting within scope of employment, whether or not the employee or member has private insurance (cf. *U.S.* v. *Gilman*, 347 U.S. 507 (1954)). "Scope of employment" is determined by the laws of the state where the injury occurred.

(2) *Persons not in scope who injure themselves.* An RJA will not assert a claim based on a tort liability theory against a tortfeasor who is a soldier, family member or retiree for the tortfeasor's own medical care; a person cannot create tort liability by injuring himself or herself. In such instances, however, the RJA may assert a claim under 10 U.S.C. 1095 against the injured tortfeasor's personal injury protection (PIP) or medical payments insurance coverage.

(3) *Persons not in scope with liability insurance.* An RJA may assert a medical care claim against the liability insurer of a service member, civilian employee, family member or retiree who injures some other person entitled to medical care. Interfamilial tort immunity would not preclude the RJA from asserting a medical care claim based on a tort liability theory for care furnished to a tortfeasor's family members (see, e.g., *U.S.* v. *Haynes*, 445 F.2d 907 (5th Cir. 1971); *U.S.* v. *Moore*, 469 F.2d 788 (3rd Cir. 1972).

(4) *Persons not in scope with no insurance.* An RJA may assert a medical care claim against a soldier, civilian employee, family member or retiree without insurance coverage with the approval of the Chief, Personnel Claims and Recovery Division, USARCS, or designee. Approval will be granted if there are aggravating circumstances, such as willful misconduct, and the tortfeasor has sufficient assets to satisfy both the injured victim and the Government's claim.

(d) *Government contractors.* Some contracts have "cost-plus" or reimbursement provisions which require the government to reimburse the contractor for many types of expenses. If it appears that the contract would require the government to reimburse a contractor for money recovered on an otherwise meritorious affirmative claim, the RJA will investigate the claim and forward a recommendation to USARCS, referencing the specific contract clauses involved. The RJA will assert other claims against government contractors after verifying that the contract does not contain a reimbursement provision.

(e) *NG organizations and members.* The RJA will investigate claims arising from the tortious conduct of NG members. The RJA will assert claims against NG members and their insurers in accordance with § 536.218 (b) and (c). If the NG members were acting within the scope of employment as State employees and an assertion against the NG organization's insurer appears appropriate, the RJA will forward a recommendation to USARCS.

**Property Claims**

**§ 536.219 General.**

(a) Other regulations establish systems of property accountability and responsibility; and provide for the administrative collection of charges from military and civilian personnel of the United States, and other individuals and legal entities from whom collection may be made without litigation. However, when the investigation results in a preliminary indication of pecuniary liability and no other method of collection is provided, the matter will be referred for action under this chapter. Assertions may be made under this section for the loss, damage, or destruction of—

(1) Property under DA control (AR 735–5).

(2) Property of the Defense Supply Agency in DA custody.

(3) Property of nonappropriated fund activities of the Army (except AAFES property unless a special agreement exists). (See AR 215–1 and AR 215–2.)

(4) Federal property made available to the ARNG (AR 735–5).

(b) This section does not apply to—

(1) Claims for damage to property funded by civil functions appropriations.

(2) Reimbursements from agencies and instrumentalities of the United States for damage to property.

(3) Collection for damage to property by offset against the pay of employees of the United States, or against amounts owed by the United States to common carriers, contractors, and states.

(4) Claims by the United States against carriers, warehousemen, insurers, and other third parties for amounts paid in settlement of claims by members and employees of the Army or DOD for loss, damage, or destruction of personal property while in transit or storage at Government expense (chapter 11).

**§ 536.220 Repayment in kind.**

The RJA may accept the repair or replacement of the property in lieu of payment of the claim. The staff officer responsible for the property must certify accomplishment of the repair or replacement (such as is described for motor vehicles in AR 735–5) before a release may be executed. The authority conferred by this paragraph is not limited to incidents involving motor vehicles.

**§ 536.221 Property damage predemand procedures.**

(a) *Identification of potential claims.* The RJA will ensure that installation motor pools, housing and engineering staff sections, unit property custodians, and similar persons apprise the claims office of damage to DA property. In addition, claims personnel will review MP blotters and reports, civilian news sources, reports of survey, magistrate court proceedings, line of duty and AR 15–6 investigations, and similar reports to identify additional property damage cases. A claims office designated as the NG point of contact for a state will coordinate with NG officials to ensure that NG units appoint unit claims officers and report potential claims.

(b) *Transfer of responsibility.* If another claims office is better situated to investigate and assert a property damage claim, the claims office will coordinate with that office. The Chief, Affirmative Claims Branch, USARCS, will resolve any disagreements. In addition, the office designated as the NG point of contact for a state will forward potential claims arising in another office's area of responsibility to that office.

(c) *Investigation.* Claims personnel will investigate potential incidents, question witnesses to determine the facts and circumstances, and identify all available insurance coverage. Claims personnel may directly request assistance from other DOD claims offices. Claims personnel may also request an investigation of an incident by a unit claims officer for the unit or organization responsible for the damaged or destroyed property, or, when the investigation may be more practically conducted by the claims officer of some other unit or organization, by another unit claims officer. If no other report has been prepared, the unit claims officer will prepare DA Form 1208. Claims personnel will obtain a breakdown of costs from the custodian of the property.

(d) *Closing potential claims without assertion.* If the RJA determines that there is no tort liability or that the potential recovery is too small to be worth pursuing, he or she will dispose of the notification without asserting a claim. If a potential claim file was opened, claims personnel will annotate the basis for closing the potential claim on the chronology sheet referencing the Federal Claims Collection Standards.

(e) *Asserting demands.* If there is a legal and factual basis for the Government to recover, claims personnel should notify both the tortfeasor and the tortfeasor's insurer. The assertion letter should outline the facts and cite the Federal Claims Collection Act as the basis for recovery. The claims office may also cite local law. The claims office should assert the claim for the full costs to the Government, if known, or state that the costs are still being ascertained. Where appropriate, the assertion letter should also provide the option to repair the damaged property or to replace it in kind.

## Medical Care Claims

**§ 536.222 General.**

(a) Army claims offices assert claims against tortfeasors and insurers for medical and dental care which is furnished to a soldier, family member or retiree at Army expense to treat an injury or disease resulting from tortious conduct. In states that have modified traditional tort liability, Army claims offices also assert claims against insurers other than health benefits insurers, such as no-fault and medical payments automobile insurers, and workers' compensation funds. In doing so, claims offices coordinate their efforts with the injured party's efforts to recover other damages from tortfeasors and insurers.

(b) Claims offices will forward potential claims for medical care furnished to service members, family members or retirees of Air Force, Navy, Marine Corps or Coast Guard to the nearest installation or office of that service. As an exception to this rule, however, claims offices may assert and collect claims for medical care provided to retirees of another service and their dependents if:

(1) Medical care was furnished at the local Army MTF; and

(2) the incident giving rise to the claim occurred near the Army installation; or

(3) the retiree resides near the Army installation. In these exceptional situations, the claims office must ensure that the retiree is not receiving care at another service's MTF. The claims office must also notify USARCS as well as the nearest installation or office of the retiree's service that it is handling the claim.

(c) In some instances, the Army and the VA will both pay for care provided to a soldier or retiree. The VA, however, is precluded from asserting claims for "service-connected" injuries. *Accordingly:*

(1) If a soldier is injured and is discharged from the service, the claims office will assert claims for the reasonable value of medical care furnished at Army expense (including care furnished in a VA facility) prior to a soldier's discharge. Claims offices will not assert for the value of medical care furnished at VA expense, but the RJA will consider future care provided by VA in determining whether to approve a waiver or compromise.

(2) If a retiree is injured and receives some care paid for by the Army and other care in a VA facility, the claims office will coordinate with the nearest VA office and assert a claim for the full value of the care provided. The office will remit the amount recovered for care provided at VA expense to the VA.

**§ 536.223 Recovery Rights under the FMCRA.**

Pursuant to the Federal Medical Care Recovery Act the Government may pursue recovery of medical costs under any of the following tactics:

(a) *Subrogation.* The United States is subrogated to any rights or claims held by a person to whom the Government has provided medical care against the tortfeasor who caused him or her to be injured. As subrogee, the United States can recover from the wrongdoer the reasonable value of the medical care it

has furnished or will furnish the injured party.

(b) *Intervention.* The United States can intervene in an injured party's suit against a tortfeasor or bring suit as the assignee of an injured party's right of action.

(c) *Independent Action.* The United States can assert administratively and litigate a medical care claim in its own name.

(d) *Item of Special Damages.* The injured party's attorney can assert the Government's claim as an item of special damages in an injured party's suit against the tortfeasor.

**§ 536.224 Identification of potential medical care recovery claims.**

(a) *By MTF personnel.* (1) The MTF commander will ensure that the claims office is notified of instances where the MTF provides or is billed by a civilian facility for inpatient or outpatient care resulting from injuries such as broken bones or burns arising from automobile accidents, gas explosions, falls, civilian malpractice, and similar incidents which do not involve collections from a health benefits or medicare supplemental insurer. Claims personnel will coordinate with MTF personnel to ensure that inpatient and outpatient records, and emergency room and clinic logs are properly screened to identify potential cases.

(2) The MTF commander will also ensure that the MTF does not release billings or medical records, or respond to requests for assistance with worker's compensation forms, without coordinating with the RJA.

(b) *By CHAMPUS fiscal intermediaries.* The CHAMPUS fiscal intermediary is required to identify and to promptly mail claims involving certain diagnostic codes to the claims office designated as the state point of contact. The fiscal intermediary is required to provide the contact office with a personal injury questionnaire completed by the injured party and a copy of the CHAMPUS Explanation of Benefits showing the amount that CHAMPUS paid on the claim.

(1) In accordance with chapter 5 of the CHAMPUS Fiscal Intermediary Operations Manual (September 1991), a fiscal intermediary must suspend payment on a claim with possible medical care recovery until the injured party properly completes the personal injury questionnaire. Within 15 working days after receiving and evaluating the completed questionnaire, the fiscal intermediary is required to dispatch possible medical care recovery cases to the appropriate claims office. The contact office must work with the fiscal intermediary to ensure that claims are properly identified and forwarded in a timely manner. The claims office should document persistent problems and notify USARCS.

(2) Prior to settlement of a CHAMPUS claim, claims offices should recontact the fiscal intermediary to ensure that all amounts paid for by CHAMPUS are included in the Government's assertion.

(c) *By claims personnel.* The RJA will ensure that MTF comptroller, clinic, and Patient Administration Division records are screened to identify potential medical care recovery cases. The RJA will also coordinate with Navy and Air Force claims offices and MTFs to ensure that they identify potential claims involving treatment provided to Army personnel. To the extent possible claims personnel will review civilian police reports, military police blotters and reports, news reports, magistrate court proceedings, line of duty and AR 15–6 investigations, and similar sources to identify other potential medical care recovery claims.

**§ 536.225 Medical care procedures following identification.**

(a) *Opening potential claims.* Unless it is obvious from the notification documents that there is no potential recovery, claims personnel will open a potential claims file on each incident identified. Until the Affirmative Claims Management Program is revised to include a "potentials database," potential claims will be recorded in the Claims Journal (DD Form 1667).

(b) *Transfer of responsibility.* (1) Several claims offices may be notified of incidents involving more than one injured party or treatment at more than one facility. If an RJA has reason to believe that this has occurred, the RJA will contact the other offices to determine which office has the most significant contacts and should assert the claim. The office closest to where the injury occurred is not necessarily the office with the most significant contacts. In the event that offices cannot agree, they will refer the matter to the Chief, Affirmative Claims Branch, USARCS for a decision. The claims office will notify the MTF if it transfers responsibility for a claim that the MTF referred.

(2) The office designated as the CHAMPUS or NG point of contact for a state will forward potential claims arising in another office's area of responsibility to that office.

(c) *Investigation.* If MTF personnel have not already collected the necessary information, claims personnel will dispatch questionnaires to injured parties to determine the facts and circumstances and identify all available insurance coverage. Claims personnel will obtain medical records and billings to determine the value of the Government's claim, and will contact witnesses and consult with medical personnel as appropriate. RJAs may direct unit claims officers to investigate incidents and may request assistance from other DOD claims offices as needed.

(d) *Closing potential claims without assertion.* If the RJA determines that there is no tort liability or possible recovery from an insurer or workers' compensation fund, or that the potential recovery is too small to be worth pursuing, he or she will dispose of the notification without asserting a claim. If a potential claim file was opened, claims personnel will annotate the basis for closing the potential claim on the chronology sheet. If an MTF provided the notification, claims personnel will return the notification with a dated and signed notation, "Per RJA, no third party recovery."

(e) *Asserting demands.* If there is a legal and factual basis for the Government to recover, claims personnel will assert a demand against each tortfeasor and insurer. Claims personnel should place tortfeasors and insurers on written notice of the Government's right to recover even if the injured party's attorney enters into a representation agreement (see § 536.226(b)).

(1) *Automobile case—tort liability.* If care was wholly or partly provided in an MTF on or after 5 November 1990, the claims office will assert demands against the tortfeasor and his insurer citing both the FMCRA and 10 U.S.C. 1095. If care was provided in a civilian hospital or was provided before 5 November 1990, the office will only cite the FMCRA as a basis for recovery.

(2) *Automobile cases—no tort liability.* If care was wholly or partly provided in an MTF on or after 5 November 1990, the claims office will assert demands against the injured party's Personal Injury Protection (PIP), medical payments, or no-fault insurance citing 10 U.S.C. 1095. If care was provided in a civilian hospital or was provided before 5 November 1990, the office will cite applicable state insurance law recognizing the United States as a third party beneficiary of an injured party's automobile insurance.

(3) *Automobile cases—multiple sources of recovery.* If the claims office can recover from the tortfeasor's automobile liability and from the injured party's non-liability coverage, the claims office should put both insurers on notice of the claim and

should first attempt to collect from the no-fault insurer. If the tortfeasor is an uninsured motorist and the injured party has uninsured/underinsured motorists' coverage, the claims office should attempt to recover from the injured party's insurer while following the procedures in § 536.228(a). See § 536.227(e) if the injured party has health benefits insurance.

(4) *Special rules applicable to CHAMPUS "primary payers."* Pursuant to 10 U.S.C. 1079(j)(1) and 1086(g), workers' compensation and the injured party's no-fault, PIP, medical payments, and uninsured/underinsured motorist's coverage are considered "primary" to CHAMPUS. Before the fiscal intermediary pays the injured party's medical bills and notifies the claims office to assert a claim against the tortfeasor, the fiscal intermediary is required to verify that these "primary payers" have paid.

(i) If the fiscal intermediary overlooks such coverage, the claims office will immediately assert a demand against the injured party's insurer (or the workers' compensation fund) citing 10 U.S.C. 1079(j)(1) in addition to other sources of authority. If the insurer has already disbursed the policy limits to the injured party, the claims office will request repayment from the injured party. The claims office will return money recovered in this manner to CHAMPUS (see § 536.231(d)(3)).

(ii) If the injured party or the injured party's insurer decline to pay and the claims office does not recover the full amount asserted from the tortfeasor's liability insurer, the claims office will forward the file to USARCS, which will refer the matter to the OCHAMPUS General Counsel. In this instance, the claims office will not waive or compromise any portion of the Government's claim because of undue hardship to the injured party without the approval of Chief, Personnel Claims and Recovery Division, USARCS.

(5) *On-the-job injuries.* In states that recognize the United States as a beneficiary of state workers' compensation systems, the claims office will present a claim to the appropriate office.

(6) *Other injuries.* Other instances giving rise to third party liability include gas explosions, malpractice by civilian physicians, slip-and-fall incidents, and products liability cases. Claims offices will assert demands against the tortfeasor and his insurer citing the FMCRA.

(f) *Determination of the amount asserted*—(1) *MTF costs.* Recovery for MTF care is presently based upon multiple "clinical group" per diem inpatient rates and a single per visit outpatient rate established by the Office of Management and Budget (OMB). Claims personnel should obtain a billing from each MTF. The RJA should, however, obtain information from the MTF registrar and adjust the amount asserted if it appears that the billings include inpatient days where the injured party was retained in the MTF for administrative purposes rather than medical needs.

(2) *CHAMPUS costs.* Recovery for inpatient care provided in civilian hospitals and paid through CHAMPUS is based upon the CHAMPUS "Diagnosis Related Group" (DRG) rates, regardless of the "actual" costs. Rates for outpatient care are based on the CHAMPUS "allowable charge" for that medical service. Claims offices should assert for the amount that CHAMPUS paid even though this can sometimes exceed the amount that the civilian hospital billed.

(3) *Ambulance services.* Ambulance and air ambulance services provided to soldiers, family members and retirees are "medical costs" within the meaning of the FMCRA and 10 U.S.C. 1095, but they are not included in the OMB rates. Claims offices should try to obtain a specific breakdown of costs from the MTF or the unit providing the services and include these in the amount asserted.

(4) *Burial expenses.* If a soldier dies from injuries received and is buried at Government expense, the installation Mortuary Affairs Office completes DD Form 2063 and itemizes expense data on this form. While burial expenses are not "medical care" within the meaning of the FMCRA or 10 U.S.C. 1095, many insurance policies provide for the payment of such expenses. Claims offices may assert a demand for burial expenses incurred by the Government if the insurance contract provides for payment of such expenses and state law recognizes the United States as a third party beneficiary of the contract. Claims personnel should, however, be extra sensitive to the possibility that the insurance proceeds might be inadequate and should consider waiving or compromising the Government's claim in appropriate cases to avoid undue hardship to the deceased injured party's next of kin.

**§ 536.226 Relations with the injured party.**

(a) Claims personnel will advise the injured party and/or his attorney that—

(1) The United States has a right to recover the reasonable value of medical care that has been furnished or will be furnished in the future.

(2) The injured party is required to cooperate with the United States by providing a complete statement of the facts and circumstances surrounding the injury, information about any legal action brought against any prospective defendant, and information about and copies of any insurance policies.

(3) The injured party should not execute a release or settle any claims without notifying the RJA.

(4) The injured party may consult with a legal assistance attorney if he or she is otherwise entitled to legal assistance.

(b) Claims personnel should attempt to coordinate action to collect the claim of the United States with the injured party's action to collect his or her own claim against a tortfeasor or insurer.

(1) The RJA may enter into a written agreement with the injured party's attorney to assert the Government's claim and to include it as an item of special damages if the injured party sues. The agreement must state that the Government will not pay counsel fees, and that the attorney will not compute his fee based on the Government's portion of any recovery. The agreement must also state that the Government must be consulted regarding any potential compromise and must agree to any settlement.

(2) The RJA should coordinate with the injured party's attorney to ensure that any request for compromise or waiver of the Government's claim is considered as far in advance of settlement as is practical.

(3) The RJA may arrange to make local witnesses available for the injured party's attorney. With approval from USARCS, the RJA may arrange to make other Army witnesses available for the injured party's attorney if it is in the Government's best interests to do so. Any such request must be submitted as far in advance as practical. The appearance of present and former DA military and civilian personnel as witnesses is governed by AR 27–40, chapter 7.

(4) The RJA should immediately terminate a representation agreement and independently pursue the Government's right to recover if the injured party's interests conflict with the Government's interests, or if the injured party's attorney fails to keep the RJA informed of developments or otherwise acts in a manner inconsistent with representing the Government's interest.

(c) If the injured party or his attorney fails to cooperate with the claims office, the RJA is authorized to direct the MTF personnel to withhold billing information and should vigorously

pursue the Government's right to recover. In addition, as outlined in 32 CFR 537.23, the RJA is authorized to direct the MTF to withhold release of medical records until the injured party provides the statement and other information required by § 536.226(a)(2); the RJA may not, however, direct the MTF to withhold medical records if the injured party's attorney merely refuses to enter into a representation agreement. In appropriate cases, the claims office should intervene in pending litigation.

(d) If the injured party's attorney improperly withholds or disburses money collected on behalf of the Government, the RJA should immediately initiate action to recover the money owed through litigation or through State disciplinary proceedings after appropriate coordination in accordance with AR 27–40 and AR 27–1.

(e) Claims personnel may obtain an assignment from the injured party or his attorney for the reasonable value of the care that the United States provided if this will facilitate collection. The absence of an assignment does not affect the Government's independent right under the FMCRA, however, and an assignment is normally not necessary.

**§ 536.227 The MTF Third Party Recovery Program (TPCP).**

DOD Claims offices and MTFs manage complementary programs to recover for medical care furnished at DOD expense. Pursuant to a Memorandum of Agreement (MOA) between The Judge Advocate General and The Surgeon General and understandings with Navy and Air Force authorities, claims offices and MTFs support each other's recovery programs.

(a) As provided in the MOA, claims offices will recover from automobile insurers, while MTFs will recover from health benefits and medicare supplemental insurance.

(b) As provided in the MOA, MTFs will obtain insurance and other relevant information from persons receiving inpatient and outpatient treatment for injuries resulting from an accident. MTF personnel will also screen emergency room logs, clinic records, and patient admission information to identify accident cases. MTFs will refer these cases to claims offices in a timely manner, assist claims offices in obtaining medical records and cost computations, and route requests for medical records from injured parties and attorneys through the RJA.

(c) In return, claims offices will notify the MTFs of the final disposition of cases referred, deposit money recovered under 10 U.S.C. 1095 to the operations and maintenance account of the MTF that provided the care (see § 536.231(d)), and report the amounts deposited to an MTF's account on a monthly basis.

(d) As provided in the MOA, the head of each claims office may enter into a local Memorandum of Agreement with his or her supporting Army MTF commander. Such agreements should cover procedures, the degree of staffing each office will provide, and time frames for providing records or information. Such agreements may also provide for the MTF to assist the claims office's medical care recovery effort, either by giving back money deposited by the claims office into the MTF's Operations & Maintenance fund to the claims office, or by providing personnel or other support. Any personnel provided or money returned to the claims office under such an agreement will only be used to support affirmative claims collection efforts.

(e) If care was wholly or partly provided in an MTF on or after 5 November 1990 and recovery is possible from both a health benefits insurer and an automobile insurer, the MTF will first attempt to collect from the health insurer. If the MTF cannot recover the full value of the Government's claim from the health insurer, the MTF will forward the claim file to the installation claims office for collection from the automobile insurer.

**Recovering and Depositing on Claims**

**§ 536.227 Post demand procedures.**

(a) *Uninsured Motorists.* If the tortfeasor is an uninsured motorist, affirmative claims personnel will assert a demand against the tortfeasor, and will request suspension of the tortfeasor's driving and registration privileges under a State financial responsibility law if the tortfeasor does not pay promptly. If collection from the tortfeasor is not feasible, claims personnel will pursue recovery from any State uninsured motorist's fund or, on a medical care claim, from the injured party's uninsured motorist's coverage.

(b) *Periodic review of pending claims.* Whether or not the injured party's attorney has agreed to assert the Government's claim, claims personnel will review the status of pending claims every 60 days and take follow-up action as appropriate. Claims personnel should periodically contact the injured party's attorney to determine the status of pending cases, and should call or send follow-up letters to an insurer or tortfeasor who fails to respond to a demand or provides an unacceptable response. Follow-up action should be documented on the claims chronology sheet.

(c) *Adjusting the amount asserted.* The RJA should adjust the amount asserted on a claim as further treatment is provided. The RJA should delay settlement if it appears that extensive treatment is necessary or should consider this in negotiating a settlement.

(d) *Forwarding claims to higher authorities.* The RJA or head of a claims office will terminate action or will act on requests for waiver or offers to compromise that are within his or her settlement authority (see § 536.216). If a higher settlement authority must act on the claim, the RJA will forward a completed worksheet to the area claims office (if that office has authority to take action) or to USARCS as appropriate. When time is of the essence in securing a settlement, an RJA may contact USARCS telephonically for authorization to waive or compromise a claim. Prior to the expiration of the statute of limitations, the RJA should contact USARCS for guidance on disposing of any claim which cannot be recovered in full, compromised, terminated or litigated.

**§ 536.229 Settling affirmative claims.**

Claims personnel will reflect the basis for any settlements other than payment in full in the claims file. Note that under some circumstances, settlement authority may not waive or compromise a claim that he or she would normally have authority to act on (see § 536.216(g)).

(a) *Payment in full.* A settlement authority may settle a medical care or property damage claim by recovering the full amount the Government's claim as a lump sum, through installment payments, or as a repair in kind on a property damage claim. An offer for the full amount of available insurance would not "pay in full" a claim asserted for a greater amount, and the RJA would have to follow compromise procedures.

(b) *Compromise.* (1) If there are difficulties in recovering on a medical care or property damage claim (as defined by part 103 of the Federal Claims Collection Standards), a settlement authority may accept less than the amount asserted from a tortfeasor or insurer for the convenience of the government. Acceptable bases for compromise for the convenience of the government include inability of the tortfeasor to pay, insufficient insurance, probability that the government will be unable to prove its case, or collection costs which are not commensurate with the amount being compromised.

(2) If the injured party or the injured party's attorney requests waiver or

compromise of a medical care claim, a settlement authority may accept an amount less than the amount asserted to equitably apportion the available funds and avoid undue hardship to the injured party. To do so, the settlement authority must consider the fair value of the injured party's claim, the future value of care provided by the United States, and the potential recovery available. In evaluating a request, the settlement authority may consider an offer by the injured party's attorney to reduce his or her fee, but should not make this a condition for granting a request. Prior to approval of any compromise based on undue hardship, the injured party must provide the following information:

(i) Detailed information on what funds are available for recovery.

(ii) Reasonable value of the injured party's claim for permanent injury, pain and suffering, decreased earning power, and any other items of special damages.

(iii) Military, VA, and Social Security disability, and any other Government benefits accruing to the injured party.

(iv) Probability and amount of future medical expenses of the Government and the injured party.

(v) Present and prospective assets, income, and obligations of the injured party and those dependent on him or her.

(vi) A statement regarding the financial condition of the debtor.

(c) *Termination of collection action.* If there are difficulties in recovering on a medical care or property damage claim (as defined by 4 CFR part 104.3 of the Federal Claims Collection Standards), a settlement authority may close the claim without recovery for the convenience of the Government. Acceptable bases for terminating collection action include lack of legal merit to the claim, lack of evidence to substantiate the claim, costs of recovery which will exceed the amount recoverable, or inability to locate the debtor in instances where the likelihood of collection is too remote to justify retention of the file.

(d) *Waiver.* If the injured party or the injured party's attorney requests waiver or compromise of the government's claim, a settlement authority may close a medical care claim without recovery where collection of any part of the government's claim will result in undue hardship to the injured party. Prior to granting a request for waiver, the settlement authority will consider the factors outlined in § 536.229(b)(2) and require the injured party to provide the items listed in § 536.229(b)(2) (i) through (vii). Property damage claims cannot be "waived."

**§ 536.230 Litigation.**

If a tortfeasor or insurer refuses to settle, or if an injured party's attorney improperly withholds funds, the RJA must consider litigation to protect the interests of the United States. Litigation is particularly appropriate if a particular insurer consistently refuses to settle claims, or if the Government's interests are not adequately represented on a large claim.

(a) RJA's must maintain close contact with local U.S. Attorney's offices to ensure that these offices are willing to initiate litigation on cases. RJA's are encouraged to obtain appointments as Special Assistant U.S. Attorneys.

(b) In order to directly initiate or intervene in litigation, an RJA must prepare a litigation report and formally refer the case through the Affirmative Claims Branch, USARCS and the Litigation Division, OTJAG (as required by AR 27–40, chapter 5) to the U.S. Attorney. While the RJA should attempt to initiate litigation well before the expiration of the statute of limitations, the RJA may contact USARCS telephonically if statute of limitations problems necessitate quick action on a case. The RJA should also contact USARCS if a U.S. Attorney is reluctant to pursue an important case. An injured party's attorney may represent the Government's interest in litigation without any special coordination.

(c) The Department of Justice requires all cases involving damage to government property of $200,000 and under to go through the Department of Justice Central Intake Facility in Silver Spring, Maryland, before going to a United States attorney for litigation. Forward the agency referral package cover sheet and all documentation normally provided to the U.S. Attorney on all such cases to USARCS, which in turn will forward them to the Central Intake Facility through the Litigation Division, Office of the Judge Advocate General, as appropriate.

**§ 536.231 Administrative matters.**

(a) *Receipts.* The RJA may provide a receipt for payment.

(b) *Releases.* The RJA may execute a release acknowledging that the Government has received payment in full of the amount asserted or compromise amount agreed upon, or the final installment payment; and should try to use a release similar to the release printed as Figure 9–1, DA Pam 27–162. The RJA may not, however, execute any kind of indemnity agreement, nor may the RJA execute a release which prejudices the Government's right to recover on other claims arising out of the same incident without the approval of the Chief, Personnel Claims and Recovery Division, USARCS. In addition, the RJA may not execute a release that purports to release any claim that the injured party may have other than for medical care furnished or to be furnished by the United States. The RJA will not execute a release if the Government's claim is waived or terminated.

(c) *Depositing property damage recovery*—(1) *For damage to appropriated fund property.* Monies recovered for damage to appropriated fund property will be deposited to Account 21R3019 (Recoveries for Government Property Lost or Damaged).

(2) *For damage to NAFI property.* Monies recovered for damage to NAFI property will be returned to the NAFI. If the NAFI no longer exists, forward the money to HQDA (DAAG-NAF), Alexandria, VA 22331–0321. Checks should be made out to the NAFI, or, if it no longer exists, to the Army Morale, Welfare, and Recreation Fund.

(3) *For damage to Army Stock Fund or Defense Business Operations Fund property.* Monies recovered for damage to property belonging to one of these funds will be returned to that fund unless the fund has charged the cost of repair or replacement to an appropriated fund account. The Defense Business Operations Fund replaced the Army Industrial Fund.

(d) *Depositing medical care recovery*—(1) *To an MTF account.* CONUS and OCONUS claims offices and command claims services will deposit money recovered from an automobile insurer for medical care provided in an MTF on or after 5 November 1990 in the Operations & Maintenance account of the Army, Navy or Air Force MTF that provided the care. Offices will deposit money recovered from all types of automobile insurance, including liability insurance, to MTF accounts.

(2) *To the General Treasury.* Money recovered directly from tortfeasors, from workers' compensation funds, from insurance other than automobile insurance (such as homeowner's insurance), from automobile insurers for care provided in an MTF prior to 5 November 1990, or from automobile insurers for care provided in a civilian hospital will be deposited in the Miscellaneous Receipts Account, 21R3210.

(3) *Apportioning medical care recovery between accounts.* Only money recovered under the provisions of 10 U.S.C. 1095 can be deposited into an MTF account. Claims offices will often have to apportion money recovered among different accounts.

(i) Apportioning money between MTF accounts and the General Treasury. Deposit money recovered from an automobile insurer for care provided prior to 5 November 1990 or provided in a civilian hospital to the General Treasury. Deposit money recovered for care provided in an MTF after that date to the MTF's account. If the amount recovered is less than the amount asserted, deposit money to the MTF's account first, and deposit any remaining money to the General Treasury.

(ii) Apportioning money between two or more MTF accounts. If care was provided by two or more MTF's on or after 5 November 1990 and the claims office recovers less than the amount asserted, the claims office should give each MTF a pro rata share of the money recovered. For example, if MTF1 provided $2,000 worth of care and MTF2 provided $1,000 worth of care, the claims office will deposit $800 of a $1,200 recovery to MTF1's account and the remaining $400 to MTF2's account.

(e) *Fiscal Integrity.* Field claims offices must reconcile the property damage and medical care recovery accounts with their servicing finance and accounting offices. Field claims offices must ensure that their deposits have been credited to the proper accounts at least on a quarterly basis, and all accounts must be reconciled at the end of the fiscal year.

## Subpart N—Claims Office Administration

### Records and File Management

#### § 536.232 Records.

Unless otherwise required by this part, claims JAs and claims attorneys charged with the responsibility for claims administration will maintain only such current and temporary records as are required for the administration of claims activities and for the preparation of prescribed reports. Basic records for each claims office are—

(a) *DA Form 1667 (Claims Journal (Personnel) (Tort) (Affirmative) Claims).* Journals will be individually maintained for personnel claims, for affirmative claims, and for tort and special claims, corresponding to the automated claims data management programs for such claims, using the April 1988 version of this form. Each event requiring entry in the journal will be recorded immediately upon receipt of information as to its occurrence. Use of the journal for personnel claims is optional, although modified use is highly recommended.

(b) *Automated claims data base.* The automated claims data base will be used for all claims opened in fiscal year 1988 or later, and earlier year claims if they involve expenditures of funds in fiscal year 1988 or later, as follows:

(1) Tort and Special Claims Management data base (all offices);

(2) Personnel Claims Management data base (all offices except COE claims offices).

(3) Affirmative Claims Management data base (all offices except COE claims offices).

(c) *Investigative files.* A claims office will maintain separate investigative files on potentially compensable events (PCE) for every incident which it (or a unit claims officer) has investigated, or has received a copy of a report of incident or report of investigation from a unit claims officer or any other source. Similar files will be maintained for incidents investigated by a claims office or other Army official that might give rise to an affirmative claim in favor of the Army. The investigative file will be merged into a claims file when a claim is filed or asserted. Investigative files not otherwise merged into a claims file will be retained until transferred to another Army claims office or until the time for filing a claim has expired.

#### § 536.233 Arrangement of claims files.

Instructions on the arrangement of claims files are found in § 536.196 and in DA Pam 27–162. Every file for a claim against the United States must ultimately contain the following:

(a) For files processed under the automated claims data management system, a printout (i.e., "paper screen") of the automated data pertaining to that claim.

(b) If the claim has been paid in whole or in part, a copy of the settlement agreement, if any, and the certified copy of the paid voucher (comeback copy from the finance and disbursing office).

(c) The action or recommendation.

(d) The claim (initial and any amendment).

(e) The report of claims officer, with exhibits.

#### § 536.234 Disposition of claims files.

(a) The Commander, USARCS, is the proper authority for post settlement review of claims against the United States. Claims having the following file numbers under AR 25–400–2 will be forwarded to USARCS (subject to the provisions of b and c below) for disposition under that regulation: 27–20a, 27–20g, 27–20h, 27–20i, 27–20j, or 27–20q. Claims having other 27–20 file numbers will be disposed locally according to the instructions in AR 25–400–2.

(b) Files of completed tort claims will not be forwarded to the Commander, USARCS prior to the expiration of any appeal period or the 6-month period for filing suit, as applicable. The file of a tort claim in which an award that is final is not accepted by the claimant, within a reasonable time, will also be forwarded.

(c) For personnel claims involving recovery action, claims files will be assembled and processed for local recovery action or forwarded for centralized recovery action in accordance with DA Pam 27–162, chapter 3, and §§ 536.195 and 536.196. After completion of final recovery action by field claims offices or command claims services such files will be forwarded to USARCS for retirement.

(d) Files will be administratively closed as abandoned or withdrawn and forwarded to the Commander, USARCS, as provided herein.

(1) *Personnel claims.* Claims under subpart K will be administratively closed as abandoned in the following situations:

(i) The claimant affirmatively withdraws or abandons the claim prior to adjudication. Such files will contain evidence of the claimant's intention to do so, such as a letter from the claimant or a memorandum of a telephone conversation with the claimant.

(ii) The claimant cannot be located to be paid or, if the claim is not fully substantiated, to have his or her intentions with regard to the claim ascertained (but, see paragraph (d)(1)(iv) of this section).

(iii) For other reasons, final action on the claim cannot be taken.

(iv) When a claimant has neither affirmatively abandoned nor fully substantiated a claim cognizable under subpart K, he or she should be directed by certified mail to provide the required substantiation within a specified period, usually 30 days. If correspondence is returned as undeliverable, and the claimant is an active duty service member, a current military address can usually be obtained from the Commander, U.S. Army Enlisted Records and Evaluation Center, Army Worldwide Locator Service, ATTN: PCRE–RF, Fort Benjamin Harrison, IN 46249–5301. If the claimant fails to respond, to the extent that the claim is substantiated and meritorious it should be paid; otherwise, it should be disapproved.

(2) *Tort claims.* Each file will contain evidence of claimant's intention to withdraw or abandon the claim, such as a letter or a memorandum for record of a telephone conversation with claimant.

(i) Before apparently abandoned claims are forwarded to USARCS, a certified letter should be sent to the

claimant requesting his/her intentions within a specified period, usually 30 days. If no reply is received within a reasonable time, usually 30 days, the files may be closed and forwarded to USARCS, except as follows:

(ii) Tort claims under subparts D, E and F. Additionally, a paragraph of the letter should state that failure to respond will result in the presumption that the claim is abandoned. Further, it should be stated that if the claimant is dissatisfied with the action taken, the claimant may file suit in an appropriate United States District Court no later than six months from the date of mailing of the letter, or the claimant's remedy will be forever barred.

(iii) In tort claims under subpart C, the last paragraph should advise the claimant that failure to respond will result in the presumption that the claim is abandoned, and that if the claimant is dissatisfied with the action taken, the claimant has a right to appeal the action for a review and final decision. Further, it should be stated that the claimant only has 60 days to submit such an appeal.

(iv) Only after each of the above actions has been completed, may a tort claim be considered to be abandoned, and be forwarded to USARCS for retirement. If correspondence to a claimant is returned as undelivered, and the claimant is an active duty service member, a current military address can usually be obtained from the Commander, U.S. Army Enlisted Records and Evaluation Center, Army Worldwide Locator Service, ATTN: PCRE-RF, Fort Benjamin Harrison, IN 46249–5301.

**§ 536.235 Retrieval of claims files.**

(a) Field claims offices will occasionally have need of a file that has been sent to USARCS for centralized recovery or retirement (for example, action on a "late" reconsideration request). When requesting the return of a file from USARCS (either in writing or telephonically), the requesting office must provide—

(1) The claim number.

(2) The claimant's name.

(3) The date the file was forwarded to USARCS.

(4) The name of the TGBL carrier (if the claim was a household goods or hold baggage shipment claim).

(5) Whether the file was forwarded for retirement or centralized recovery.

(6) The reason the file is being requested.

(b) If USARCS has already acted on a request for reconsideration on a personnel claim, the file will not be returned to a field office for action on a second request for reconsideration. In such cases, the request will be sent to USARCS for action.

**§ 536.236 Certified and registered mail.**

Correspondence to claimants and/or their attorneys denying or making final offers in tort claims under subparts C, D, E, F, G, H, and L or the transmittal of an abandonment notice will be accomplished by certified or registered mail, return receipt requested. The return receipt (green card), upon its return to the claims office, will be retained as a part of the claims file as proof of receipt by the claimant or other addressee.

**§ 536.237 Maintenance of claims files.**

(a) The contents of each claim file for claims against the United States will be placed in a standard 9¼ inch by 11¾ inch manila folder . The name of the claimant, exactly as entered into the automated claims management data base, will be placed on the top-left portion of the file folder. The complete nine-digit computer-generated claim number displayed in the automated database will be placed on the extreme top right-hand side of the folder. The fiscal year, office code, and claim sequence number will be separated by a dash mark (example, "88–011–0079"). Both name and claim file number entries on the manila file folder will be printed legibly in blue-black ink. The claim file should be stapled together before inserting in the file folder; however, the file need only be placed in the folder without stapling to the file folder.

(b) Investigative files will also be maintained in manila folders. The date of the incident and general descriptive data (for example, "1 Jul 86/ auto accident (1st and Elm, Smallville)" or "24 Sep 86/ heart operation (Jones, John M.)") will be placed on the top-left portion of the file folder.

(c) AR 25–400–2 requires labeling of file folders and containers with specific information. In complying therewith, the following guidance is provided:

(1) Only the "dummy" or "lead" folder will contain the disposition instructions required by AR 25–400–2, for files that have a common disposition.

(2) When labeling individual file folders, only the information required by AR 25–400–2 will be typed on the label. The label will be placed on the top center portion of the folder. Under no circumstances will the information concerning the claim (see paragraph (a) of this section) be placed on this label.

**Monthly Claims Reporting System**

**§ 536.238 General.**

(a) The Personnel Claims Management Program, the Affirmative Claims Management Program, and the Tort and Special Claims Management Program are the automated programs which generate a monthly status report on claims against the United States and recovery actions. Specific instructions pertaining to the USARCS Claims Automation Program are contained in DA Pam 27–162, chapter 1 and in documentation provided with the automation software.

(b) The data contained in the USARCS Claims Automation Program and the monthly claims office status reports generated by the automation software provide the data necessary to make sound management decisions by claims officers, by heads of area claims offices, by SJAs responsible for OCONUS command claims services, and by the Commander, USARCS. The system provides a uniform method of assignment of claim file numbers to permit identification and retrieval of individual claim files, identifies delay in claims processing, and permits worldwide management control of all claims against the Government. The automated monthly reports forwarded to USARCS provide the data base used for the preparation of claims budgetary status reports and periodic budget estimates to the USAFAC as well as to the Office of the Assistant Secretary of the Army (Financial Management). It is the responsibility of all claims office personnel to ensure that automated claims records are complete and accurate.

(c) This section does not apply to the reporting of reimbursement obligations to foreign countries pursuant to the NATO-SOFA or other similar treaties or agreements.

(d) The Commander, USARCS, will furnish software and documentation for the Personnel Claims Management Program, the Affirmative Claims Management Program, and the Tort and Special Claims Management Program, with updated versions as required. These are the only programs authorized for recording and reporting claims in the Army Claims System. Local modification of these programs is not authorized.

**§ 536.239 Reporting requirements.**

The head of each area claims office and command claims service will ensure that a monthly computer-generated claims report is prepared for each claims office with an office code within his or her area of responsibility

and for each Foreign Claims Commission using the automation programs provided by USARCS. The report(s) (tort claims only) and diskettes containing current claims data base(s) (for all programs) will be posted to USARCS by the fifth calendar day of the month. In addition, a copy of any archive disk prepared during the reporting period will be forwarded for processing. Whenever possible, the data should be sent using a modem or other electronic data transfer system. Claims offices under the jurisdiction of a command claims service will forward their report(s) and diskettes through the command claims service and will comply with any additional reporting requirements of the command claims service. Diskettes must be marked with the office name, the office code, the type of claim record, the disk sequence number, the month and year, and the data base file name(s) contained in the diskette (for example, Fort Blank, 001, Tort Claims, 1 of 1, Mar 89, T9000103.1DB). Detailed instructions on the preparation of the monthly automated claims report and claims data diskettes are contained in DA Pam 27–162, chapter 12 and program documentation. If there are no changes from the previous month in the Affirmative Claims reports, the Personnel Claims report, or the Tort and Special Claims report, a negative report will be submitted within the stated time guidelines.

**§ 536.240 Error reports.**

USARCS will provide field claims offices with monthly error reports listing claims records that cannot be loaded into the USARCS data base due to data entry errors or omissions. Errors listed on the error reports must be corrected as soon as possible; resubmission of the corrected claims records will occur at the time of the next regular monthly reporting cycle.

**§ 536.241 Preparation.**

(a) *Reporting.* Quarterly, each command claims service or office authorized to assert affirmative claims will submit a copy of the "Previous Three Months" report generated by the Affirmative Claims Management Program to USARCS, ATTN: JACS-PCA. Command claims services and offices will identify these reports by quarter and fiscal year (i.e. "1st Qtr, FY 93") and forward them so that they arrive not later than the 7th calendar day of every quarter (i.e., 7 January, 7 April, 7 July, and 7 October each year). Offices authorized to assert affirmative claims which have no affirmative claims activity in a given quarter will forward negative reports.

(b) *Routing.* Area claims offices and claims processing offices will forward these reports directly to USARCS through the senior Judge Advocate in the office, for example, the SJA. Claims processing offices will forward an additional copy to their area claims offices.

(c) *Special preparation instructions.* Offices may manually correct any errors in the computer generated report using the following guidelines:

(1) Claims first asserted in an indefinite amount will be reported in the period in which a reasonably accurate figure can first be determined.

(2) When reporting the number of claims collected during the reporting period, only the first collection will be counted for claims in which payments are received in installments.

(3) When reporting the total dollar amount collected during the reporting period, include any installments. The dollar value of any replacement or property repair should be included in the total with the replacement or repair value portion noted.

**Management of Claims Expenditure Allowance (CEA)**

**§ 536.242 General.**

Each claims settlement or approval authority which is furnished a CEA by the USARCS budget office is responsible for managing that CEA. This includes knowing at all times how much of the CEA has been obligated, the remaining balance and a monthly assessment of whether the balance will cover claims obligation needs in the local office for the remainder of the current fiscal year.

**§ 536.243 CEA reporting requirement.**

(a) Each CONUS claims office having a CEA and command claims services will submit, to arrive not later than the 7th calendar day of every month, a report to USARCS, ATTN: JACS-BI, that includes the following:

(1) The office code of the reporting office.

(2) Dollars obligated for personnel and tort claims during the prior month and the number of personnel and tort claims paid.

(3) Dollars obligated for personnel and tort claims fiscal year to date (through the end of the prior month) and the total number of personnel and tort claims paid fiscal year to date.

(4) Dollars deposited during the prior month.

**Note:** Ensure that the report of dollars deposited for the month and year to date includes only funds deposited in one of the claims appropriation accounts. Do not include money recovered through the affirmative claims program and deposited with miscellaneous receipts of the U.S. Treasury.

(5) Dollars deposited year to date through prior month. (See note at paragraph (a) (4) of this section.)

(b) The report submitted at the beginning of August every year will also include the following:

(1) The total CEA furnished to that office up to that time (initial CEA plus or minus any changes).

(2) The CEA balance.

(3) The amount the office expects to be able to obligate in the remaining 2 months of the fiscal year if sufficient funds are available.

(4) The expected surplus or shortfall.

(5) A proposed CEA for the next fiscal year and the rationale for any unusual increases.

(c) Reports may be submitted telephonically or by facsimile.

**§ 536.244 Solatia payment.**

Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in overseas commands (see DA Pam 27–162, chap 8). Such payments are not to be made from the claims CEA. These payments are made from local operation and maintenance funds pursuant to directives established by the appropriate commander for the country concerned. This applies even where a command claims service is directed to administer the command's solatia program.

**Appendix A to Part 536—References**

Publications and forms referenced in this appendix may be obtained from the National Technical Information Services, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

**Required Publications**

A required publication is a publication that the reader must have to understand the subject.

AR 15–6
Procedures for Investigating Officers and Boards of Officers.

AR 27–40
Litigation.

DA Pam 27–162
Claims.

DOD 4500.34–R
Personal Property Traffic Management Regulation.

**Related Publications**

A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.

AFARS
Army Federal Acquisition Regulation Supplement

AR 1–75

Administrative and Logistical Support of Oversea Security Assistance Organizations
AR 10–72
Field Operating Agencies of the Judge Advocate General
AR 25–400–2
The Modern Army Recordkeeping System (MARKS)
AR 27–3
Legal Assistance
AR 27–60
Patents, Inventions, and Copyrights
AR 37–100
Account/Code Structure
AR 37–103
Disbursing Operations for Finance and Accounting Offices
AR 37–104–3
Military Pay and Allowances Procedures: Joint Uniform Military Pay System Army (JUMP-ARMY)
AR 37–104–10
Military Pay and Allowance Procedures for Reserve Components of the Army
AR 37–107
Accounts Payable
AR 37–108
General Accounting and Reporting for Finance and Accounting Offices
AR 40–1
Composition, Mission, and Functions of the Army Medical Department
AR 40–3
Medical, Dental, and Veterinary Care
AR 40–16
Special Notification—Injury Cases
AR 40–66
Medical Record and Quality Assurance Administration
AR 40–121
Uniformed Services Health Benefits Program
AR 55–19
Marine Casualties
AR 55–80
Highways for National Defense
AR 60–20
Army and Air Force Exchange Service (AAFES) Operating Policies
AR 190–9
Military Absentee and Deserter Apprehension Program
AR 190–22
Searches, Seizures and Disposition of Property
AR 215–1
Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities
AR 215–2
The Management and Operation of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities
AR 335–15
Management Information Control System
AR 340–17
Release of Information and Records from Army Files
AR 340–21
The Army Privacy Program
AR 405–15
Real Estate Claims Founded Upon Contract
AR 600–8–1
Army Casualty and Memorial Affairs and Line of Duty Investigations
AR 608–10
Child Development Services
AR 735–5
Basic Policies and Procedures for Property Accounting
DODD 5220.6
Defense Industrial Personnel Security Clearance Review Program
DODD 5515.3
Settlement of Claims Under 10 U.S.C. 2733 and 2743, as amended
DODD 5515.8
Single Service Assignment of Responsibility for Processing of Claims
DODD 5515.10
Settlement and Payment of Claims Under the Military Personnel and Civilian Employee Claims Act of 1964.
DODD 6000.6
Medical Malpractice Claims Against Military and Civilian Personnel of the Armed Forces
DODD 7045.13
DOD Credit Management and Debt Collection Program
DOD Manual 4525.6–M
DOD Postal Manual
FAR
Federal Acquisition Regulation
JTR
Joint Travel Regulations

**Prescribed Forms**

DA Form 1208
Report Of Claims Officer.
DA Form 1666
Claims Settlement Agreement.
DA Form 1667
Claims Journal for (Personnel) (Tort) (Affirmative) Claims.
DA Form 1668
Small Claims Certificate.
DA Form 2938–R
Affirmative Claims Report.
DD Form 1840
Notice of Loss or Damage.
DD Form 1840R
Notice of Loss or Damage.
DD Form 1841
Government Inspection Report.
DD Form 1842
Claim for Loss of or Damage to Personal Property Incident to Service.
DD Form 1843
Demand on Carrier/Contractor.
DD Form 1844
List of Property and Claims Analysis Chart.
DD Form 2526
Case Abstract for Malpractice Claims.
Standard Form 95
Claims for Damage, Injury or Death.
Standard Form 1034
Public Voucher for Purchases and Services Other Than Personal.
Standard Form 1145
Voucher for Payment Under Federal Tort Claims Act.

**Referenced Forms**

DA Form 1863–1
Services and/or Supplies Provided by Civilian Hospitals
DA Form 2135–R
Receipt for Payment (LRA)
DA Form 2631–R
Medical Care-Third Party Liability Notification (LRA)
DA Form 2985
Admission and Coding Information
DA Form 3154
MSA Invoice and Receipt
DD Form 619–1
Statement of Accessorial Services Performed
DD Form 1164
Service Order for Personal Property
DD Form 1348–1
DOD Single Line Item Release/Receipt Document
Standard Form 1049
Public Voucher for Refunds

**Appendix B to Part 536—Glossary**

**Abbreviations**

AAFES
Army-Air Force Exchange Service
ADP
Automated data processing
AFARS
Army Federal Acquisition Regulation Supplement
ALR
American Law Reports
ARNG
Army National Guard
AWOL
Absent without leave
CHAMPUS
Civilian Health and Medical Program of the Uniform Services
CMCHS
Civilian-Military Contingency Hospital System
COE
Chief of Engineers
CONUS
Continental United States
DA
Department of Army
DOD
Department of Defense
FAR
Federal Acquisition Regulation
FCA
Foreign Claims Act
FCC
Family child care
FECA
Federal Employees Compensation Act
FTCA
Federal Tort Claims Act
GAO
Government Accounting Office
GBL
Government bill of lading
GSA
General Services Administration
ITGBL
International through Government bill of lading
JA
Judge advocate
JTR
Joint Travel Regulations
MAAG
Military Assistance and Advisory Group
MACOM
Major Army command
MCA
Military Claims Act
NATO

North Atlantic Treaty Organization
NG
National Guard
NGB
National Guard Bureau
NGCA
National Guard Claims Act
NTS
Nontemporary storage
POV
Privately owned vehicle
PPGBL
Personal property Government bill of lading
RCP
Replacement cost protection
RIMP
Risk management program
RJA
Recovery judge advocate
ROTC
Reserve Officers' Training Corps
SJA
Staff judge advocate
SOFA
Status of Forces Agreement
SPCMCA
Special court-martial convening authority
TAJAG
The Assistant Judge Advocate General
TDA
Table of distribution and allowances
TDY
Temporary duty
TGBL
Through Government bill of lading
TJAG
The Judge Advocate General
UCMJ
Uniform Code of Military Justice
USAFAC
U.S. Army Finance and Accounting Center
USAR
U.S. Army Reserve
USARCS
U.S. Army Claims Service
USAREUR
U.S. Army, Europe
USARSO
U.S. Army South
VA
Department of Veterans Affairs
WESTCOM
U.S. Army Western Command

**Terms**

*Affirmative Claims*

The Government's statutory right to recover money, property, or repayment in kind incurred as a result of property loss, damage, or destruction by any individual, partnership, association, or other legal entity, foreign or domestic, except an instrumentality of the United States. Also, the Government's statutory right to recover the reasonable medical costs expended for hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) incurred under circumstances creating tort liability upon some third person.

*Civilian Employee*

A person whose activities the Government has the right to direct and control, not only as to the result to be accomplished but also as the means used. This includes, but is not limited to, full-time Federal civilian officers and employees. This term should be distinguished from "independent contractor" for whose actions the Government generally is not liable. The decision as to who is a civilian employee is a Federal question determined under Federal, not under local law.

*Claim*

A demand for payment of a specified sum of money (other than the ordinary obligations incurred for services, supplies, or equipment) and, unless otherwise specified in this regulation, in writing and signed by the claimant or a properly designated representative.

*Claim File*

A file containing the report of the claims officer or other report of investigation, supporting documentations, and pertinent correspondence.

*Claim Approval Authority*

Except for claims under chapter 7, 9, and 11 and subject to any limitations found in specific provisions of this regulation, the authority to approve and pay a claim in the amount presented or in a lesser amount upon the execution of a settlement agreement by the claimant. Under chapter 11, the authority of a designated Government agent to adjudicate and pay a claim in a meritorious amount within the monetary limits prescribed in that chapter. A person with approval authority may not disapprove a claim in its entirety or to make a final offer subject to any limitations found in specific provisions of this regulation.

*Claim Settlement Authority*

The authority to approve a claim, deny a claim in its entirety, or make a final offer subject to any limitations found in specific provisions of this regulation.

*Claims Attorney*

A DA or DOD civilian attorney assigned to a judge advocate or legal office who has been designated by the Commander, U.S. Army.

**Claims Service**

*Claims Judge Advocate*

An officer of the Judge Advocate General's Corp designated by a command or staff judge advocate to be in immediate charge of claims activities of the command.

*Claims Officer*

A commissioned officer, warrant officer, or qualified civilian employee detailed by the commander of an installation or unit who is trained or experienced in the investigation of claims.

*Claimant*

An individual, partnership, association, corporation, country, state, territory, or other political subdivision of such country. It does not include the U.S. Government or any of its instrumentalities, except as prescribed by statute. Indian tribes are not proper party claimants but individual Indians can be claimants.

*Combat Activities*

Activities resulting directly or indirectly from action by the enemy, or by the U.S. Armed Forces engaged in, or in immediate preparation for, impending armed conflict.

*Disaster*

A sudden and extraordinary calamity occasioned by activities of the Army, other than combat, resulting in extensive civilian property damage or personal injuries and creating a large number of potential claims.

*Federal Agency*

A Federal agency includes executive departments and independent establishments of the United States and corporations acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

*Final Offer*

An offer of payment by a settlement authority in full and final settlement of a claim which, if not accepted, constitutes a final action for purposes of filing suit under chapter 4 or filing an appeal under chapter 3 or 6, provided such offer is made in writing and meets the other requirements of a final action as set forth in this regulation.

*Government Vehicle*

A vehicle owned or on loan to any agency of the U.S. Government, or privately owned and operated by a member or civilian employee of the Army in the scope of his or her office or employment with the U.S. Government, including vehicles being operated on joint operations of the U.S. Armed Forces.

*Medical Claims Judge Advocate*

A judge advocate assigned to an Army Medical Center, under an agreement between The Judge Advocate General and The Surgeon General, to perform the primary duty of investigating and processing medical malpractice claims.

*Medical Claims Investigator*

A senior legal specialist or qualified civilian assigned to assist a medical claims judge advocate on a full-time basis. A medical claims investigator is authorized to administer oaths under the provisions of Article 136(b)(7), Uniform Code of Military Justice, when performing his or her investigative duties.

*Medical Malpractice Claim*

A claim arising out of substandard or inadequate care of an Army patient.

*Military Personnel*

Members of the Army on active duty for training or inactive duty training as defined in AR 310–25 and 10 U.S.C. 101(22), 101(23), and 101(30). This includes members of the District of Columbia Army National Guard while performing active duty or training under 32 U.S.C. 316, 502, 503, 504, or 505.

*Noncombat Activities*

Authorized activities essentially military in nature, having little parallel in civilian pursuits, and which historically have been considered as furnishing a proper basis for

payment of claims. Examples are practice firing of missiles and weapons, training and field exercises, and maneuvers which include the operation of aircraft and vehicles, use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use.

Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances.

*Personal Property*

Property consisting solely of corporeal personal property, that is, tangible things.

**Kenneth L. Denton,**

*Army Federal Register Liaison Officer.*

[FR Doc. 94–6019 Filed 3–16–94; 8:45 am]

BILLING CODE 3710–08–P

federal register

Thursday
March 17, 1994

# Part III

# Department of Health and Human Services

## Administration on Aging

45 CFR Part 1321

Grants for State and Community Programs on Aging; Proposed Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration on Aging**

**45 CFR Part 1321**

**RIN 6666–1212**

## Grants for State and Community Programs on Aging

**AGENCY:** Department of Health and Human Services (HHS), Administration on Aging (AoA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This Notice of Proposed Rulemaking (NPRM) requests comments from the public on proposed changes to rules concerning grants for State and community programs on aging. These changes are required to clarify and implement Older Americans Act (Act) Sections 305(a)(2)(C), 305(a)(2)(D), 307(b)(1), 307(c), 307(d), and 307(e) as amended by the 1992 amendments to the Act. The Act now requires the Commissioner on Aging to review and approve each State's intrastate formula for the distribution of funds under Title III of the Act, and requires the State to specify the bases and impact of its intrastate funding formula on each Planning and Service Area (PSA) in its State plan.

**DATES:** In order to be considered, comments on this proposed rule must be received on or before May 16, 1994.

**ADDRESSES:** Please address comments to: Edwin Walker, Associate Commissioner, Office of State and Community Programs, Administration on Aging, room 4737, 330 Independence Avenue SW., Washington, DC 20201.

Beginning 14 days after close of the comment period, comments will be available for public inspection in room 4740, 330 Independence Avenue SW., Washington, DC 20201, Monday through Friday between the hours of 9 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** David Bunoski, (202) 260–0669.

**SUPPLEMENTARY INFORMATION:**

### I. Program Background and Purpose

The Older Americans Act was first enacted in 1965 and was amended eleven times between 1965 and 1992. The President signed the Older Americans Act Amendments of 1992 (Pub. L. 102–375) on September 30, 1992.

On February 23, 1993, the Secretary of the Department of Health and Human Services, Donna E. Shalala, pursuant to the authority permitted by section 2 of Reorganization Plan No. 1 of 1953, 42 U.S.C. 3501, and 5 U.S.C. 301, designated the position of Assistant Secretary for Aging to perform the duties and functions of the Commissioner of Aging. The term "Commissioner" will be used in these regulations, however, in order to comport with Public Law 102–375, which retains the title of Commissioner for the head of the Administration on Aging.

The 1992 amendments to the Older Americans Act reemphasize the intention of the Congress to target services and resources on the needs and problems of those older individuals identified as having the greatest economic need, the greatest social need, and those who are low-income minority. These amendments, for the first time, require that approval of the State plan be dependent on approval of the intrastate funding formula. The basis of these regulations are those provisions of the 1992 amendments to the Act that directly affect a State's intrastate funding formula and which:

- Require the Commissioner on Aging under section 304(c) of the Act to approve a State's intrastate funding formula prior to the release of Title III funds;
- Require State agencies under section 307(a)(33) of the Act to include descriptive statements about the intrastate funding formula's assumptions, goals, and outcomes based on the allocation of funds to each Planning and Service Area; and
- Require the Commissioner on Aging under section 305(a)(2)(C) to assist States in the development of their intrastate funding formulas by providing them with guidelines.

### II. Purpose of the NPRM

The Administration on Aging (AoA) is proposing to revise the current rules governing the State agencies' development and submission of an intrastate funding formula by providing new guidance and to amend the current rules affecting State plans and State plan submissions. These revisions are designed to be consistent with those provisions in the 1992 amendments to the Act that require greater targeting on those older individuals in greatest economic need, greatest social need, and low-income minority older individuals.

The 1992 amendments to the Older Americans Act (Pub. L. 102–375) now require States to submit their intrastate funding formulas to the Commissioner on Aging for approval, rather than only for review and comment, as was the case prior to the 1992 amendments. The amendments also require the Commissioner to provide guidance to States in the development of their intrastate funding formulas. AoA has interpreted the amendments to require that this guidance be in addition to the language contained in section 305(a)(2)(C) of the statute which requires State agencies to take into account the geographic distribution, greatest economic and greatest social need of older individuals in the development of their intrastate funding formulas. If the Commissioner does not approve the intrastate funding formula, a new requirement under section 304(c) requires the Commissioner to withhold the State's allotment of funds.

In order to comply with these new statutory requirements as well as address the intent of Congress that targeting services and resources on the needs and problems of those older individuals identified as having the greatest economic need, the greatest social need, and those who are low-income minority be accomplished through the intrastate funding formula, the Commissioner has developed standards for review and provided directions to a State agency on how to evaluate whether its formula meets those standards. The proposed regulations are designed to provide a State agency with flexibility to either maintain its current formula or, if necessary to allow for the development of a modified or new formula that addresses the requirements set out by Congress in section 305(a)(2)(C) of the Older Americans Act. These proposed regulations require that careful consideration be given to the geographic distribution of older individuals in the State, and the distribution among the planning and service areas of older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority individuals.

Section 304(c) now requires the Commissioner to withhold funds if the Commissioner does not approve a State's intrastate funding formula. In the course of developing these intrastate funding formulas, States are now required, under sections 305(a)(2)(C) and 305(d), to publish their intrastate funding formulas for review and comment by the public. This publication for review and comment must include: "(1) A descriptive statement of the formula's assumptions and goals, and the application of the definitions of greatest economic or social need; (2) a numerical statement of the actual funding formula to be used; (3) a listing of the population, economic, and social data to be used for each planning and service area in the State;

and (4) a demonstration of the allocation of funds, pursuant to the funding formula, to each planning and service area in the State." In addition, section 307(a)(33) now requires the State plan to include the statement and the demonstration required by paragraphs (2) and (4) of section 305(d), and provides that the Commissioner may not approve the State plan unless the Commissioner approves the statement and demonstration.

In light of these new requirements, AoA believes it is of critical importance that States have as much time as possible to review their current intrastate funding formulas, and, if necessary, modify them or develop new formulas; to consult with area agencies as required in section 305(a)(2)(C); to publish their plans for review and comment as required in section 305(d); and to seek and obtain legislation or legislative approval prior to submitting the formulas for approval, if necessary. To ensure that States have the time to accomplish these steps, AoA is publishing this NPRM separately from, and in advance of, its notice of other rules being developed in response to the 1992 amendments to the Act.

## III. Summary of the Provisions of the NPRM

*Section 1321—Grants to State and Community Programs on Aging*

1321.3 Definitions—The term "low-income" is added in order to clarify its direct relationship to the new definition of poverty added to Title I by the 1992 amendments to the Act, and to assist State agencies in targeting resources when they develop their intrastate funding formulas.

The term "medically underserved areas," as used in § 1321.37(g) of this proposed rule, is added to clarify where funds should be targeted in developing a method to allocate funds provided under section 303(f) of the Act.

The term "minority" as defined in 28 CFR, subpart F, § 42.402 (e) is added in order to clarify who is a minority for the purposes of assisting States to determine who is a low-income minority older individual in developing their targeting strategies and activities as well as developing intrastate funding formulas.

The term "periodic," as used in sections 306(a)(6) and 307(a)(8) of the Act and part 1321 with respect to evaluations of, reports on, and public hearings on, activities carried out under State and area plans, is added to clarify that the term means, at a minimum, once each fiscal year (annually).

The term "rural area" is defined as required by section 307(a)(37) of the Act, to clarify the definition of rural area within a planning and service area, and to assist States in identifying actual and projected additional costs of providing services in rural areas as required under section 307(a)(37) as well as in the development of their intrastate funding formulas.

1321.17 Content of State plan—this subjection is amended to reflect and clarify additional requirements in the 1992 amendments to the Act, to remove those sections and paragraphs that are now unnecessary because they are set forth in the Act under the 1992 amendments, and to assure that States provide adequate descriptions and exhibits in the State plan to assist the public in understanding changes required by the 1992 amendments. The NPRM proposes to remove the assurances now required under current § 1321.17(f)(1)–(3), (8)–(10), (13), and (15) as unnecessary because they are now reflected in the 1992 amendments to the Act. The following new requirements are proposed pursuant to the 1992 amendments:

(1) Section 1321.17(c)(1)–(4) is amended to require the State to show the distribution of Title III funds using the intrastate funding formula developed under section 305(a)(2)(C) of the Act, including—

- A description of how the State will meet the rural expenditure requirements under seciton 307(a)(3)(B) of the Act,
- An exhibit that details how the State meets the requirements of 307(a)(37) of the Act to identify total actual and projected costs of providing services in rural areas,
- A comparison between the current intrastate funding formula and the proposed one using the best available demographic data, the Commissioner's guidelines, the geographic distribution of older individuals, and of those older individuals in greatest economic and greatest social need with particular attention to low-income minority older individuals, as required by section 305(a)(2)(C) of the Act including:
- A numerical statement comparing the current intrastate funding formula to the proposed one under section 305(a)(2)(C);
- A comparison of the population, economic, and social data for each planning and service area used for the current and for the proposed formulas; and
- A comparison and demonstration of the allocation of Title III funds allocated to each planning and service area under the current intrastate funding formula and the one proposed;

(2) Section 1321.17(c)(5) is added to assist AoA in monitoring and assessing the State's progress in meeting the new requirements under section 307(a)(37) of the Act which require that State plans identify, for each fiscal year of the plan, the actual and projected additional costs for providing services to older individuals residing in rural areas. In addition, the information obtained under this section will assist AoA in carrying out the requirements of section 202(b)(27)(A) of the Act which requires the Commissioner to "conduct a study to determine ways in which Federal funds might be more effectively targeted to low-income minority older individuals, and older individuals residing in rural areas, to better meet the needs of States with a disproportionate number of older individuals with greatest economic need and older individuals with greatest social need." It is our expectation that providing this information in the State plan will greatly reduce the paperwork burden that would be incurred with a separate national study conducted solely for this purpose. Accordingly, using the definition of rural areas in § 1321.3 of this NPRM, we propose that each State plan include a table displaying planning and service areas (PSA's) ranked by the proportion of rural older individuals in each as a percentage of the rural population in the State; showing the distribution of Title III funds in each PSA under the current intrastate funding formula and under the proposed intrastate funding formula (IFF); and the source of the distribution information (which must by law be the best available data).

EXAMPLE

| PSA's | PSA's ranked by percentage of rural population in the State | Distribution of title III allocation to rural areas under current IFF | Distribution of title III allocation to rural areas under proposed IFF (assume no change in allocation) |
|---|---|---|---|
| PSA–A | 20% #3 | Placer County—$2 million; Census tracts 2 and 3—$1.5 million. | Placer County—$2 million; Census tracts 2 and 3—$1 million. |
| PSA–B | 4% #6 | Rosemount City—$300,000; Census tract 7—$700,000 | Rosemount City—$300,000; Census tract 7—$700,000. |
| PSA–C | 30% #1 | Census tracts 11, 16, 19—$4 million; Auburn township—$2 million; Tuluga County—$3 million. | Census tracts 11, 16, 19—$4 million; Auburn township—$2 million; Tuluga County—$3 million. |
| PSA–D | 6% #5 | Entire PSA—$1.5 million | Entire PSA—$1 million. |
| PSA–E | 15% #4 | Empire County—$1.5 million; Census tracts 21, 32, 11, & 47—$1.5 million. | Empire County—$1.5 million; Census tracts 21, 32, 11, & 47—1.5 million. |
| PSA–F | 25% #2 | Yolo County—$2 million; Lake County—$3 million; Census tracts 53, 44, 39—$2 million; Blythe County—$1 million. | Yolo County—$2 million; Lake County—$3 million; Census tracts 53, 44, 39—$2 million; Blythe County—$2 million. |
| Total | 100% | $26 million | $26 million. |

In the above hypothetical example, the table shows the effect on rural areas of a proposed intrastate funding formula which would reduce the funds allocated to PSA–A and PSA–D, and increase the funds allocated to PSA–F.

(3) Section 1321.17(f)(9)(i) (previously 1321.17(f)(14)(i)) is revised to clarify when a State agency may permit an area agency to use Title III service dollars to fund program development and coordination activities. Under current policy, AoA provides State and area agencies with the flexibility to explore new and alternative methods for providing supportive and nutrition services through a comprehensive and coordinated delivery system by permitting the expenditure of service dollars, under section 304(d)(1)(D), for that purpose. During the past five years, State and area agencies have raised issues about whether section 1321.17(c)(14)(i) of the current rule clearly establishes the threshold at which State agencies may allow area agencies to so use section 304(d)(1)(D) service funds is based on the total allotment of Title III dollars awarded a State, including State plan administration, or based on the total amount of Title III dollars awarded to area agencies for the provision of supportive and nutrition services under section 304(d)(1)(D) of the Act.

This regulation makes clear that a State agency may not fund program development and coordinated activities as a cost of supportive services until the State agency has funded area plan administration to a level of at least 10 percent of the Title III funds in section 304(d)(1)(D), with the exception of those funds provided for in section 303(b)(3) and section 303(f), which are not distributed through the State's IFF.

(4) Section 1321.17(f)(10) is added to require a new assurance that States provide the Commissioner with a periodic update of the plan to reflect the actual and projected additional costs of providing services in rural areas, as required by the new section 307(a)(37) of the Act;

(5) Section 1321.17(f)(11) is added to require a new assurance that the State agency, in consultation with each area agency, will set specific objectives for the provision of Title III funded services to low-income minority older individuals, and assure that such objectives are included in the area plan; and

(6) Section 1321.17(f)(12) is added to require a new assurance that the State will support area plan objectives by undertaking specific program development, advocacy, and outreach efforts focused on the needs of low-income minority older individuals and provide the Commissioner with a written description of its activities to be included in the Commissioner's annual report to the Congress.

(7) Section 1321.17(g) is added to clarify and set out those requirements that States which are designated Single Planning and Service Areas must meet to receive a grant under Title III of the Act.

1321.21 Submission of the State plan or plan amendments to the Commissioner for approval—this section is revised by requiring States to submit their State plans or plan amendments for approval at least 90 days prior to the effective date of the plan or plan amendment rather than the current 45 days. This change was made in order to facilitate simultaneous review and technical assistance, if needed, by the AoA Regional Office. The additional 45 days also provides the State agency with additional time to discuss any deficiencies the Regional Office may find in the State plan or the intrastate funding formula and for the State to correct them. It is AoA's intention that this additional time during the pre-approval period will assist States and AoA in assuring that State plans and intrastate funding formulas are approved in a timely manner.

1321.37 Intrastate funding formula—this section is revised to comply with the 1992 amendments to the Act that require the Commissioner to provide guidelines to State agencies in the development of their intrastate funding formulas, and to approve each State's intrastate funding formula as a condition of approving the State plan.

The Commissioner's guidelines are intended to provide State agencies with criteria for developing intrastate funding formulas that target the needs of those in greatest economic and social need, and low-income minorities within each PSA. The guidelines also provide area agencies, service providers, older individuals, units of general purpose local government, and the pubic with a method by which to assess the State's proposed intrastate funding formula impact in each planning and service area. We anticipate that the public hearing process at both the State and local levels will provide groups, organizations, and individuals that may be affected with as much information as possible about the actual impact the formula will have on current and projected plans and services within the PSA's.

AoA is aware that there may be changes in the allocation of Title III funds to PSA's if State agencies determine that it is necessary to modify current or develop new intrastate

funding formulas in response to changes in demographics, or in compliance with the Commissioner's guidelines in these regulations. Whether the formula remains the same, is modified or a new formula is developed, it is essential that the process of targeting older individuals in greatest economic and social need with particular emphasis on low-income minority individuals have a demonstrable outcome.

The 1992 Amendments strengthen the targeting provisions of the OAA through a number of requirements relating to State Units on Aging (SUAs), area agencies on aging (AAAs) and service providers. The Amendments require SUAs to set specific objectives and describe actions used to increase participation of low-income minority older individuals (Section 305(a)(2)(G)); require SUAs to provide technical assistance to minority service providers (Section 305(a)(1)(D)); require area plans to include specific service objectives for minority targeting (Section 306(a)(5)(A)(i)); provide assurances that providers serve low-income minority individuals in accordance with their need for services (Section 306(a)(5)(A)(ii)); and require that all AAA activities must include a focus on the needs of low-income minority older individuals (Section 306(a)(5)(C)).

In determining how funds available under Title III are to be distributed to implement these objectives, the 1992 Amendments make it clear that States must base the distribution of funds on an intrastate funding formula that takes into account the distribution of older individuals, and of older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority older individuals. The Amendments also require that the SUA submit its formula to the Commissioner for approval.

The guidelines proposed here in accordance with section 305(c)(2)(C) having the following objectives:

- To provide flexibility for the States to develop a formula, based on the provisions of the Act, which is appropriate to the conditions in each State; and
- To provide criteria for approval by the Commissioner which are outcome rather than process oriented and meet a standard of administrative simplicity.

The criteria developed in these guidelines are based on the principle that funds and services should be targeted on older individuals in greatest economic need and older individuals in greatest social need, with particular attention to low-income minority older individuals.

There are two criteria for approval of the formula:

(1) to be approved, the formula may not allocate less funds to each PSA with a high concentration of low-income minority older individuals than would have been allocated to each of these PSA's by application of the current formula to the most recent decennial U.S. census data or the best available data.

In view of the provisions in the Act which require particular attention to low-income minority older individuals, this criterion is intended to ensure that the proposed formula will not divert funds from PSA's with the highest concentrations of such individuals, when applied to the same population data as the old formula.

(2) to be approved, the formula may not allocate less funds, from the total amount subject to allocation, to each PSA with a high concentration of low-income minority older individuals that would be allocated to each of these PSA's if the formula submitted for approval were based solely on the factors of age, i.e., 60+, and greatest economic need, i.e., the proportion of older individuals below the poverty line.

In view of the provisions in the Act which require particular attention to low-income minority older individuals, the introduction of social need factors in the formula should, if anything, increase funds distributed to PSA's with the highest concentrations of low-income minority older individuals to an amount no less than would go to the PSA based only on age and economic need. In no event may the introduction of social need factors decrease such funds.

A standard procedure is proposed for identifying the PSA's with the highest concentrations of low-income minority older individuals. After the State ranks the PSA's based on the proportion of low-income minority older individuals to all older individuals in the PSA, those PSA's with the highest proportion of low-income minority individuals which, taken together, contain 51 percent of all low-income minority older individuals in the State shall be, for the purposes of this rule, considered the PSA's with the highest concentrations of low-income minority older individuals.

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## Example of Tests for Proposed Intrastate Funding Formulas for Hypothetical State with a 60+ Population of 100,000 and an Allotment of $1,000,000

| | Population 60+ | | | | | Cumulative percent distribution of low-income minority 60+ by PSA | Distribution by PSA of hypothetical $1,000,000 state allotment using: | | | Is column 9 greater than: | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Low-income minority | | | | | | | | |
| | | | | Percent of all income levels** | | | | | | | |
| | Total | Low-income | Number | Value | Rank | | Current formula*** | Two-factor formula**** | Proposed formula***** | column 7? (Y or N) | column 8? (Y or N) |
| PSA* | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) | (11) |
| PSA A | 15,000 | 4,000 | 1,500 | 10.00 | 1 | 25.86 | 150,000 | 208,333 | 218,822 | Y | Y |
| PSA B | 30,000 | 5,400 | 2,900 | 9.67 | 2 | 75.86 | 300,000 | 330,000 | 377,500 | Y | Y |
| PSA C | 25,000 | 3,000 | 1,000 | 4.00 | 3 | 93.10 | 250,000 | 225,000 | 205,603 | N | N |
| PSA D | 10,000 | 1,600 | 300 | 3.00 | 4 | 98.28 | 100,000 | 103,333 | 89,598 | N | N |
| PSA E | 20,000 | 1,000 | 100 | 0.50 | 5 | 100.00 | 200,000 | 133,333 | 108,477 | N | N |
| State total | 100,000 | 15,000 | 5,800 | 5.80 | (NA) | (NA) | 1,000,000 | 1,000,000 | 1,000,000 | (NA) | (NA) |

(NA) Not applicable.

* PSA's are shown in rank order according to the ranks in column 5, a rank of 1 indicating the highest percentage of low-income minority 60+ and a rank of 5 indicating the lowest percentage.

** For this example, this percentage was computed by dividing column 3 by column 1 In real applications, the denominator should exclude persons in nursing homes and other institutions.

*** For this example, a hypothetical current formula was created which has one variable: population 60+ (data from column 1).

**** For this example, the factors for population (data from column 1) and low-income (data from column 2) were weighted equally.

***** For this example, a hypothetical proposed formula was created which has four equally weighted factors: (1) population 60+, (2) low-income population 60+, (3) low-income minority population 60+, and (4) population 60+ with mobility or self-care limitations. PSA-level data for the first three variables were taken from columns 1-3. Hypothetical values for the fourth variable are as follows: PSA A (4,000), PSA B (7,000), PSA C (4,000), PSA D (2,000), and PSA E (3,000).

NOTE: The shaded area identifies the PSA's which contain at least 51 percent of the state's low-income minority elderly population (see column 6). These PSA's must show a response of "Y" (for "yes") in columns 10 and 11 if the proposed formula is acceptable. The percentages in column 6 are derived by cumulating the numbers shown in column 3 from the top down after the PSAs are listed in rank order based on the percentages in column 4. For example, the second data value in column 6 (75.86%) was derived by adding the first two values in column 3 (1,500 + 2,900 = 4,400) and dividing the result by the state total on the last line (5,800). The result expressed as a percentage is 75.86%.



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In the example above, PSA's A and B constitute the PSAs with the highest concentration of low-income minority older individuals (see column 4) and have a combined total of 76% of the State's total low-income minority elderly population (see column 6), which meets the 51% requirement.

This example represents a hypothetical State's proposed formula that meets the proposed criteria for approval in that PSA's A and B would not receive less funds under the proposed formula (col. 9) than either would have received by application of the current formula to the most recent decennial U.S. census data (col. 7), and neither PSA would receive less funds under the formula (col. 9) than it would if funds were distributed solely on the basis of age and greatest economic need (col. 8). Finally, this example shows that when more than one PSA is required to accumulate 51 percent of the low-income minority older individuals in the State, the distribution to each such PSA must satisfy both specified criteria.

AoA has developed the criteria for approval of an intrastate funding formula so as to ensure that social need factors do not result in decreased funding to PSA's with the highest concentration of low-income minority older individuals.

We note that the proposed guidelines do not speak to the distributional effects on PSA's which contain the other 49 percent of the low-income minority older individuals in the State (which may also contain a significant number of older individuals in greatest economic need, greatest social need, and low-income minority older individuals). However, it should be observed that the law requires that SUAs, area agencies on aging, and service providers utilize effective methods of targeting services to older individuals who are in the greatest economic need and the greatest social need, with particular attention to low-income minority older individuals *in all PSA's*. Thus, irrespective of the distribution of Title III funds, the SUA's, AAA's, and service providers are required to comply with the targeting requirements in the Act, using such Title III funds and other sources as are available to support services to individuals in targeted groups.

1321.76 Appeal process to the Commissioner—this subsection is added to Subpart E to reflect the Commissioner's new responsibilities under section 305(b)(5)(C)(i) of the 1992 amendments to the Act.

We anticipate that some Title III funds may shift among PSA's if intrastate funding formulas are modified or changed in accordance with these proposed regulations. Although the 1992 amendments to the Act and these proposed rules do not require a change in PSA boundaries, section 305(a)(1)(E) of the Act requires States to consider the total number of older individuals 60+, older individuals in greatest economic need, and older individuals in greatest social need, with particular attention to low-income minority older individuals residing in the State, in dividing the State into distinct PSA's. As a result of the 1990 census, States may elect to change some PSA boundaries in order to reflect changes in demographics and geographic locations of particular groups of older individuals based on the 1990 census. AoA is proposing this new rule to provide parties adversely affected by a State's decision to change PSA boundaries with an opportunity to appeal to the Commissioner, pursuant to section 305(b)(5)(C) of the Act.

1321.77 Scope—this subsection is revised to allow for alternative methods of dispute resolution, and to reflect the requirements of the 1992 amendments to the Act which allow an appeal to the Secretary of HHS after the Commissioner has disapproved a State's plan, plan amendment or intrastate funding formula. AoA includes these revisions in these proposed rules in order to clarify appeals procedures that are to apply when the Commissioner does not approve the intrastate funding formula under section 305(a)(2)(C) or otherwise finds that a State plan has failed to meet the requirements of Section 307.

1321.79 When a decision is effective—this subsection is revised to include a State's right to appeal to the Secretary.

1321.81 How the State may appeal—this subsection is revised to describe how a State may appeal to the Secretary.

**Impact Analysis**

*Executive Order 12866*

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department of Health and Human Services has determined that this rule is consistent with these priorities and principles. An assessment of the costs and benefits of available regulatory alternatives (including not regulating) demonstrated that the approach taken in the regulation is the most cost-effective and least burdensome while still achieving the regulatory objectives.

*Regulatory Flexibility Act of 1980*

The Regulatory Flexibility Act of 1980, Pub. L. 96–354, requires that an agency prepare a regulatory flexibility analysis for a proposed or final rule if the rule would have significant economic impact on a substantial number of "small entities", i.e. small businesses, small non-profit organizations, or small governmental jurisdictions.

The responsibility for meeting the requirements of the regulations proposed in this NPRM is on the State agencies and to a lesser extent on area agencies. Actual delivery of services may be provided in some circumstances by proprietary, public, and not-for-profit agencies or organizations under grants or contracts from State or area agencies. Although area agencies and most service delivery agencies and organizations are "small entities" within the meaning of the Act, this rule will impose no significant burdens on State agencies, area agencies or other affected parties and will provide flexibility to State and area agencies in implementing the provisions of the Act. For these reasons, the Secretary hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

*Paperwork Reduction Act*

This proposed rule contains information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. The title, description, and respondent description of the information collection are shown below with an estimate of the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

*Title:* Grants for State and Community Programs on Aging.

*Description:* The 1992 amendments to the Older Americans Act (Pub. L. 102–375) now require States to submit their intrastate funding formulas to the Commissioner on Aging for approval, rather than only for review and comment, as was the case prior to the 1992 amendments. The amendments also require the Commission to provide guidance to States in the development of their intrastate funding formulas. AoA has interpreted the amendments to require that this guidance be in addition to the language contained in section 305(a)(2)(C) of the statute which requires State agencies to take into account the geographic distribution,

greatest economic and greatest social need of older individuals, with particular attention to low-income minority individuals, in the development of their intrastate funding formulas. If the Commissioner does not approve the intrastate funding formula, a new requirement under section 304(c) requires the Commissioner to withhold the State's allotment of supportive and nutrition funds under Title III of the Act.

In order to comply with these new statutory requirements as well as address the intent of Congress, the Commissioner has developed regulatory standards, and provided directions for each State agency on how to evaluate whether its formula meets those standards. The proposed regulations are designed to provide a State agency with flexibility to either maintain its current formula or, if necessary, to allow for the development of a modified or new formula that addresses the requirements set out by Congress in section 305(a)(2)(C) of the Act. These proposed regulations require that careful consideration be given to the geographic distribution of older individuals in the State, and the distribution among the planning and service areas of older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority individuals.

Because section 304(c) now requires the Commissioner to withhold funds if the Commissioner does not approve a State's intrastate funding formula, States cannot reasonably be expected to develop intrastate funding formulas that can be approved, unless they receive regulatory guidelines. Further, in the course of developing their intrastate funding formulas, States are required, under sections 305(a)(2)(C) and 305(d), to publish their intrastate funding formulas for review and comment by the public. This publication for review and comment must include: "(1) A descriptive statement of the formula's assumptions and goals, and the application of the definitions of greatest economic or social need; (2) a numerical statement of the actual funding formula to be used; (3) a listing of the population, economic, and social data to be used for each planning and service area in the State; and (4) a demonstration of the allocation of funds, pursuant to the funding formula, to each planning and service area in the State." In addition, section 307(a)(33) now requires the State plan to include the statement and the demonstration required by paragraphs (2) and (4) of section 305(d) of the Act. The Commissioner may not approve the State plan unless the Commissioner approves the statement and demonstration. These proposed regulations provide States with guidelines on how to make an acceptable numerical statement and an acceptable demonstration of the allocation of funds.

*Description of Respondents:* State or local governments and non-profit institutions.

ESTIMATED ANNUALIZED BURDEN

[Reporting burden associated with the regulations]

| Regulation section | Respondents per year | Responses per year | Total Respondents | Hours/Respondents | Total burden |
|---|---|---|---|---|---|
| 1321.17(c)—Intrastate funding formula development | 11 | 1 | 11 | 80 | 880 |
| 1321.17(d)—Intrastate funding formula approval | (11) | 1 | 11 | 8 | 88 |
| 1321.17(e)—Intrastate formula publication for review and comment | (11) | 1 | 11 | 30 | 330 |
| 1321.17(g)—Determination of medically under served and separate allocation | 11 | 1 | 11 | 20 | 220 |
| 1321.17(h)—Demonstration of targeting by single planning and service areas | 4 | 1 | 4 | 25 | 100 |

Total reporting burden 1618.

*Basis for estimates:* The statute allows States to submit their State plans every two, three, or four years. Our estimates are based on the average number of State plan submissions per year during the four year periods between Older Americans Act reauthorizations. We estimate that 11 State agencies will incur regulatory burdens in complying with the requirements under proposed sections 1321.17 (c), (d), and (e); 11 State agencies will incur regulatory burdens in complying with proposed section 1321.17(g); and 4 State agencies and trust territories will incur regulatory burdens in complying with proposed section 1321.17(h). Because some States have chosen two or three year State plans, they will either submit new plans or amend approved plans more than once during the four years between reauthorizations. The table above projects our estimate that on average 26 of the 57 State agencies and trust territories will incur burdens on complying with these proposed requirements once a year.

We have submitted a copy of this proposed rule to OMB for its review of these information collections. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Allison Eydt, HHS Desk Officer, Human Resources and Housing, OMB, and to the Office of Information and Regulatory Affairs, OMB, Washington, DC 20503.

**List of Subjects in 45 CFR Part 1321**

*45 CFR Part 1321*

Administrative practice and procedure, Aged, Grant programs—Indians, Grant programs—social programs, Indians, Legal services, Nutrition, Reporting and recordkeeping requirements.

Dated: February 22, 1994.

**Fernando M. Torres-Gil,**

*Commissioner on Aging, Assistant Secretary for Aging.*

Approved:

Dated: March 2, 1994.

**Donna E. Shalala,**

*Secretary of Health and Human Services.*

For the reasons set forth in the preamble, 45 CFR part 1321 is proposed to be amended as follows:

## PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

1. The authority for part 1321 continues to read as follows:

**Authority:** 42 U.S.C. 3001 et seq.; title III of the Older Americans Act, as amended.

### Subpart A—Introduction

2. Section 1321.3 is amended by revising the definition of "Periodic" and adding definitions in alphabetical order as follows:

**§ 1321.3 Definitions.**

* * * * *

*Low-income* means below the official poverty guidelines (as defined by the Office of Management and Budget, and adjusted by the Secretary (HHS) in accordance with subsection 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)).

* * * * *

*Medically underserved areas*, as used in § 1321.37(g), are those areas within planning and service areas which are identified by the State as having low ratios, relative to other areas in the State, of primary care physicians per 1,000 individuals age 60 and over.

*Minority*, as used in this Part, are confined to the following designations:

(1) Black, not of Hispanic Origin. A person having origins in any of the black racial groups of Africa.

(2) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

(3) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

(4) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

* * * * *

*Periodic*, as used in sections 306(a)(6) and 307(a)(8) of the Act with respect to evaluations of, reports on, and public hearings on, activities carried out under State and area plans, means, at a minimum, once each fiscal year (annually).

*Rural area*, as used in this part, means any area that is not defined as urban. Urban areas comprise:

(1) Urbanized areas (incorporated places and adjacent densely settled territory with a combined minimum population of 50,000) and

(2) All other places with 2,500 or more inhabitants.

## Subpart B—State Agency Responsibilities

3. Section 1321.17 is revised to read as follows:

**§ 1321.17 Content of State plan.**

To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act. In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification by the State of the sole State agency that has been designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III of the Act and any objectives established by the Commissioner through the rulemaking process.

(c) A resource allocation plan which indicates the proposed use of all Title III funds administered by a State agency, and the distribution of Title III funds to each planning and service area using the intrastate funding formula developed under section 305(a)(2)(C), and published in accordance with the requirements of section 305(d); contains a descriptive narrative explaining how the State will meet the requirements of section 307(a)(3)(B); and contains an exhibit that details how the State will meet the requirements of section 307(a)(37) of the Act, including:

(1) A descriptive statement and comparison of the current intrastate funding formula's assumptions and goals and those of the proposed formula developed as required under section 305(a)(2)(C) for the Commissioner's approval;

(2) A numerical statement of the current intrastate funding formula compared to the formula developed as required under section 305(a)(2)(C) for the Commissioner's approval;

(3) A listing of the population, economic, and social data to be used for each planning and service area in the State;

(4) A comparison and demonstration (i.e., statement) of the allocation of funds, pursuant to the current intrastate funding formula, applied to the best available data, for each planning and service area in the State compared to the allocation of funds for each planning and service area using the formula developed as required under section 305(a)(2)(C) for the Commissioner's approval; and

(5) In accordance with the definition of rural areas in § 1321.3, the State must submit the following supporting information displayed in one table:

(i) The Planning and Service Areas (PSA's) ranked from high to low based on the proportion of rural individuals age 60 years and over to the total population age 60 years and over in each PSA;

(ii) The distribution of funds to rural areas in each of the PSA's based on the current formula; and

(iii) The distribution of funds to rural areas in each of the PSA's using the formula developed under section 305(a)(2)(C) for the Commissioner's approval.

(d) Identification of the geographic boundaries of each planning and service area and of the area agency on aging designated for each planning and service area, if appropriate.

(e) For the preceding year, the number of low-income minority older individuals and older individuals residing in rural areas, and a description of the methods used to satisfy their service needs, as required by sections 307(a) (23) and (29) of the Act.

(f) Each of the assurances and provisions required in sections 305 and 307 of the Act, and provisions that the State meets each of the requirements under sections 1321.5 through 1321.83 of this part, and the following assurances as prescribed by the Commissioner:

(1) Procedures exist to ensure that all services under this part are provided without use of any means tests;

(2) All services provided under Title III meet any existing State and local licensing, health and safety requirements for the provision of those services;

(3) Older individuals are provided opportunities to voluntarily contribute to the cost of services;

(4) Area plans shall specify as submitted, or be amended annually to include, details of the amount of funds expended for each priority service during the past fiscal year;

(5) The State agency shall develop policies in consultation with the area agencies on aging governing all aspects of programs operated under this part, including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies on aging where area agencies on aging have been designated;

(6) Area agencies on aging shall compile available information, with necessary supplementation, on courses of post-secondary education offered to older individuals with little or no tuition. The assurance shall include a commitment by the area agencies on aging to make a summary of the information available to older individuals at multipurpose senior centers, congregate nutrition sites, and in other appropriate places.

(7) Individuals with disabilities who reside in a non-institutional household with and are accompanied by an individual eligible for congregate meals under this part shall be provided a meal on the same basis that meals are provided to volunteers pursuant to subsection 307(a)(13)(I) of the Act.

(8) Individuals with disabilities who reside in a non-institutional household with an individual eligible for home

delivered meals under this part shall be provided a meal on the same basis that meals are provided to volunteers pursuant to subpart 307(a)(13)(I) of this Act.

(9) (i) The State agency will not fund program development and coordination activities as a cost of supportive services for the administration of area plans until it has first spent 10 percent of the total of its funds allotted under section 304(d)(1)(D) for the administration of area plans;

(ii) State and area agencies on aging will, consistent with budgeting cycles (annually, biennially, or otherwise), submit the details of proposals to pay for program development and coordination as a cost of supportive services, to the general public for review and comment; and

(iii) The State agency certifies that any such expenditure by an area agency on aging will have a direct and positive impact on the enhancement of services for older individuals in the planning and service area.

(10) The State agency will update the plan periodically to reflect the actual and projected additional costs of providing services under this title as required in section 307(a)(37) of the Act.

(11) The State agency shall set specific objectives, in consultation with each of its area agencies on aging, for each planning and service area for providing services funded under Title III to low-income minority older individuals, and such objectives must be included in the area plan.

(12) The State, in support of area plan objectives developed under section 306(a)(1) of the Act, will undertake specific program development, advocacy, and outreach efforts focused on the needs of low-income minority older individuals and provide the Commissioner a written description of its activities and accomplishments in an annual report due not later than 60 days following the close of the fiscal year.

(g) To receive a grant under this part, a State that is designated a Single Planning and Service Area must have an approved State plan as prescribed in section 307 of the Act, with the exception of sections 307(a)(3)(B), 305(a)(2)(C) and 305(d) as cross referenced in section 307. The State plan must also meet the provisions of this rule as set out in:

(1) Section 1321.17(a);

(2) Section 1321.17(b);

(3) Section 1321.17(c) using other appropriate geographical designations as appropriate in place of planning and service areas, and excluding §§ 1321.17(c)(1) through 1321.17(c)(4);

(4) Section 1321.17(c)(5) using other appropriate geographical designations as appropriate in place of planning and service areas;

(5) Section 1321.17(e); and

(6) Section 1321.17(f) with the exception of those sections of the Act as noted in §§ 1321.17(c) and 1321.17(f)(9). States will use single planning and service area in place of area agency wherever it appears.

4. Section 1321.21 is revised to read as follows:

*§ 1321.21 Submission of the State plan or plan amendment to the Commissioner for approval.*

Each State plan or plan amendment which requires approval of the Commissioner shall be signed by the Governor or the Governor's designee and submitted to the Commissioner for approval at least 90 calendar days before the proposed effective date of the plan or plan amendment.

5. Section 1321.37 is revised to read as follows:

*§ 1321.37 Intrastate funding formula.*

(a) The State agency, after consultation with all area agencies on aging in the State, shall, based on the requirements of section 305(a)(2) (C) and (E) of the Act, with the exception of those funds provided for in section 303(b)(3) and section 303(f) of the Act, develop and use one intrastate funding formula for the allocation to all area agencies of all funds under section 304(d)(1)(D) of the Older Americans Act.

(b) In developing its intrastate formula, the State agency shall use the most current U.S. decennial census data or the best available data.

(c) The State agency shall submit its formula to the Commissioner for review and approval at least 90 days prior to the period for which it will apply in the State. The State agency shall also submit at the same time the following supporting information displayed in one table:

(1) The Planning and Service Areas (PSA's) ranked cumulatively from high to low based on the proportion of low-income minority individuals (as defined in § 1321.3) age 60 years and over (as defined in section 102(38) of the Act) to the total population age 60 years and over in the PSA;

(2) The distribution of funds to each of the PSA's as applied to the best available data under the current formula;

(3) The distribution of funds to each of the PSA's based on a formula with population age 60 and over and population age 60 and over in greatest economic need (as defined in section 102(29) of the Act) as the only factors and using the best available data; and

(4) The distribution of funds to each of the PSA's based on the intrastate funding formula submitted to the Commissioner for approval.

(d) The Commissioner shall approve the intrastate funding formula if the following criteria are satisfied when applied to each of the top ranked PSA's which cumulatively contain fifty one percent of all low-income minority older individuals in the State under paragraph (c)(1) of this section, rounded to the nearest integer:

(1) No less funds are allocated to each PSA in the top fifty one percent of all PSA's ranked cumulatively under paragraph (c)(1) of this section than would be allocated to each of those PSA's by application of the current formula to the most recent decennial census or the best available data; and

(2) Each PSA in the top fifty one percent of all PSA's ranked cumulatively under paragraph (c)(1) of this section is allotted no less funds, from the total amount subject to allocation in section 304(d)(1)(D), under the formula submitted for approval than each of these PSA's would have received under a formula with 60 years and over and greatest economic need as the only factors.

(e) The State agency shall publish the formula for review and comment by older individuals, other appropriate agencies and organizations, and the general public.

(f) At least every two years the State agency shall review the most recent U.S. decennial census or the best available data and shall, based on any changes, allocate funds under section 304(d)(1)(D) through its intrastate funding formula. The States shall submit a report to the Commissioner detailing any changes in the distribution of funds by PSA not later than 30 days after the allocation.

(g) The intrastate funding formula shall provide for a separate allocation of funds received under subsection 303(f) for disease prevention and health promotion. The State agency shall award such funds to priority planning and service areas which the State agency determines:

(1) Are medically underserved; and

(2) In which there are large numbers of individuals age 60 and older in greatest economic need.

(h) State agencies in those States which have been designated as single planning and service areas are not required to have an intrastate funding formula but shall demonstrate in their State plan as required in § 1321.17(g) that the funds received under the Older

Americans Act are used in a manner which targets services to older individuals in greatest economic need and older individuals in greatest social need, with particular attention to low-income minority older individuals.

## Subpart E—Hearing Procedures for State Agencies, Area Agencies on Aging, and Other Adversely Affected Parties

6. Section 1321.76 is added to subpart E to read as follows:

### § 1321.76 Appeal Process—for Changes in Planning and Service Areas.

This section sets forth the procedures the Commissioner follows for providing hearings to adversely affected parties under section 305(b)(5)(C).

(a) Any adversely affected party who has been provided a hearing and a written decision by the State agency may appeal the decision to the Commissioner in writing no later than 30 days following receipt of the State's decision.

(b) The Commissioner, or the Commissioner's designee, will provide the opportunity for a hearing; if a hearing is requested, the Commissioner will issue a written decision within 60 days of the hearing; and if a hearing is not requested, the Commissioner will issue a written decision within 60 days of receipt of the items in paragraph (c) of this section.

(c) When the Commissioner receives an appeal, the Commissioner will request the State Agency to submit:

(1) A copy of the appellant's application for designation as a planning and service area;

(2) A copy of the written decision of the State; and

(3) Any other relevant information the Commissioner may require.

(d) The Commissioner may:

(1) Deny the appeal and uphold the decision of the State agency;

(2) Grant the appeal and overturn the decision of the State agency; or

(3) Take other appropriate action, including facilitating an alternative method of dispute resolution such as mediation, or remanding the appeal to the State agency after initial findings.

7. Section 1321.77 is revised to read as follows:

### § 1321.77 Scope.

(a) This section governs the procedures and opportunity for a hearing on:

(1) Disapproval of a State plan or amendment;

(2) Determination that a State agency does not meet one or more requirements of section 307 of the Act, including the intrastate funding formula requirement under section 305 of the Act; and

(3) Determination that there is a failure in the provisions or the administration of an approved plan to comply substantially with Federal requirements, including failure to comply with any assurance required under the Act or under this rule.

(b) Hearing procedures for State plan disapproval, as provided for in section 307(c) and subsection 307(d) of the Act are subject to the provisions of 45 CFR part 213 with the following exceptions:

(1) Section 213.1(a); §§ 213.32(d); and 213.33 do not apply.

(2) Reference to "SRS Hearing Clerk" shall be understood to mean "HHS Hearing Clerk."

(3) References to "Administrator" shall be read to mean "Commissioner on Aging" or, on appeal from the Commissioner's final decision, "the Secretary."

8. Section 1321.79 is revised to read as follows:

### § 1321.79 When a decision is effective.

(a) The State may appeal the Commissioner's decision to the Secretary within 30 days of the date of the decision, as provided in § 1321.81. The Commissioner may set aside or otherwise modify the decision before the State files such an appeal.

(b) If the State appeals the Commissioner's decision to the Secretary, then the Commissioner's decision will not take effect. The State may appeal the Secretary's decision to the United States Court of Appeals for the Circuit in which the State is located not later than 30 days after such decision. The Secretary may set aside or modify the decision before the filing of the record in the Court. The Secretary's decision will become effective 31 days after the date of decision if the State does not appeal. If the State appeals the Secretary's decision, then it will become effective when the record is filed in the Court.

(c) In lieu of appealing the Commissioner's decision to the Secretary, the State may appeal directly to the United States Court of Appeals for the Circuit in which the State is located within 30 days of the Commissioner's decision. The Commissioner may set aside or otherwise modify the decision before the filing of the record in the Court.

(d) If the State appeals the Commissioner's decision to the United States Circuit Court of Appeals, then the Commissioner's decision will become effective on the date the appeal is filed. If the State does not appeal the Commissioner's decision, then the decision will become effective on the thirty-first day after the date of the decision.

9. Section 1321.81 is revised to read as follows:

### § 1321.81 How the State may appeal.

(a) A State may appeal the final decision of the Commissioner disapproving the State plan or plan amendment, finding non-compliance, or finding that a State agency does not meet one or more requirements of sections 305 or 307 of the Act, to the Secretary, as follows:

(1) The State shall file the appeal to the Secretary, with a copy to the Commissioner, not later than 30 days after the Commissioner's final decision;

(2) The State's appeal shall include a copy of the Commissioner's final decision, and the reason why the State claims it is incorrect;

(3) Within 30 days of receipt of the appeal the Commissioner shall submit to the Secretary a copy of the record and a response to the State's claim;

(4) The Secretary shall issue a written decision within 60 days of receipt of the Commissioner's decision;

(5) The Secretary may:

(i) Deny the appeal and uphold the Commissioner's decision;

(ii) Grant the appeal and reverse the Commissioner's decision; or

(iii) Take other appropriate action, including, but not limited to, facilitating an alternative method of dispute resolution such as mediation, or remanding the case to the Commissioner for further development of the record;

(6) The Secretary may designate an appropriate Departmental employee to make a recommended decision before the Secretary issues a final written decision.

(b) A State may appeal the final decision of the Commissioner or the Secretary to the United States Court of Appeals for the Circuit in which the State is located as provided in section 307(e) of the Act.

10. Section 1321.83 is revised to read as follows:

### § 1321.83 How the Commissioner may reallot the State's withheld payments.

The Commissioner will disburse funds withheld from the State directly to any public or nonprofit private organization or agency, or political subdivision of the State that has the authority and capacity to carry out the functions of the State agency and submits a State plan which meets the requirements of this part and which

contains an agreement to meet the non-Federal share requirements.

[FR Doc. 94–6136 Filed 3–16–94; 8:45 am]
BILLING CODE 4150–04–M

federal register

Thursday
March 17, 1994

Part IV

# Department of Transportation

Federal Aviation Administration

14 CFR Parts 91 and 135

# Department of the Interior

National Park Service

36 CFR Part 1, et al.

Overflights of Units of the National Park System; Proposed Rule

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Parts 91 and 135**

**DEPARTMENT OF THE INTERIOR**

**National Park Service**

**36 CFR Parts 1, 2, 3, 4, 5, 6 and 7**

**[Docket No. 27643; Notice No. 94–4]**

## Overflights of Units of the National Park System

**AGENCY:** National Park Service (NPS), DOI and Federal Aviation Administration (FAA), DOT.

**ACTION:** Advanced notice of proposed rulemaking (ANPRM).

**SUMMARY:** This notice seeks public comment on general policy and specific recommendations for voluntary and regulatory actions to address the effects of aircraft overflights on national parks.

On December 22, 1993, Transportation Secretary Federico Peña and Interior Secretary Bruce Babbitt announced the formation of an interagency working group to explore ways to limit or reduce impacts from overflights on national parks. Secretary Babbitt and Secretary Peña concur that increased flight operations at the Grand Canyon and other national parks have significantly diminished the national park experience for park visitors, and that measures can and should be taken to preserve a quality park experience for visitors. The Secretaries see the formation of the working group, and the mutual commitment to addressing the impacts of park overflights, as the initial steps in a new spirit of cooperation between the two departments.

National parks are unique national resources that have been provided special protection by law. The National Park Service (NPS) and the Federal Aviation Administration (FAA) recognize that excessive noise from commercial air tours and other flights over units of the national parks system can interfere with NPS efforts to achieve a natural park experience for visitors and to preserve other park values. Through the interagency working group, the NPS and FAA will cooperate in developing measures to resolve current noise impacts and prevent potential future impacts from overflights at national parks. The purpose of this ANPRM is twofold. First, the ANPRM addresses overflights of Grand Canyon National Park and national parks in the State of Hawaii, with particular emphasis on overflights by commercial tour operators. Second, the ANPRM solicits policy views and recommendations on more general issues as part of an effort to form a comprehensive policy on preventing, minimizing, or eliminating impacts of aircraft overflights.

This notice presents options that may be considered as means to minimize the adverse effects of commercial air tour operations and other overflights on units of the national park system, and seeks public comments and suggestions on voluntary and regulatory actions to deal with noise and other overflight issues that may affect national parks.

**DATES:** Comments on this ANPRM must be received on or before June 15, 1994.

**ADDRESSES:** Comments on this advance notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC–200), Docket No. 27643, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27643. 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:** David L. Bennett, Office of Chief Counsel, AGC–600, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3473, or Michael M. Tiernan, Office of the Solicitor, Department of Interior (DOI), 18th and C Streets, NW., Washington, DC 20240, telephone (202) 208–7597.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested persons are invited to participate in this advance notice of proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments relating to the policy, environmental, energy, federalism, or economic impact that might result from considering the options in this advance notice are also invited. Comments should identify the regulatory docket number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the specified closing date for comments will be considered by NPS and FAA before taking action on this advanced notice of proposed rulemaking. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. Commenters wishing the FAA or NPS to acknowledge receipt of their comments submitted in response to this notice must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 27643." The postcard will be date stamped and mailed to the commenter.

### Availability of ANPRM

Any person may obtain a copy of this ANPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–200, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3485. Communications must identify the notice number of this ANPRM.

### Background

The management of the national park system is guided by the Constitution, public laws (Pub. L.), proclamations, executive orders, rules and regulations, and directives of the Secretary of the Interior and the Assistant Secretary for Fish and Wildlife and Parks. The Act of August 25, 1916, otherwise known as the NPS Organic Act, established the NPS and serves as the touchstone for national park system management philosophy and policy. The Act created the NPS to promote and regulate national parks, monuments, and reservations in accordance with the fundamental purpose of said parks, monuments, and reservations, which is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U.S.C. 1). Subsequent legislation further states that any authorized activity "shall not be exercised in derogation of the values and purposes" of a park area or the national park system, except as may have been or shall be directly and specifically provided by Congress. (16 U.S.C. 1a–1).

Thus, "unimpairment" is joined by a responsibility to avoid derogation not only of the purposes of a park area but also the values for which the national park system and its individual units have been established.

In 1987, the Congress enacted the NPS Overflights Act because it recognized that aircraft overflights can adversely affect national parks. The Act specifically found that noise associated with aircraft overflight at the Grand Canyon National Park was causing "a significant adverse effect on the natural quiet and experience of the park and current operations at the Grand Canyon National Park have raised serious concerns regarding safety of park users." (Pub. L. 100–91, section 3(a)). The Act

mandated a number of studies related to the effects of overflights on parks. The studies have taken longer than was originally anticipated because many of the issues with which they deal are on the cutting edge of technical and scientific capability. Measuring degrees of quiet and perception of quiet is very different from measuring amounts of noise. Since the Overflights Act was passed, the adverse effects associated with the numbers and extent of commercial air sightseeing tours have continued to expand.

The general and over-arching responsibilities for park management by NPS may be modified by specific direction in individual enabling legislation and proclamations. The individual statutes and proclamations for some units of the national park system make it clear that the units were established to provide visitors with natural quiet, an opportunity for solitude, and other attributes that are not necessarily compatible with the noise of commercial air tour sightseeing flights. Some people simply find commercial sightseeing tours over parks inappropriate and incompatible with protection of certain park values and resources. On the other hand, a commercial air tour may provide an opportunity for people to see some park resources in ways not otherwise attainable.

As is pointed out in the Management Policies (NPS 1988):

> Over the years, legislative and administrative actions have been taking place that have brought some measure of change to these components of our national parks. Such actions impact park resources, yet they are not necessarily deemed to have impaired resources for the enjoyment of future generations. Whether an individual action is or is not an "impairment" is a management determination based on NPS policy. In reaching it, the manager should consider such factors as the spatial and temporal extent of the impacts, the resources being impacted and their ability to adjust to those impacts, the relation of the impacted resources to other park resources, and the cumulative as well as the individual effects.

Both physical resources, such as wildlife or geologic features or cultural resources, and intangible values, such as natural quiet solitude, and the experience of wilderness, can be impaired.

### Impacts to Parks

In the case of commercial air tour sightseeing flights operating over and near units of the national park system, the NPS believes that significant park resources are being impaired in some units. Managers of almost one-third of national park system units perceive a problem with some aspect of already existing aircraft overflights. The sound of aircraft is regarded as the primary impact. A survey of park managers confirmed that mechanical noise is among the more serious problems in parks and aircraft noise is the most prominent among these. The perception of noise and adverse effects in units of the national park system may be related to the fact that parks tend to be quieter places in general and that typical sources of noise found in urban and suburban settings are absent in most parks. The potential exists for impairment of park resources and values by the noise and visual intrusion associated with commercial air tour/sightseeing operations in other units where the air tour sightseeing industry is not yet established or developed.

Given the changes in our population distribution, patterns of use of our national parks, and other factors related to transportation, it is no longer sufficient for park managers to consider strategies and actions solely within park boundaries to protect parks and their resources. Overflights are a case in point. Most overflights of units of the national park system begin and end at airports outside parks; the attractions the overflights offer are the resources of the parks themselves. Technically, the park overflight passenger is not a park visitor even though there may be significant adverse effects from noise on the park. In recognition of this fact, the FAA and the NPS are working more closely to use the FAA's plenary authority for regulation of aviation in support of NPS management objectives.

### FAA Authorities

The FAA has broad authority and responsibility to regulate the operation of aircraft and the use of the navigable airspace, and to establish safety standards for and regulate the certification of airmen, aircraft, and air carriers. (Federal Aviation Act of 1958, as amended (FAAct), Section 307(a) and (c); Title VI.) The FAAct provides guidance to the Administrator in carrying out this responsibility. Section 102 of the FAAct states that the Administrator will consider the public interest to include among other things, regulation for safety and efficiency of both civil and military operations, promotion of the development of civil aviation, fulfillment of the requirements of national defense, and operation of a common system of air traffic control for civil and military aircraft. Section 104 provides to each citizen of the United States a public right of transit through the navigable airspace of the United States. Section 305 directs and authorizes the Administrator to encourage and foster the development of civil aeronautics and air commerce. Section 306 requires the Administrator in exercising his authority, to give full consideration to the requirements of national defense, commercial and general aviation, and to the public right of freedom of transit through the navigable airspace.

The FAA's authority is not limited to regulation for aviation safety, efficiency, and development. Subsection 307(c) of the FAAct provides that FAA air traffic rules and flight regulations may be adopted "for the protection of persons and property on the ground." The FAA considers this protection to extend to environmental values on the surface as well as to the safety of persons and property. Section 611 of the FAAct, "in order to afford present and future relief to the public health and welfare from aircraft noise," directs the Administrator to adopt regulations "as the FAA may find necessary for the control and abatement of aircraft noise," including application of such regulations to any of the various certificates issued under Title VI. Finally, it is the general policy of the Federal government that the FAA, like other agencies, will exercise its authority in a manner that will enhance the environment, and that the FAA will make a special effort to preserve the natural beauty of public park and recreation lands, wilderness areas, and wildlife refuges. Section 101 of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321; Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303; and Executive Order 11514, as amended by Executive Order 11991. In addition, the DOT has further authority to regulate services by commercial operators.

### Fees

The Budget Reconciliation Act of 1993 (Pub. L. 103–66, August 10, 1993) amended Section 4 of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–6a) requiring the NPS to impose a commercial tour use fee on each vehicle entering a unit of the national park system, that presently charges an entrance fee, for the purpose of providing commercial tour services.

In addition to surface transportation, this commercial use fee applies to aircraft entering "the airspace of units of the National Park System" identified in sections 2(b) and 3 of Public Law 100.91 (Grand Canyon National Park and Haleakala National Park) as well as any other park areas where the level of commercial aircraft services are equal to

or greater than these two identified areas.

The actual fees established by the legislation are as follows:

- $25 per vehicle with a capacity of 25 people or less, and
- $50 per vehicle with a capacity greater than 25 people. The legislation also gives the Secretary the authority to make reasonable adjustments to these recommended commercial tour fees. Currently, there are no additional NPS areas that charge entrance fees, and also have a level of commercial aircraft services equal or greater to Grand Canyon or Haleakala National Parks. As a result of the legislation, the NPS will need to monitor the number of air tour operations over the affected parks.

**Grand Canyon National Park**

At Grand Canyon, 42 companies offer aerial tours operating from five states (Arizona, California, Nevada, Utah, and New Mexico). These companies provide air tours of the Grand Canyon to about 750,000 people and generate revenues in excess of $100 million. During peak summer months, the number of tours exceeds 10,000 each month. On June 5, 1987, the FAA issued Special Federal Aviation Regulation (SFAR) No. 50–1 (52 FR 22734, June 15, 1987) which provided rules to enhance safety of overflight operations in the vicinity of the Grand Canyon National Park. Section 3 of Public Law 100–91 required the Secretary of the Department of the Interior (DOI) to submit to the FAA Administrator recommendations for the protection of resources in the Grand Canyon from adverse impacts associated with aircraft overflights. The recommendations were to provide for substantial restoration of the natural quiet and experience of the Grand Canyon. With limited exceptions, the recommendations were to prohibit the flight of aircraft below the rim of the Canyon and to designate zones that were flight free except for purposes of administration of underlying lands and emergency operations.

Public Law 100–91 further required the Secretary of the Interior to prepare and issue a final plan for the management of air traffic above the Grand Canyon. In December 1987, the DOI submitted recommendations to the FAA for an aircraft management plan at the Grand Canyon. The recommendations included both rulemaking and non-rulemaking actions. On May 27, 1988, the FAA issued SFAR No. 50–2 (53 FR 20264, June 2, 1988) which revises the procedures for operation of aircraft in the airspace above the Grand Canyon. The rule implements the preliminary recommendations of the Secretary of the Interior for an aircraft management plan at the Grand Canyon with some modifications that the FAA initiated in the interest of aviation safety. SFAR No. 50–2 establishes a Special Flight Rules Area from the surface to 14,500 feet above mean seal level (MSL) in the area of the Grand Canyon. The SFAR prohibits flight below a certain altitude in each of five sectors of this area with some exceptions. The SFAR also establishes flight free zones from the surface to 14,500 feet msl above large areas of the park. The "flight free zones" cover virtually all of the visitors to the North and South Rims and about 90 percent of backcountry users. The SFAR also provided special routes for commercial tour operators and transient operators through the canyon area. Commercial air tour operations are required to be conducted as air taxi and commercial operations under part 135 with stringent requirements including special operations specifications for Grand Canyon. The NPS believes the SFAR has been successful in limiting some noise-associated adverse impacts to the park but most, if not all, of the gain has been, or may be, lost as a result of the exponential growth in numbers of flights over the canyon.

Virtually every class of visitor activity at Grand Canyon National Park is limited or controlled in some way by the NPS to insure that there will be no derogation or impairment of resources and values. Each raft trip on the Colorado River through Grand Canyon National Park must have a permit and the number of permits is limited for both commercial and private rafters. For some private raft trips, a permit may take 4 or 5 years to obtain. Each overnight visitor in the backcountry must have a backcountry permit; the demand for such permits far exceeds the supply. The waiting list for trips by mule into the inner canyon runs into years for some times of the year. There are a limited number of hotel rooms in the park and there are a limited number of parking spaces. In contrast, the commercial air tour sector has experienced unlimited growth at Grand Canyon National Park in the last 10 years. This is so even though Congress found noise associated with overflights to be significantly and adversely affecting the park in the 1987 Overflights Act. In addition, the NPS believes there is ample evidence that the uncontrolled and unregulated growth in this sector is in derogation of the resources and values of the park. NPS studies to that effect will be published later this year.

**Grand Canyon—Actions to Date**

Public Law 100–91 directed the DOI to substantially restore "natural quiet" to the Grand Canyon National Park. Public Law 100–91 also required a study of aircraft noise impacts at a number of national parks and imposed flight restrictions at three parks: Grand Canyon National Park, Yosemite National Park in California, and Haleakala National Park in Hawaii. Public Law 100–91 also required the DOI to conduct a study, with the technical assistance of the Secretary of Transportation, to determine the proper minimum altitude to be maintained by aircraft when flying over units of the national park system. The research was to include an evaluation of the noise levels associated with overflights. Before submission to Congress, the DOI is to provide a draft report (containing the results of its studies) and recommendations for legislative and regulatory action to the FAA for review. The FAA is to notify the DOI of any adverse effects these recommendations would have on the safety of aircraft operations. The FAA is to consult with the DOI to resolve these issues. The final report must include a finding by the FAA that implementation of the DOI recommendations will not have adverse effects on the safety of aircraft operations, or, in the alternative, a statement of the reasons why the recommendations will have an adverse effect. The DOI expects to complete the report by early summer, 1994.

**Haleakala and Hawaii Volcanoes National Parks**

The national parks in Hawaii—Hawaii Volcanoes and Haleakala—have similar problems with commercial air sightseeing tours, principally noise associated with helicopters. The FAA held a series of public hearings in January 1994 to elicit public comments and recommendations for regulatory or policy action related to overflights, including their effects on parks. There are 9 tour operators on the island of Hawaii, and there are approximately 60 commercial air tours a day over Hawaii Volcanoes National Park. At Haleakala, which was established to preserve resources in "natural condition," (39 Stat. 432, section 4), seven companies based on the island of Maui offer helicopter tours. On clear days, helicopters fly over the park during all hours of daylight so that helicopter noise is audible over 30 minutes of every daylight hour (personal communication, Haleakala National Park). Interpretive talks, wildlife observations and censuses, ceremonies,

and other normal activities are interrupted by air tour overflights. The NPS recognizes that the commercial air tour industry is important to the economy of Hawaii but also believes that the tourism industry benefits from the continued NPS protection of the superlative resources of its national parks, unimpaired.

**Hawaii—Actions to Date**

The majority of flights conducted by helicopter companies in Hawaii are commercial air tour/sightseeing operations. Both the NPS and FAA have received numerous complaints of commercial air sightseeing tour flights over residential communities, national parks, wildlife refuge areas, State natural reserve areas, sanctuaries and areas of significant historic or cultural value. Issues raised by the growth of air tour sightseeing activity and the associated increase in the number of flights conducted over a given area include aircraft noise, flight noise, flight safety, and airport site constraints near scenic areas. It may be necessary to determine if there are thresholds of adverse effects that have been met in terms of impacts to the parks.

The FAA has taken several steps to address the overflight issues in Hawaii. In 1986, the FAA conducted a study of helicopter sightseeing operations in Hawaii. As a result of that study, recommendations were made to the State and to operators in Hawaii to improve safety and community relations. Also in 1986, the FAA conducted a joint study with the State on heliport and airport access. A result of that study was a helicopter operating plan for Hawaii. Numerous meetings have since been held with NPS personnel, industry, and local communities, including four public meetings conducted in January 1994.

**Impacts to Parks and Their Resources**

At some parks, including Grand Canyon National Park, Hawaii Volcanoes National Park, and Haleakala National Park, the temporal and spatial extent of commercial air tours are, in the judgment of NPS managers, impairing park resources and visitor experience. While the NPS and FAA are interested in evaluating potential solutions to the problems at these parks, they are also seeking solutions that will make it possible to avert problems in the future throughout the national park system as have developed at these parks.

**Cultural Resources**

Very limited information is available on the response of structures to subsonic aircraft and helicopters. The greatest potential risk to historic structures and cultural resources in units of the national park system is from helicopters. The noise characteristics of helicopters are such that they tend to excite nearby structural elements at their resonance frequency, causing low frequency vibrations, rattle, and in some cases, damage. The sound pressure is greatest at structures in the plane of the main rotor, such as could be the case for a helicopter approaching cliff dwellings. When representative cultural resources were reviewed for probability of damage, most were found to be at some risk from commercial air sightseeing tours. Mesa Verde (Colorado) and Canyonlands National Parks (Utah), among others, protest fragile prehistoric stone and adobe structures, including granaries and cliff dwellings, as well as associated cultural materials that are susceptible to damage from helicopter-induced noise and rotor wash. The cultural and spiritual values commemorated in units of the national park system like San Antonio Missions National Historical Parks and the battlefields of the Civil War can be wholly lost by frequent and intrusive commercial air sightseeing tour overflights.

As further examples of areas impacted by aircraft overflights, Mount Rushmore National Memorial and the Statue of Liberty National Monument are cultural icons that can be adversely affected in significant ways be commercial air tour overflights. At the Statue of Liberty, an impending aircraft service would take off and land helicopters from a floating raft less than one-half mile from the statue. This service would be added to two existing commercial sightseeing helicopter operators that account for 115 flights per day and a service that operates four fixed-wing aircraft on air tours. Similarly, the experience of Mount Rushmore National Memorial for the visitors on the ground can be irretrievably lost as a consequence of the aircraft flights close to memorial.

**Wildlife Effects**

A comprehensive study of the adverse effects of commercial air sightseeing tours on wildlife in parks has yet to be concluded. Studies to date indicate that aircraft can be associated with stress responses on a number of animals, including migratory birds. Endangered species, like the grizzly bear in Glacier National Park, can be harassed by commercial air tour operators unaware of the potential adverse effects of flying too close to them. Other mammals like desert bighorn sheep, dear, and elk that have found refuge in parks can be panicked and stressed by low-flying aircraft, as well. No studies that evaluate long-term effects on wildlife, including population level impacts of commercial air sightseeing tours, have been conducted. As with any potential impact associated with activities in parks, the NPS policy is to err on the side of resource protection until conclusive information is available that would indicate otherwise.

**Assessing Noise Impacts**

The FAA is working with the NPS to define acceptable noise levels as the basis for any proposed limitations on aircraft overflights. This process involves identifying areas with the highest levels of noise sensitivity. Highly sensitive areas potentially would be subject to lower noise limits than would apply to other areas with higher ambient noise levels, based on resource values, types of use, or other factors. Depending on local conditions, alternative approaches may be employed in different areas to achieve the same noise goal.

Current FAA policy and guidelines designate the yearly day-night average sound level (DNL) as the single noise metric for measuring aviation impacts on people in and around airports. This traditional metric alone may not be appropriate for assessing aviation noise impacts in parks and wilderness areas. Three supplemental metrics other than DNL are proven and appear particularly suitable for site-specific assessments. These are Equivalent Sound Level ($L_{eq}$), Sound Exposure Level (SEL) and Time Above a dBA Threshold (TA). Additionally, defining a change of 5 dB as significant at any initial DNL level may be appropriate for specifying further noise analysis in parks and wilderness areas.

The ongoing NPS studies have identified two potential (dose-response relationships that also may be appropriate for assessing aircraft noise impacts. These are "Annoyance vs. Percent Time Heard" and "Interference with Quiet vs. Percent Time Heard." These relationships are preliminary and must be subjected to rigorous analysis for further determination of their potential application.

**Policy Considerations**

In reviewing potential alternatives for achieving NPS and FAA purposes, the FAA has considered a number of measures within its authority under the FAAct that would have the potential to address the problems identified by the NPS. In determining whether a particular action would be beneficial for this purpose and otherwise feasible, the FAA and NPS must take into account a

number of legal and policy considerations.

The action, if regulatory, must be consistent with Administration rulemaking principles as set forth in Executive Order 12866. These principles include requirements that regulations be drafted in the most cost-effective manner to achieve the objective; that regulations be based on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the action to be taken; and that regulations be tailored to impose the least burden on society, including individuals, businesses, and communities, consistent with obtaining the regulatory objective.

The action must have no adverse effect on aviation safety. The action should have the minimum possible adverse effect on the efficiency of air navigation, consistent with the regulatory objective, and should not unduly burden interstate commerce. It must also meet NPS requirements for protecting resources, assuring that there is no impairment, and that there is no derogation, to park resources and values.

The action should focus directly on the problem rather than indirectly. For example, if the issue is the adverse impacts of overflights of a unit of the national park system, then the agency action will address those overflights directly, rather than seek to influence them through regulation of takeoffs and landings at a nearby airport.

**Options for Evaluation**

The FAA and NPS believe that each of the following measures may have some utility, in certain circumstances, as a measure to mitigate the adverse effects of commercial air sightseeing tour overflights of units of the national park system. Inasmuch as some of the measures have not been used before, neither the FAA nor NPS has concluded that such actions would meet the legal and policy considerations summarized above, and specific comment is requested on the benefits, costs, and impacts of each.

*Voluntary Measures*

Voluntary, non-regulatory measures that mitigate noise impacts would impose the minimum burden on operators and can be effective. An example is the recommended minimum altitude of 2,000 feet above ground level described in FAA Advisory Circular 91–36C, which is honored by most transient operators. Another option would be expansion of the existing Interagency Agreement among the FAA, the NPS, the Fish and Wildlife Service, and the Bureau of Land Management. Through that agreement the proponents agree to assess severe situations where impact of aircraft operations upon human, cultural, or natural resources are sufficiently serious to warrant consideration of site-specific action by the FAA to minimize or eliminate the causes of such problems. Expansion of the Interagency Agreement could provide for additional non-regulatory actions by the agencies to mitigate overflight impacts. The agencies seek comments on the relative merits of voluntary measures generally, and specific suggestions for other voluntary measures not currently used by the FAA or NPS.

*Grand Canyon Model*

One option is to follow a model similar to that in use at Grand Canyon, with extensive regulation of airspace, routes, and minimum altitudes as discussed separately below. Such an approach may not adequately consider the fact that the total number and frequency of flights, and the steady growth in numbers of flights, are not currently addressed under that regulatory framework.

*Prohibition of Flights During Flight-Free Time Periods*

A prohibition could be established on use of some or all of the airspace above parks at certain times; e.g., 1 hour per day, 1 day per week, or 2–4 weeks per year. The "quiet times" would be published well in advance both for air tour operator scheduling and for planning by park visitors. In terms of noise mitigation, non-flying quiet periods would present an unusual approach to the balance between air access and the interest in restoring some degree of the natural quiet in Grand Canyon National Park. At some cost in inconvenience and lost business for air tour operators and temporarily reduced access to air tours for their passengers, the park would enjoy a virtual absence of aircraft noise in sensitive areas for specific periods. The agencies specifically request comment on the potential efficacy of these approaches in meeting FAA and NPS goals.

*Altitude Restrictions*

SFAR No. 50–2 at Grand Canyon currently specifies a minimum altitude for flight over the different areas of the park as high as 14,500 feet msl. It also specifies minimum altitudes for operation in the flight corridors between the flight-free zones. Different altitudes are specified for transient general aviation operations and for air tour operators, to separate high-frequency tour flights from one-time transient flights. Different altitudes are also specified for fixed-wing aircraft and helicopter tour flights, for safety and efficiency reasons. The tour operation altitudes are at canyon rim level or above (although some are slightly below the minimum altitude requested by NPS as "rim level" in 1987). A relatively high minimum altitude in a particular area limits access to the airspace over that area by many general aviation aircraft because of performance limitations. Generally, noise mitigation is achieved through higher minimum altitudes because the greater the slant-range distance from an aircraft to a point on the surface, the lower the sound level on the surface from aircraft noise. However, this mitigation can be offset or reversed based on attenuation factors such as hills, heavily wooded areas, and "soft ground" terrain.

*Flight Free Zones/Flight Corridors*

SFAR No. 50–2 at Grand Canyon now describes specific "flight-free" zones to an altitude of 14,500 feet msl above the park. The remaining airspace is defined as corridors for operations over the park by both general aviation and commercial air tour operators. Impact mitigation is achieved through specifying corridors for flight over the park that assure there are no overflights of large areas of the park below the current minimum altitude of 14,500 feet msl. The current corridors and flight-free zones could be amended to address concerns about effects on particular areas of the park.

*Restrictions on Noise Through Allocation of Aircraft Noise Equivalencies*

A noise budget is a mechanism for limiting total aircraft noise impact on the park by assigning each air tour operator an individual limit on noise impact. This would allow individual air tour operators the flexibility to decide what combination of equipment and flight frequency they will use to attain the target noise level. The noise budget would apply only to air tour sightseeing operators and not to transient general aviation operations. The noise budget concept assumes that the FAA and NPS could determine (1) the acceptable amount of aircraft noise exposure on the park surface, and (2) the number of aircraft operations under various mixes of aircraft types that could operate within the total noise budget.

While complex to develop and administer, the noise budget could achieve noise mitigation through directly addressing the issue of noise

impact but would not address the impacts other than noise. Once the "budget" is established based on target noise levels in various areas of the park, air tour operators would have substantial flexibility to adjust their business operations without exceeding those levels. The noise budget could act as a practical limit on the amount of aviation activity, but would not impose limits on the number of operations. A noise budget would also represent an incentive for operators to acquire relatively quiet aircraft to avoid a penalty on the number of operations that could be conducted within each operator's target noise level.

Individual allocations under a noise budget could be established by designating maximum noise levels for each operator. This could be done by "grandfathering" the current noise contribution by each air tour operator, or by some other administrative means.

*Incentives To Encourage Use of Quiet Aircraft*

Air tour operators could be encouraged to use relatively quiet aircraft on park overflights. For example, a flight corridor with a good scenic view of the canyon could be limited to aircraft meeting certain noise emission standards. An air tour operator could find it advantageous to convert its entire fleet to such quiet aircraft to incorporate that corridor in its tours. While there is no Federal requirement for aircraft to be manufactured to produce less noise than Stage 3 standards, some aircraft appropriate for air tour operations are quieter than Stage 3. Increased use of such aircraft in air tours would achieve noise mitigation through reducing noise levels on the surface of the park, although this option does not address issues other than noise.

**Questions**

The NPS and FAA also solicit comments on several questions related to air tour sightseeing operations in and adjacent to units of the national park system.

*Policy*

1. Should commercial sightseeing flights be prohibited over certain national parks? If so, what criteria should be used in determining which parks should not have such tours?

2. Should action pertaining to aircraft overflights in national parks be considered only for air tour/sightseeing operations? What circumstances would include other categories of overflights?

3. What factors should be considered by NPS and FAA in evaluating recommendations for addressing aircraft overflight issues?

*Technical*

1. Is the use of quiet technology aircraft a viable alternative for reducing noise from commercial air tour/sightseeing operations in national parks?

2. Should all commercial air tour/sightseeing operations be conducted under air carrier rules of FAR part 135 and/or 121?

3. Should air carrier operators be required to have special operations specifications for conducting sightseeing flights?

4. Should there be special airspace rules for identified units of the national park system?

5. Should the measures developed for Grand Canyon and Hawaii become models for more general use at parks with actual or potential overflight impacts?

**Request for Comments**

The FAA and NPS solicit comments and information from all segments of the public interested in aviation and national parks and their relationship. The primary focus of this advance notice is commercial air sightseeing tours, rather than military or general aviation operations. It is anticipated that any regulations eventually developed would be general in nature and applicable to the entire national park system. It is not the intent of the NPS or FAA to develop regulations specific to any one park at this time. However, examples of aviation activities observed in one park may be used to support an opinion on overall aviation management issues.

All comments received by FAA and NPS at the addresses and by the dates listed above will be reviewed and utilized in any development of proposed regulations. Comments received pursuant to this Advance Notice of Proposed Rulemaking will be analyzed and discussed in the preamble to the Proposed Rule. Any proposed rulemaking will also be made available for public review and comment.

**Regulatory Process Matters**

*Economic Impact*

The FAA and NPS are unable to determine at this point the likely costs of imposing regulations affecting overflights of national parks or the annual effect on the economy. Following a review of the comments submitted to this ANPRM, the FAA and NPS will determine what regulatory requirements will be proposed, if any, and will review the potential costs and benefits, as required by Executive Order 12866.

*Significance*

This anticipated rulemaking is not a "significant regulatory action" as defined in Executive Order 12866. The FAA has determined that the ANPRM is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, February 2, 1979).

*Other Regulatory Matters*

At this preliminary stage it is not yet possible to determine whether there will be a significant economic impact on a number of small entities or what the paperwork burden might be. These regulatory matters will be addressed at the time of publication of any NPRM on this subject.

**List of Subjects**

*36 CFR Parts 1 through 7*

Grand Canyon National Park, Haleakala National Park, Hawaii Volcanoes National Park.

*14 CFR Parts 91 and 135*

Aircraft, Airmen, Airports, Air taxis, Air traffic control, Aviation safety, Noise control.

Issued in Washington, DC on March 11, 1994.

**Barry L. Valentine,**

*Assistant Administrator for Policy, Planning, & International Aviation.*

**George T. Frampton, Jr.,**

*Assistant Secretary of Interior, Fish and Wildlife and Parks.*

[FR Doc. 94–6216 Filed 3–14–94; 12:28 pm]

BILLING CODE 4910–13–M

federal register

Thursday
March 17, 1994

# Part V

# Securities and Exchange Commission

**17 CFR Parts 211, 231, and 241**

**Municipal Securities Issuers and Others; Statement of the Commission Regarding Disclosure Obligations; Final Rule**

**17 CFR Part 240**

**Municipal Securities Disclosure and Confirmation of Transactions; Proposed Rules**

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 211, 231, and 241**

**[Release No. 33–7049; 34–33741; FR–42; FILE NO. S7–4–94]**

## Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Interpretation; Solicitation of comments.

**SUMMARY:** The Securities and Exchange Commission ("Commission") is publishing its views with respect to the disclosure obligations of participants in the municipal securities markets under the antifraud provisions of the federal securities laws, both in connection with primary offerings and on a continuing basis with respect to the secondary market. This interpretive guidance is intended to assist municipal securities issuers, brokers, dealers and municipal securities dealers in meeting their obligations under the antifraud provisions. The Commission is seeking comment on issues discussed in this release and possible future agency action.

**DATES:** This Interpretation is effective March 9, 1994.

Comments should be received on or before July 15, 1994.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 6–9, Washington, DC 20549. Comment letters should refer to File No. S7–4–94. All comments received will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

**FOR FURTHER INFORMATION CONTACT:** Ann D. Wallace ((202) 272–7282), Amy Meltzer Starr ((202) 272–3654), Vincent W. Mathis ((202) 272–3968), Division of Corporation Finance; Janet W. Russell-Hunter (with respect to Sections III.C.6. and V.) ((202) 504–2418), Division of Market Regulation, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** In a companion release, the Commission is proposing rule amendments that prohibit a broker, dealer or municipal securities dealer from underwriting a municipal issue unless the issuer agrees to disseminate information to the secondary market and from recommending the purchase of a municipal security without reviewing such information.

### I. Executive Summary

The recent high volume of municipal securities offerings, as well as the growing ownership of municipal securities by individual investors, has highlighted the need for improved disclosure practices in the municipal securities market, particularly in the secondary market. To encourage and expedite the ongoing efforts by market participants to improve disclosure practices, and to assist market participants in meeting their obligations under the antifraud provisions, the Commission is publishing its views with respect to disclosures under the federal securities laws in the municipal market.

This interpretive release addresses the following:

(1) With respect to primary offering disclosure, despite the significant improvement in disclosure practices in recent years as a result of voluntary initiatives, increased attention needs to be directed at

- Disclosure of potential conflicts of interest and material financial relationships among issuers, advisers and underwriters, including those arising from political contributions;
- Disclosure regarding the terms and risks of securities being offered;
- Disclosure of the issuer's or obligor's financial condition, results of operations, and cash flows. This information should include audited financial statements (or disclosure that the financial statements were not subject to audit) and an explanation of the accounting principles followed in the preparation of the financial statements, unless the statements were prepared in accordance with generally accepted accounting principles ("GAAP") or accompanied by a quantified explanation of any deviation from GAAP;
- Disclosure of the issuer's plans regarding the provision of information to the secondary market; and
- Timely delivery of preliminary official statements to underwriters and potential investors.

(2) The Commission is renewing its recommendation for legislation to repeal the exemption for corporate obligations underlying certain conduit securities from the registration and reporting requirements of the federal securities laws.

(3) Particularly because of their public nature, issuers in the municipal market routinely make public statements and issue reports that can affect the market for their securities; without a mechanism for providing ongoing disclosures to investors, these disclosures may cause the issuer to violate the antifraud provisions.

Basic mechanisms to address potential antifraud liability include:

- Publication of financial information, including audited financial statements and other financial and operating information, on at least an annual basis;
- Timely reporting of material events reflecting upon the creditworthiness of the issuer or the obligor and the terms of its securities, including material defaults, draws on reserves, adverse rating changes and receipt of an adverse tax opinion; and
- Submission of such information to an information repository.

(4) Underwriters and municipal securities dealers are key players in maintaining the quality of disclosure in the municipal securities markets. The underwriter has a duty to review the issuer's disclosure documents before offering, selling or bidding for the securities and to have a reasonable basis for its belief as to the accuracy and completeness of the representations in the documents. Municipal dealers must have a reasonable basis for recommending the purchase of securities.

In a companion release,[1] the Commission is proposing for comment two related rule amendments, the first proposing to prohibit a broker, dealer or municipal securities dealer from underwriting a municipal issue unless the issuer makes a commitment to provide annual and event-related secondary market information to a designated repository; and the second proposing to prohibit a broker, dealer, or municipal securities dealer from recommending purchases of such issues in the secondary market if it does not review such information.

### II. Introduction

#### *A. The Municipal Securities Market*

As detailed in the recent Staff Report on the Municipal Securities Market, the market for municipal securities is characterized by great diversity and high volume. Issuers, estimated to number approximately 50,000, include state governments, cities, towns, counties, and special subdivisions, such as special purpose districts and public authorities. It is estimated that there currently are 1.3 million municipal issues outstanding, representing approximately $1.2 trillion in securities.[2] In 1993, a record level of over $335 billion in municipal securities was sold, representing over 17,000 issues. This record financing was heavily influenced by refundings. Nevertheless, the level of long term new money financings, representing 49% of financings for the year, reflected continued growth. In 1993, there were $142 billion of new money long term

[1] Exchange Act Release No. 33742 (March 9, 1994) ("Companion Release").

[2] See Division of Market Regulation, Securities and Exchange Commission, *Staff Report on the Municipal Securities Market* ("Staff Report") (Sept. 1993) at 1.

financings, compared to $81 billion in 1988, a 75% increase.[3]

In recent years, the forms of securities used to meet the financing needs of these issuers have become increasingly diverse and complex. For example, conduit bonds, certificates of participation, and a variety of derivative products have joined traditional general obligation and revenue bonds as prevalent forms of municipal financing.[4]

In addition, there has been a change in the investor profile in the municipal securities market. By 1992, individual investors, including those holding through mutual funds, held 75% of the municipal debt outstanding, compared to 44% in 1983.[5]

Along with the changing investor profile, there has been a change in investor strategy. Traditionally, municipal bondholders have been buy and hold investors; however, this strategy has changed significantly with the growth and development of municipal bond funds. Many of these funds actively trade their portfolio securities to take advantage of market conditions or to meet redemption needs.

*B. SEC Oversight of the Municipal Securities Market*

As the agency charged with administering the federal securities laws and overseeing this nation's securities markets, the Commission has an obligation to protect investors in the municipal markets from fraud, including misleading disclosures. As the New York City report stated nearly two decades ago:

> By virtue of the large dollar volume of municipal securities issued and outstanding each year, such securities are a major factor in the Nation's economy and the national securities markets. In light of the national scope of the municipal securities markets, there is an overriding federal interest in assuring that there is adequate disclosure of all material information by issuers of municipal securities.
>
> Although municipalities have certain unique attributes by virtue of their political nature, insofar as they are issuers of securities, they are subject to the proscription against false and misleading disclosures.[6]

The burgeoning volume and complexity of municipal securities offerings, as well as the retail nature of the market, heighten the need for market participants to seek to prevent fraud through the timely provision of material information concerning municipal issuers and securities.

While Congress exempted offerings of municipal securities from the registration requirements and civil liability provisions of the Securities Act of 1933,[7] and a mandated system of periodic reporting under the Securities Exchange Act of 1934,[8] it did not exempt transactions in municipal securities from the coverage of the antifraud provisions of section 17(a) of the Securities Act,[9] section 10(b) of the Exchange Act, and Rule 10b–5 promulgated thereunder.[10] These antifraud provisions prohibit any person, including municipal issuers and brokers, dealers and municipal securities dealers, from making a false or misleading statement of material fact, or omitting any material facts necessary to make statements made by that person not misleading, in connection with the offer, purchase or sale of any security. In addition, brokers, dealers and municipal securities dealers are subject to regulations adopted by the Commission, including those regulations adopted to define and prevent fraud.[11] Municipal securities dealers are also subject to rules promulgated by the Municipal Securities Rulemaking Board ("MSRB").[12]

*C. Disclosure Practices and Calls for Enhanced Disclosure*

In the absence of a statutory scheme for municipal securities registration and reporting, disclosure by municipal issuers has been governed by the demands of market participants and antifraud strictures. Spurred by the New York City fiscal crisis in 1975 and the Washington Public Power Supply System defaults,[13] participants in the municipal securities market have developed extensive guidance to improve the level and quality of disclosure in primary offerings of municipal securities, and to a more limited extent, continuing disclosure in the secondary market.

In 1989, the Commission adopted Rule 15c2–12 under the Exchange Act[14] to enhance the quality and timeliness of disclosure to investors in municipal securities.[15] The rule requires that underwriters (both bank and non-bank) of primary offerings of municipal securities with an aggregate principal amount of $1,000,000 or more obtain and distribute to their customers the issuers' official statements for the offerings. This mechanism provides underwriters an opportunity to review the issuer's disclosure documents before commencing sales to investors.[16]

There is a consensus that, over the last two decades, these market and regulatory efforts have improved significantly the quality of primary offering disclosure in the municipal securities markets.[17] Nonetheless, there continue to be concerns with the adequacy of municipal offering disclosure, particularly with respect to offerings of non-general obligation bonds and smaller issues.[18]

Secondary market disclosure practices present greater concerns. Recent highly publicized defaults[19] and refundings,[20]

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[3] "A Decade of Municipal Finance," *The Bond Buyer* (Jan. 6, 1994) at 24.

[4] Staff Report at 1–2.

[5] *The Bond Buyer 1993 Yearbook* ("Bond Buyer 1993 Yearbook") at 61–63.

[6] *Staff Report on Transactions in Securities of the City of New York* ("NY City Report") (Aug. 1977) Chapter III, at 1–2.

[7] See section 3(a)(2) of the Securities Act (15 U.S.C. 77c(a)(2)).

[8] See section 3(a)(29) of the Exchange Act (15 U.S.C. 78c(a)(29)).

[9] 15 U.S.C. 77q(a).

[10] 15 U.S.C. 78j(b); 17 CFR 240.10b–5.

[11] Sections 15(c) (1) and (2) of the Exchange Act (15 U.S.C. 78o(c) (1) and (2)).

[12] See *MSRB Manual* (CCH).

[13] See Securities and Exchange Commission, *Report of the Securities and Exchange Commission on Regulation of Municipal Securities* (1988); Securities and Exchange Commission, *Staff Report on the Investigation in the Matter of Transactions in the Washington Public Power Supply System Securities* (1988); Securities Act Release No. 6021, *Final Report in the Matter of Transactions in the Securities of the City of New York* (Feb. 5, 1979); NY City Report.

[14] 17 CFR 240.15c2–12; see Municipal Securities Disclosure, Securities Exchange Act Release No. 26100 (Sept. 28, 1988), 53 FR 37778 ("Proposing Release"); Municipal Securities Disclosure, Securities Exchange Act Release No. 26985 (July 10, 1989), 54 FR 28799 ("Adopting Release").

[15] Proposing Release, 53 FR at 37779–37782; Staff Report at 25.

[16] Adopting Release, 54 FR at 28800.

[17] National Federation of Municipal Analysts, *Membership Survey Results Fall 1992 Disclosure Survey* ("NFMA Survey"); Public Securities Association, Municipal Securities Disclosure Task Force, *Report: Initial Analysis of Current Disclosure Practices in the Municipal Securities Market* (June 1988) ("PSA Survey") (content and completeness of primary disclosure documents and sufficiency of financial information rated satisfactory to excellent by 94% and 93% of firms responding, respectively).

[18] See Letter to Chairman Levitt from Charles Mires, Allstate Insurance Company (Nov. 4, 1993, as updated Jan. 19, 1994) ("Allstate Letter") (primary market disclosure by conduits found inadequate in 43.8% of rated issues reviewed); NFMA Survey (local housing, special district, hospitals, long term healthcare and industrial development issues were found to provide the least disclosure); PSA Survey (small issue industrial development bonds received a low rating; issues of $10 million or less received a low rating).

[19] Examples include the defaults engendered by the failures of Mutual Benefit Life, Executive Life and Tucson Electric Power, and the bankruptcies arising out of the Colorado Special Districts. See, *e.g.*, Hinden, "Mutual Benefit Life's Collapse Shows Fragility of Bond Guarantees," *The Washington Post* (Jul. 22, 1991) at F 27; Levinson, "No Coverage Against Junk," *Newsweek* (Apr. 22, 1991) at 46; Stamas, "Rep. Dingell Asks SEC to Investigate Defaults by Special Assessment Districts in Colorado," *The Bond Buyer* (Jan. 25, 1991) at 1.

[20] See Gasparino, "Balancing Budgets Through Lease Deals May Pose Credit Risks, Rating Agency Warns," *The Bond Buyer* (Jan. 25, 1993) at 1;

Continued

as well as the tremendous level of issuances during the past two years, have heightened interest in municipal secondary market disclosure.[21] The PSA has testified that today "secondary market information is difficult to come by even for professional municipal credit analysts, to say nothing of retail investors."[22] Substantial issuer information, in the form of official statements, state-required reports, and other public documents, is available from the approximately 20% of municipal issuers that come to market frequently, accounting for 80% of the dollar volume of municipal securities issued.[23] However, the remaining issuers, representing 20% in dollar volume but 80% in number, which come to the market much less frequently, provide substantially less continuing information. Many of these issues are health care issues, housing issues, industrial development bonds, and other conduit financings,[24] financing sectors which have had the greatest incidence of defaults, both monetary and technical.[25] In addition, information often is unavailable for smaller issues of securities of general purpose units of government and the securities of special purpose districts and authorities.[26]

In response to a request by Commission Chairman Arthur Levitt for a recommended "market-participant sponsored solution" to the disclosure issues in the municipal securities market, on December 20, 1993, 12 groups and associations representing a broad range of market participants submitted to the Commission a Joint Statement on Improvements in Municipal Securities Market Disclosure (the "Joint Statement").[27] The Joint Statement sets forth "a framework for improving the availability of information in the marketplace" that calls for both continued market initiatives to improve issuer disclosure and "support from the SEC and the Municipal Securities Rulemaking Board (MSRB)."[28] Among other things, its participants recommend the adoption of a rule or interpretive guidance restricting underwriting of municipal issues unless continuing information covenants are provided by the issuer.

## III. Primary Offering Disclosure

### *A. Application of the Antifraud Provisions*

The antifraud provisions of the federal securities laws prohibit fraudulent or deceptive practices in the offer and sale of municipal securities.[29] Disclosure documents used by municipal issuers, such as official statements, are subject to the prohibition against false or misleading statements of material facts, including the omission of material facts necessary to make the statements made, in light of the circumstances in which they are made, not misleading. The adequacy of the disclosure provided in municipal security offering materials is tested against an objective standard: an omitted fact is material if there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor]. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[30]

### *B. Voluntary Guidelines*

In the primary offering of municipal securities, the extensive voluntary guidelines issued by the Government Finance Officers Association ("GFOA") have received widespread acceptance and, among a number of larger issuers, have been viewed as "in essence obligatory rules."[31] Other groups, including the National Federation of Municipal Analysts ("NFMA"), have published voluntary disclosure guidelines covering industry specific sectors, including among others, housing, student loans, transportation and health care.[32] In connection with the offering of municipal securities, the GFOA Guidelines call for:[33]

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Herman, "Municipal-Bond Holders: Watch Out for 'Call' Shock," *The Wall Street Journal* (Aug. 29, 1992) at C1; Hume, "Dealer Threatens Suit Over Proposed Call for Escrowed Bonds," *The Bond Buyer* (Nov. 6, 1993) at 4; Hume, "Issuer in Louisiana May Run Afoul of Law if Escrowed Bonds Are Called Next Month," *The Bond Buyer* (Apr. 22, 1993) at 1; Hume, "Rise in Re-Refundings of Escrowed Bonds Likely to Gain Attention at Treasury, SEC," *The Bond Buyer* (May 12, 1992) at 1.

[21] See generally, Testimony of Jeffrey S. Green, General Counsel, Port Authority of New York and New Jersey on behalf of Government Finance Officers Association, before the Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, Oct. 7, 1993 ("GFOA Testimony") at 7–9; Remarks by C. Richard Lehmann, President, Bond Investors Association Before the U.S. House of Representatives Subcommittee on Telecommunications and Finance Concerning the Municipal Securities Market, Oct. 7, 1993 ("Lehmann Testimony") at 4–5; Testimony of Andrew R. Kintzinger, President-Elect, National Association of Bond Lawyers, Before the Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, Oct. 7, 1993 ("NABL Testimony") at 8–23; Testimony of Harvey Eckert, Chairman of the Blue Ribbon Committee on Secondary Market Disclosure on Behalf of the National Association of State Auditors, Comptrollers and Treasurers Before the Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, Oct. 7, 1993 ("NASACT Testimony") at 3–6; Testimony Relating to the Municipal Securities Market given by the National Federation of Municipal Analysts, Katherine Bateman, Chairperson, to the Subcommittee on Telecommunications and Finance, Oct. 7, 1993 ("NFMA Testimony") at 1–7; Statement of Gerald McBride, Chairman, Municipal Securities Division, Public Securities Association, Before the House Committee on Energy and Commerce, Telecommunications and Finance Subcommittee, Oct. 7, 1993 ("PSA Testimony") at 5–7; NASACT, *State and Local Government Securities Markets and Secondary Market Disclosure* (Oct. 1993) at 5; Stamas, "Issuers' Intentions on Secondary Market Disclosure are Starting to Appear in Official Statements," *The Bond Buyer* (Dec. 14, 1992) at 1; Standard & Poor's, "In Support of Secondary Market Disclosure," *CreditWeek Municipal* (Mar. 16, 1992).

[22] PSA Testimony at 5. See also Lehmann Testimony at 4; NASACT Testimony at 3; Nemes, "Investors' Service Steps in to Fill Void in Hospital Data Disclosure," *Modern Healthcare* (Feb. 3, 1992) at 46; Quint, "Credit Markets; Aiming for More Data About Municipal Bonds," *The New York Times* (June 28, 1993) at D5; Schifrin, "Hello, Sucker," *Forbes* (Feb. 1, 1993) at 40.

[23] NASACT, *Report of the Blue Ribbon Committee on Secondary Market Disclosure—Improving Secondary Market Disclosure* (Aug. 1993) ("NASACT Blue Ribbon Committee Report") at 1–2.

[24] See *id.* at 1. See also Allstate Letter.

[25] See Bond Buyer 1993 Yearbook at 3–5; *Municipal Bond Defaults—The 1980's; a Decade in Review* (J.J. Kenny Co., Inc. 1993)("Kenny Default Report"); Public Securities Association, *An Examination of Non-Rated Municipal Defaults 1986–1991* (Jan. 8, 1993)("PSA Default Report"); Staff Report, Appendix B.

[26] See NASACT Blue Ribbon Committee Report at 1–2.

[27] Joint Statement on Improvements in Municipal Securities Market Disclosure ("Joint Statement") (Dec. 20, 1993) at 1. The Joint Statement was submitted by the American Bankers Association's Corporate Trust Committee, American Public Power Association, Association of Local Housing Finance Agencies, Council of Infrastructure Financing Authorities, Government Finance Officers Association, National Association of Bond Lawyers, National Association of Counties, National Association of State Auditors, Comptrollers and Treasurers, National Association of State Treasurers, National Council of State Housing Agencies, National Federation of Municipal Analysts, and Public Securities Association.

[28] Id.

[29] See *In re Washington Public Power Supply System Securities Litigation*, 623 F. Supp. 1466, 1478 (W.D. Wash. 1985). See also *Brown* v. *City of Covington*, 805 F.2d 1266, 1270 (6th Cir. 1986).

[30] *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).

[31] Letter from Harlan E. Boyles, Treasurer of North Carolina to SEC Chairman Levitt, dated December 7, 1993. See Government Finance Officers Association, Disclosure Guidelines for State and Local Government Securities (Jan. 1991) ("GFOA Guidelines").

[32] See NFMA, *Disclosure Handbook for Municipal Securities 1992 Update* (Nov. 1992) ("NFMA Handbook"). See also Government Accounting Standards Board, *Codification of Government Accounting and Financial Reporting Standards* (2d ed. 1987); PSA, *Recommendations for a Consistent Presentation of Basic Bond Provisions in Official Statements* (Dec. 1989).

[33] GFOA Guidelines at xv–xix (summary).

• An introduction to serve as the guide to the official statement;

• A description of the securities being offered, including complete information regarding the purposes of the offering, the plan of financing, the security and sources of repayment, and the priority of the securities, as well as structural characteristics, such as call provisions, tender options, original issue or deep discount, variable rates, and lease purchase agreements;

• Information regarding the nature and extent of any credit enhancement and financial and business information about the issuer of the enhancement;

• A description of the government issuer or enterprise, including information about the issuer's range or level of service, capacity and demographic factors and, in the case of revenue supported offerings, information on the enterprise's organization, management, revenue structure, results of operations and operating plan;

• With respect to obligations of private profit making and nonprofit conduit issuers, information regarding the business or other activity, including the enterprise's form of organization and management, rate-making or pricing policies, and historical operations and plan of operation;

• A description of the issuer's outstanding debt, including the authority to incur debt, limitations on debt, and the prospective debt burden and rate of its retirement;

• A description of the basic documentation, such as indentures, trust agreements and resolutions authorizing the issuance and establishing the rights of the parties;

• Financial information, including summary information regarding the issuer's or obligor's financial practices and results of operations, and financial statements, prepared in conformity with generally accepted accounting principles and audited in accordance with generally accepted auditing standards;

• A discussion of legal matters, such as pending judicial, administrative, or regulatory proceedings that may significantly affect the securities offered, legal opinions, and tax considerations; and

• A discussion of miscellaneous matters, including ratings and their description and meanings, underwriting arrangements, arrangements with financial advisors, interests of named experts, pending legislation, and the availability of additional information and documentation.

The guidelines prepared by the GFOA and the NFMA provide a generally comprehensive roadmap for disclosure in offering statements for municipal securities offerings. There are, however, areas that need further improvement in both the context of negotiated and competitively bid underwritings. In addition, implementation of these guidelines needs to be extended to the whole market. For example, while large repeat general obligation issuers usually have comprehensive disclosure documents, small issuers and conduit issuers, particularly in the health care, housing and industrial development areas, do not always provide the same quality of disclosure.[34]

*C. Areas Where Improvement Is Needed*

1. Conflicts of Interest and Other Relationships or Practices

Information concerning financial and business relationships and arrangements among the parties involved in the issuance of municipal securities may be critical to an evaluation of an offering.[35] Recent revelations about practices used in the municipal securities offering process have highlighted the potential materiality of information concerning financial and business relationships, arrangements or practices, including political contributions, that could influence municipal securities offerings. For example, such information could indicate the existence of actual or potential conflicts of interest, breaches of duty, or less than arm's-length transactions. Similarly, these matters may reflect upon the qualifications, level of diligence, and disinterestedness of financial advisers, underwriters, experts and other participants in an offering. Failure to disclose material information concerning such relationships, arrangements or practices may render misleading statements made in connection with the process, including statements in the official statement about the use of proceeds, underwriters' compensation and other expenses of the offering. In addition, investors reasonably expect participants in municipal securities offerings to follow standards and procedures established by such participants, or other governing authorities, to safeguard the integrity of the offering process; accordingly, material deviations from those procedures warrant disclosure.

Existing rules and voluntary guidelines call for certain specific disclosures by offering participants. GFOA guidelines call for offering statement disclosure to investors of contingency fees to named experts, including counsel, and any other interest or connection those parties have with other transaction participants.[36] MSRB rules call for dealer disclosure to issuers and investors of any financial advisory relationship between an issuer and a broker, dealer, or municipal securities dealer, under certain circumstances.[37] MSRB rules also call for dealer disclosure to investors of, among other things, certain fees and expenses in negotiated transactions.[38]

Beyond existing specific disclosure requirements and guidelines, the range of financial and business relationships, arrangements and practices that need to be disclosed depends on the particular facts and circumstances of each case. If, for example, the issuer (or any person acting on its behalf) selects an underwriter, syndicate or selling group member, expert, counsel or other party who has a direct or indirect (for example, through a consultant) financial or business relationship or arrangement with persons connected with the offering process, that relationship or arrangement may be material.[39] Areas of particular concern are undisclosed payments to obtain underwriting assignments and undisclosed agreements or arrangements, including fee splitting, between financial advisers and underwriters.[40] If the adviser is hired to assist the issuer, such relationships, financial or otherwise, may divide loyalties. Similarly, affiliations between sellers of property to be used in a financed project and conduit borrowers raise questions regarding, among other things, the determination of fair market value of the property and self-dealing.

2. Terms and Risks of Securities

Evolution in the financial markets has led to increasingly complex and sophisticated derivative and other municipal products. While these new

[34] See NASACT Blue Ribbon Committee Report at 1–2; Staff Report at 26. Industry participants generally agreed in testimony before the House of Representatives Subcommittee on Telecommunications and Finance on October 7, 1993, that both the greatest disclosure problems and the greatest risk of default were with unrated hospital, housing, special district and industrial development revenue bonds.

[35] See *SEC* v. *Washington County Utility District*, 676 F.2d 218, 222 (6th Cir. 1982) ("Flagrant violations" of antifraud provisions arising from failure to disclose use of proceeds to purchase options on property held by issuer's manager and financial arrangements between the manager and the underwriter).

[36] Section XII.D. of the GFOA Guidelines.

[37] MSRB rule G–23.

[38] MSRB rule G–32. See Section 15B(c)(1) of the Exchange Act (15 U.S.C. 78*o*–4(c)(1)) (requiring compliance with MSRB rules); MSRB rule G–17.

[39] Gasparino, "The Trouble with Consultants", *The Bond Buyer* (Nov. 16, 1993) at 1. In his testimony before the Subcommittee on Telecommunications and Finance, Andrew Kintzinger, on behalf of the National Association of Bond Lawyers ("NABL"), stated: "[M]embers of the municipal finance bar should work with issuers to develop procurement procedures for state and local governments to ensure that all material financial arrangements between underwriters within the syndicate and between underwriters and financial advisors and possible conflicts of interest between issuers and members of the underwriting syndicate or other participants be accurately documented and disclosed or, if appropriate, prohibited." NABL Testimony at 28. See Joint Statement at 2.

[40] Gasparino, "Several Issuers Start to Scrutinize Ties Between Advisers, Bankers," *The Bond Buyer* (Dec. 27, 1993) at 1. *See* Section XII.C. of the GFOA Guidelines; rule G–23 of the MSRB.

products offer investors a wide range of investment alternatives, in choosing among the alternatives, investors need a clear understanding of the terms and the particular risks arising from the nature of the products.[41]

In particular, investors need to be informed about the nature and effects of each significant term of the debt, including credit enhancements and risk modifiers, such as inverse floaters and detachable call rights. Investors in these securities should be aware of their exposure to interest rate volatility, under all possible scenarios. In addition, any legal risk concerning the issuer's authority to issue securities with unconventional features needs to be disclosed. The PSA recently has identified disclosure that should be provided in connection with the offer of financial instruments that include such features as auction and swap-based inverse floaters and embedded cap bonds.[42]

Credit enhancements are used with increasing frequency in the municipal market. According to published information, over 37% of the dollar volume of new long term issues carry some form of credit enhancement.[43] The existence of bond insurance or other credit enhancement creates the need for disclosure concerning the provider of the credit enhancement and the terms of the enhancement[44] to avoid misleading investors concerning the value of the enhancements provided and the party's ability to fund the enhancement. The GFOA recommends that appropriate financial information about the assets, revenues, reserves and results of operations of credit enhancers be provided in the official statement. In determining the extent of disclosure, consideration should be given to the amount of the enhancement relative to the income and cash flows of the issuer or obligor, conditions precedent to application of the enhancement, duration of the enhancement, and other factors indicating a material relationship between the enhancement and the investor's anticipated return.

In a trend that has become increasingly common, municipal bond insurers are including in indentures provisions that appear to delegate to the bond insurer the ability to modify terms of the indenture, prior to default, without the consent of, or even prior notification to, bondholders.[45] There should be clear disclosure of any such provision that may have a material impact on the rights of bondholders or the obligations of the issuer, including the specific material rights of the bondholder that could be so altered.

3. Financial Information

a. *Financial Accounting.* Sound financial statements are critical to the integrity of the primary and secondary markets for municipal securities, just as they are for corporate securities.[46] The key to the reliability and relevancy of the information contained in the financial statements of a municipal issuer is the use of a comprehensive body of accounting principles consistently applied by the issuer.[47]

Although there continues to be some diversity in the financial reporting practices used in preparing financial statements of governmental issuers, practice in the municipal market is evolving rapidly to reliance on generally accepted accounting principles ("GAAP") as determined by the Government Accounting Standards Board ("GASB").[48] Only two years after GASB was founded in 1984, financial statements prepared in accordance with GAAP, as promulgated by GASB, were required by 75.2% of cities, 78.3% of counties and 69% of school districts responding to a research survey.[49] Forty-six states currently require, or are in the process of establishing a requirement, that state government financial statements be presented in accordance with GAAP.[50] In addition, local as well as state governments that receive significant amounts of federal aid must prepare financial statements in accordance with GAAP or provide information concerning variance from GAAP.[51]

The GFOA Guidelines call for financial statements that are either prepared in accordance with GAAP or accompanied by a quantified (if practicable) explanation of the differences.[52] To avoid misunderstanding, investors need to be informed of the basis for financial statement presentation. Accordingly, when a municipal issuer neither uses GAAP nor provides a quantified explanation of material deviations from GAAP, investors need a full explanation of the accounting principles followed.

b. *Audits.* Investors in the public securities markets have a reasonable expectation that annual financial statements contained in offering documents or periodic reports are subject to audit.[53] In the case of municipal issuers, these financial statement audits are typically conducted by either an independent certified public accountant or a state auditor. Although the frequency and timeliness of audits vary, every state requires some periodic audit verification of government financial statements.[54] A prudent investor needs to be able to evaluate the extent to which he or she can rely on the second look an auditor provides.

Accordingly, the offering statement should state whether the financial statements it contains were audited in accordance with generally accepted auditing standards ("GAAS"), as established by the American Institute of Certified Public Accountants.

c. *Other Financial and Operating Information.* Financial information beyond that contained in the financial statements—provided in tabular and

[41] As the NABL Testimony indicates: "Derivatives are sophisticated securities products designed for sophisticated investors and should not be sold to retail investors generally and certainly not without comprehensive disclosure. If issuers choose to undertake the financial benefits of these sophisticated and complicated transactions, they can assume the financial costs of providing * * * information." NABL Testimony at 22.

[42] PSA, *Recommendation on Dissemination of Product—Specific Terms For Municipal Derivative Products* (1993).

[43] PSA, *Municipal Market Developments* (Aug. 1993) at 5.

[44] *See* Revisions to Rules Regulating Money Market Funds, Securities Act Rel. No. 7038, 58 FR 68585, 68588 (footnote omitted) ("Money Market Fund Release"); Securities and Exchange Commission, *Report by the United States Securities and Exchange Commission on the Financial Guarantee Market: The Use of the Exemption in Section 3(a)(2) of the Securities Act of 1933 for Securities Guaranteed by Banks and the Use of Insurance Policies to Guarantee Debt Securities* (Aug. 28, 1987) ("SEC Financial Guarantee Report") at 82; Adopting Release, 54 FR at 28812.

[45] See Allstate Letter.

[46] See NY City Report at Ch. II p. 92.

[47] See GFOA Guidelines at 50.

[48] The financial statements of corporate obligors backing conduit securities should follow GAAP for such entities, as established by the Financial Accounting Standards Board and other bodies.

[49] Ingram & Robbins, *Financial Reporting Practices of Local Governments*, Government Accounting Standards Board (1987) at 12 (The survey results were based on information received from 567 respondents to a survey questionnaire mailed to 1161 government units).

[50] *State Comptrollers: Technical Activities and Functions* (1992 Edition).

[51] Where state and local governments programs that are subject to the federal "Single Audit Act of 1984," Public Law 98–502 *et seq.* prepare financial statements on a basis other than GAAP, "the audit report should state the nature of the variances thereffom and follow professional guidance for reporting on financial statements which have not been prepared in accordance with GAAP." Office of Management and Budget, "Questions and Answers on the Single Audit Process of OMB Circular A–128, 'Single Audits of State and Local Governments,' " 52 FR at 43716 (Nov. 13, 1987), question 35.

[52] GFOA Guidelines at 45.

[53] See Gauthier, *An Elected Official's Guide to Auditing* (1992) at vii and xi.

[54] State Comptrollers: Technical Activities and Functions; NASACT, *Municipal Task Force Report* (1990) ("NASACT 1990 Task Force Report") at 12.

narrative format, footnotes, supplemental tables, schedules and discussions of operations and financial position—is essential to the fair presentation of an issuer's financial performance and position. As reflected in industry guidelines,[55] the type of information needed (*e.g.*, tax revenue base, budget, demographics, project revenues and operations) varies depending on the type of issuer, the type of security sold, and the sources for repayment of the bond obligations.

There are a number of areas in which greater care needs to be taken to provide investors with adequate information. In a pooled financing structure, such as that used by bond banks, in addition to providing financial information concerning the issuing authority or program in the aggregate, it may be necessary to provide information on participating obligors. This will depend on diversification and risk concentration factors, such as the significance of any single obligor to the overall financing.

Conduit bond issuers need to provide operational information concerning the activities of the private enterprise that will provide the cash flows to service the debt—for example, financial reporting, legal proceedings, changes in indebtedness, defaults and other significant developments relating to the underlying corporate obligor. Where the issuing authority in a conduit financing has no remaining obligation for the repayment of the indebtedness, in providing financial information about the issuing entity (as compared to the obligor on the bonds), care must be taken to avoid misleading investors regarding the sources of repayment.[56]

Municipal issuers also must consider disclosure issues arising from their activities as end users of derivative products. For example, the use of non-exchange traded derivatives to alter interest rate risk exposes the issuer to counterparty credit risk. Disclosure documents need to discuss the market risks to which issuers are exposed, the strategies used to alter such risks and the exposure to both market risk and credit risk resulting from risk alteration strategies. The NFMA has published sector specific secondary market disclosure guidelines calling for a discussion of the issuer's use of derivative products, especially interest rate swaps.[57]

Moreover, in addition to financial and operating data, the official statement may need to include a narrative explanation to avoid misunderstanding and assist the reader in understanding the financial presentation. A numerical presentation alone may not be sufficient to permit an investor to judge financial and operating condition of the issuer or obligor.[58] For example, it may be necessary to explain the presentation of budget information and the relationship of the budget figures to the financial statements.

In addition, issuers must assess whether the future impact of currently known facts mandate disclosure. The GFOA Guidelines call for a description of known facts that would significantly affect the financial information presented or future financial operation of the issuer, as well as a discussion of its projected operations.[59] For example, in a hospital financing, a steadily declining population in the surrounding community that, in the future, would not support the size of facility to be built would be important to investors. Disclosure of such currently known conditions and their future impact is critical to informed decisionmaking.

d. *Timeliness of Financial Statements.* The timeliness of financial information is a major factor in its usefulness. To avoid providing investors with a stale, and therefore potentially misleading, picture of financial condition and results of operations, issuers and obligors need to release their annual financial statements as soon as practical. After extensive discussion with market participants, it appears that, for the most part, audited financial statements of municipal issuers for the most recently completed fiscal year are available within six months after fiscal year end. The six month time period is consistent with the recommendations of NASACT's Blue Ribbon Committee Report.[60] Unaudited financial statements should be provided when available prior to the completion of the audit.

4. Availability of Continuing Information

An investor's ability to monitor future developments affecting the issuer, as well as the likely liquidity of a security, are important to an investor's evaluation of an offering. The official statement should state clearly whether ongoing disclosure concerning the issuer or obligor will be provided, including the type, timing, and method of providing such information.[61] In deciding whether to purchase the securities or to continue to hold them, investors need to know whether the issuer has committed to provide information on an ongoing basis.[62] The absence of such a commitment can adversely affect the secondary market for the securities and increases the risks of the investment.

As discussed above, the Joint Statement recommends that the Commission adopt a rule prohibiting a municipal securities dealer from underwriting securities absent a commitment to provide ongoing information. In the Companion Release, the Commission is proposing such a rule for comment. In order to fully inform investors, an issuer needs to include in the official statement a description of the scope of its continuing disclosure commitment, the type of information that would be provided, the repositories to which the information would be sent, when annual and other periodic information would be available, and the consequences of the issuer's failure to abide by the requirements of the covenant.

5. Clarity and Conciseness

Like other disclosure documents, official statements need to be clear and concise to avoid misleading investors through confusion and obfuscation. The expanded level of disclosure in official statements and increased sophistication of municipal securities instruments have, in many cases, resulted in longer

[55] See generally, GFOA Guidelines; NFMA Handbook. *See also infra* n. 84.

[56] See Letter of John Murphy, Executive Director of Association of Local Housing Finance Agencies to Chairman Levitt (Dec. 20, 1993).

[57] NFMA Handbook.

[58] See Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835 (May 24, 1989), 54 FR 22427; Securities Act Release No. 6711 (April 24, 1987), 52 FR 13715.

[59] GFOA Guidelines at 55.

[60] See NASACT Blue Ribbon Committee Report at 17. While due dates for audited financial statements of government units differ, a significant majority of states currently require audited financial statements for government units to be filed within six months after the fiscal year end. NASACT 1990 Task Force Report at 12–22.

[61] See Fall 1992 NFMA Survey. See also American Bankers Association, Corporate Trust Committee, Four Point Public 1991 Disclosure Guidelines for Corporate Trustees ("ABA 1991 Guidelines") at 2; Stamas, "Issuers' Intentions on Secondary Disclosure are Starting to Appear in Official Statements," *The Bond Buyer* (Dec. 14, 1992) at 1.

[62] See MSRB, *Report of the Municipal Securities Rulemaking Board on Regulation of the Municipal Securities Market* (Sept. 1993) at 6–7 (Board announced plan that would include requiring underwriters to recommend to issuers that they provide continuing disclosure to the market and requiring municipal securities dealers to disclose to their customers the negative impact that the lack of secondary market information may have on the value and liquidity of the securities and whether the issuer has agreed to voluntarily provide such disclosures).

and more complex disclosure documents, with the corresponding danger of overly detailed, legalistic, and possibly obtuse disclosure.[63]

The location, emphasis, and context of the disclosure can affect the ability of a reasonable investor to understand the relationship between, and cumulative effect of, the disclosure.[64] As the U.S. Court of Appeals for the Second Circuit has stated:

> [D]isclosures in a prospectus must steer a middle course, neither submerging a material fact in a flood of collateral data, nor slighting its importance through seemingly cavalier treatment. The import of the information conveyed must be neither oversubtle nor overplayed, its meaning accurate, yet accessible.[65]

Appropriate disclosure "is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead" investors.[66] As the Commission has indicated in other contexts, legalistic, overly complex presentations and inattention to understandability can render the disclosure incomprehensible and consequently misleading.[67]

6. Delivery of Official Statements

One of the concerns leading to the adoption of Rule 15c2–12 was that underwriters were not receiving official statements within time periods that would allow them to examine the accuracy of the disclosure.[68] The Commission noted in proposing the rule that a thorough, professional review by underwriters of municipal offering documents could encourage appropriate disclosure of foreseeable risks and accurate descriptions of complex put and call features, as well as novel financing structures now employed in many municipal offerings. In addition, with the increase in novel or complex financings, there may be greater value in having investors receive disclosure documents describing fundamental aspects of their investment. Yet, underwriters are unable to perform this function effectively when offering statements are not provided to them on a timely basis.[69]

To address this concern, the rule requires any underwriter, including lead underwriters, syndicate members, and selling group members that receive in excess of the usual seller's commission, to obtain and review an official statement that is deemed final as of its date by the issuer, except for the omission of certain information, before bidding for, purchasing, offering, or selling municipal securities in a primary offering.

Since the adoption of Rule 15c2–12, however, there have been continued problems with the timeliness of receipt by underwriters of the "near final" official statement required by the Rule.[70] In addition to compromising the ability of an underwriter to make a reasonable investigation of the issuer, this problem also may limit the ability of potential customers to make informed investment decisions. In a recent NFMA survey, 59% of those responding rated the delivery of preliminary official statements in competitive sales as either not very good or poor, and 50% rated the delivery of preliminary official statements in negotiated sales as either not very good or poor.[71]

One cause of delay has been confusion as to the point at which the underwriter must have obtained and reviewed the near final official statement in a negotiated offering. The term "offer" traditionally has been defined broadly under the federal securities laws and, for purposes of Rule 15c2–12, encompasses the distribution of a preliminary official statement by the underwriter, as well as oral solicitations of indications of interest. Thus, prior to the time that the underwriter distributes the preliminary official statement to potential investors, or otherwise begins orally soliciting investors, the rule requires it to have obtained and reviewed a near final official statement. If no offers are made, the underwriter is required to obtain and review a near final official statement by the earlier of the time the underwriter agrees (whether in principle or by signing the bond purchase agreement) to purchase the bonds, or the first sale of bonds to investors.[72]

The Commission has acknowledged that the rule would require greater planning and discipline by some issuers.[73] The Commission anticipated that, in order to allow underwriters to meet their obligation to have a reasonable basis for recommending any municipal securities, issuers would have to begin drafting disclosure documents earlier, and perhaps with greater care than in the past.[74] This result enables underwriters to receive, and if necessary influence the content of, the final official statement before committing themselves to an offering.[75] Moreover, placing an obligation on the issuer to prepare the official statement at an earlier stage is appropriate, because it is the issuer's obligation to ensure that there is timely dissemination of disclosure documents in connection with the offer and sale of the issuer's securities.[76]

D. Conduit Financings

When financing involves a third party as the source of repayment, investors need information on that underlying borrower. The GFOA Guidelines call for description of conduit obligors, which are defined by the GFOA Guidelines to include both private profit-making and nonprofit entities.[77] The suggested

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[63] See GFOA Testimony at 6. *See also* Allstate Letter.

[64] *Isquith* v. *Middle South Utilities*, 847 F.2d 186, 201 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Kas* v. *Financial General Bankshares, Inc., et al.*, 796 F.2d 508, 516 (D.C. Cir. 1986); *Kennedy* v. *Tallant*, 710 F.2d 711, 720 (11th Cir. 1983).

[65] *Isquith*, 847 F.2d at 202.

[66] *McMahan & Company, et. al.* v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990).

[67] See, *e.g.*, Limited Partnership Reorganizations and Public Offerings of Limited Partnership Interests, Securities Act Release No. 6900 (June 25, 1991) 56 FR 28979, 28980 ("Limited Partnership Release").

[68] Proposing Release, 53 FR at 37781.

[69] Proposing Release, 53 FR at 37782.

[70] As a practical matter, near final official statements distributed to underwriters to satisfy Rule 15c2–12(b)(1) are often the same document as the preliminary official statement distributed to potential customers pursuant to Rule 15c2–12(b)(2). See Mudge Rose Guthrie Alexander & Ferndon (April 4, 1990) ("Mudge Rose") (rejecting the argument that in a negotiated offering, the identification of a credit enhancer and related information about the credit enhancer may be omitted on the assumption that the information depends on pricing). See also Fippinger & Pittman, *Disclosure Obligations of Underwriters of Municipal Securities*, 47 Business Lawyer 127, 140 (Nov. 1991). In addition, underwriters are required to deliver to potential customers, upon request, copies of the final official statement for a specified time period. Rule 15c2–12(b)(4).

[71] NFMA Survey. See also Letter from Jeffrey M. Baker, Chairperson, NFMA Industry Practices and Procedures Committee and Richard A. Ciccarone, Past Chairperson, NFMA Industry Practices and Procedures Committee to Arthur Levitt, Chairman, Securities and Exchange Commission, Christopher A. Taylor, Executive Director, MSRB and Joseph R. Hardiman, President and Chief Executive Officer, National Association of Securities Dealers, Inc. (Oct. 19, 1993) (regarding the timeliness of receipt of near final and preliminary official statements).

[72] See Mudge Rose.

[73] Adopting Release, 54 FR at 28804. The Commission also noted that the requirements of Rule 15c2–12(b)(1) could be met through the use of multiple documents. For example, a frequent issuer might be able to supply a recent official statement, together with supplementary information containing the terms of the current offering, as well as any material changes from the previous offering materials.

[74] Proposing Release, 53 FR at 37790.

[75] *Id.*

[76] See Adopting Release, 54 FR at 28811 N. 84 (official statement is issuer's document).

[77] GFOA Guidelines at 26. In a recent policy statement, the GFOA referred to "conduit bonds" as "municipal securities issued by a state or local government for the benefit of a private corporation or other entity that is ultimately obligated to pay such bonds * * *." GFOA, Committee on Governmental Debt and Fiscal Policy, Improvements in Municipal Securities' Market

information includes the nature and development of the business or other activity to be undertaken by the conduit obligor (including its form of organization and management), location of principal facilities and service area, ratemaking or pricing policies and historical operations and plan of operations.

To address disclosure issues involving conduit financings in a comprehensive fashion, however, legislation addressing the exempt status of conduit securities under the federal securities laws is necessary. Bonds used to finance a project to be used in the trade or business of a private corporation are, from an investment standpoint, equivalent to corporate debt securities issued directly by the underlying corporate obligor.[78] Payments on these types of conduit securities are derived solely from revenues received by the governmental entity under the terms of a contractual agreement, typically a lease or a note, from a private enterprise, rather than from the general credit and taxing power of the governmental issuer. The tax-exempt status of interest payments does not alter the fundamental analysis that these are private obligations, in which the investor looks, and can look, only to a private entity for repayment.

The private nature of many conduit enterprises distinguishes them from traditional municipal financings. The incidence of bond default appears to be inversely related to the degree a financed project represents an essential public service.[79] A study conducted by the PSA on non-rated issues that defaulted found that 75% were issued by local authorities in the areas of health care and industrial related sectors such as energy, chemical, pollution control and industrial development.[80]

Given the essentially private nature of non-governmental industrial development financings, investors need the same disclosure regarding the underlying non-municipal corporate obligor as they would receive regarding any corporate obligor, and the same regulatory and liability scheme should apply. Accordingly, the Commission has consistently supported legislative proposals to amend Section 3(a)(2) of the Securities Act[81] and Section 3(a)(29)[82] of the Exchange Act to remove the registration exemption for the corporate credit underlying municipal conduit securities involving non-governmental industrial development (private activity) financings.[83] The Commission today renews that legislative recommendation.

Pending amendment to the securities laws to eliminate the registration exemption, the disclosure provided by such non-governmental conduit borrowers should be substantially the same as if such conduit borrower were subject to the information requirements of the federal securities laws applicable to the particular conduit borrower. For example, financial statements prepared in accordance with generally accepted accounting principles prescribed by the Financial Accounting Standards Board should be provided.

## IV. Disclosure in the Secondary Market for Municipal Securities

While significant progress has been made in primary market disclosure practices in recent years, the same development has not taken place with respect to secondary market disclosure. The GFOA issued separate secondary market disclosure guidelines in 1979, but they have not yet achieved the broad acceptance accorded its primary offering guidance. In the last five years, the NFMA, the National Council of State Housing Agencies, and the Association of Local Housing Authorities have published sector specific guidelines for secondary market disclosure; the National Advisory Council of the National Association of State Auditors, Comptrollers and Treasurers ("NASACT") is in the process of preparing such guidelines for adoption by the states.[84] The GFOA's longstanding Certificate of Achievement program recognizes issuers that have prepared comprehensive annual financial reports meeting its guidelines. The NFMA's Award of Recognition Program likewise recognizes issuers that have committed to provide continuous disclosure.

### *A. Application of Antifraud Provisions*

Participants in the municipal securities market do not dispute the need for ongoing disclosure following an offering of securities, but municipal issuers reportedly resist developing a routine of ongoing disclosure to the investing market because of concerns about the costs of generating and disseminating that information and about potential liability relating to such disclosure. These issuers and obligors are at times advised by their professional advisors that there is no duty under the federal securities laws to make disclosure following the completion of the distribution.[85] At least some municipal issuers thus appear to believe that silence shields them from liability for what may later be found to be false or misleading information. As a practical matter, however, municipal issuers do not have the option of remaining silent. Given the wide range of information routinely released to the public, formally and informally, by these issuers in their day-to-day operations, the stream of information on which the market relies does not cease with the close of a municipal offering. In light of the public nature of these issuers and their accountability and

Disclosure (Feb. 1, 1994) ("GFOA Disclosure Policy Statement").

[78] See Money Market Fund Release, 58 FR at 68588 (proposal to subject tax exempt money market fund investments in conduit securities to restrictions similar to those applicable to securities of comparable obligors offered to taxable funds).

[79] Kenny Default Report at 2.

[80] PSA Default Report at 12.

[81] 15 U.S.C. 77c(a)(2).

[82] 15 U.S.C. 78c(a)(29).

[83] See Remarks of David S. Ruder, Chairman, SEC, "Disclosure in the Municipal Securities Markets," Before the Public Securities Association (Oct. 23, 1987) at 17–18; Letter from John S.R. Shad, Chairman, SEC to Representative Timothy E. Wirth, Chairman, House Subcommittee on Telecommunications, Consumer Protection, and Finance (March 12, 1985); 124 Cong. Rec. 21, 639 (1978) (letter from SEC Chairman Harold M. Williams to Senator Harrison A. Williams). There were two bills introduced, one in 1975 and one in 1978, that would have repealed the exemption from the registration requirements of the Securities Act of 1933. The 1978 bill would have subjected certain industrial development bonds to the registration requirements of the Securities Act of 1933, the filing and qualification provisions of the Trust Indenture Act and the periodic reporting requirements of the Securities Exchange Act of 1934. Neither bill was enacted. *See also* "Municipal Securities Full Disclosure Act of 1976," S. 2969, 94th Cong., 2d. Sess. (Feb. 17, 1976).

Governmental industrial development financings, which would have retained their exempt status under prior proposals, include those financings in which the bonds are repaid from the general revenues of the governmental unit or the project or facility is a public facility (or part of a public facility) and owned and operated by or on behalf of the governmental unit. The prior proposals to register conduit financings would not have affected the separate exemption for securities issued by non-profit charitable organizations in Section 3(a)(4) of the Securities Act (15 U.S.C. 77c(a)(4)).

[84] See Association of Local Housing Finance Agencies, *Guidelines for Information Disclosure to the Secondary Market* (1992) ("Local Housing Guidelines"); National Council of State Housing Agencies, *Quarterly Reporting Format for State Housing Finance Agency Single Family Housing Bonds* (1989) and *Multi-family Disclosure Format* (1991) collectively ("State Housing Guidelines"); NFMA Handbook. *See also* Healthcare Financial Management Association, *Statement of Principles of Public Disclosure of Financial and Operating Information by Healthcare Providers* (Exposure Draft dated Aug. 1, 1993) ("Healthcare Disclosure Principles").

[85] See Stamas, "Issuers' Intentions on Secondary Market Disclosure Are Starting to Appear in Official Statements," *The Bond Buyer* (Dec. 14, 1992) at 1; Stamas, "Why the Issue of Secondary-Market Disclosure Remains on the Back Burner: It Can Be Risky," *The Bond Buyer* (Sept. 20, 1991) at 1; Stamas, "Analysts Warn Issuers About Some Lawyers' Disclosure Advice," *The Bond Buyer* (Jan. 15, 1991) at 1.

governmental functions, a variety of information about issuers of municipal securities is collected by state and local governmental bodies, and routinely made publicly available.[86] Municipal officials also make frequent public statements and issue press releases concerning the entity's fiscal affairs.

A municipal issuer may not be subject to the mandated continuous reporting requirements of the Exchange Act, but when it releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the antifraud provisions.[87] The fact that they are not published for purposes of informing the securities markets does not alter the mandate that they not violate antifraud proscriptions.[88] Those statements are a principal source of significant, current information about the issuer of the security, and thus reasonably can be expected to reach investors and the trading market. As the U.S. Court of Appeals for the Second Circuit has said: "The securities markets are highly sensitive to press releases and to information contained in all sorts of publicly released . . . documents, and the investor is foolish who would ignore such releases." [89] Since investors obtain information concerning the fiscal health of a municipal issuer from its public statements concerning financial and other matters, "[t]he nature of these statements and the assumptions upon which they are based must be carefully and accurately communicated to the public, so that potential investors may be fully informed of all material facts relevant to their investment decision." [90]

The current process by which municipal issuers and their officials release information to market participants does not address the risk of misleading investors, because there is no mechanism for disseminating information about the municipal issuer to the market as a whole. To the contrary, in the municipal market, information released publicly frequently is disseminated only to a narrow segment of the marketplace. For example, market participants who request current information from indenture trustees are often turned away on the grounds that they are not current holders of the securities.[91] As a result, investors purchasing municipal securities in the secondary market risk doing so on the basis of incomplete and outdated information.

Since access by market participants to current and reliable information is uneven and inefficient, municipal issuers presently face a risk of misleading investors through public statements that may not be intended to be the basis of investment decisions, but nevertheless may reasonably be expected to reach the securities markets. As market participants have urged,[92] in order to minimize the risk of misleading investors, municipal issuers should establish practices and procedures to identify and timely disclose, in a manner designed to inform the trading market, material information reflecting on the creditworthiness of the issuer and obligor and the terms of the security.[93]

*B. Secondary Market Disclosure*

There is general recognition of the need for disseminating comprehensive information on an annual basis and, on a more timely basis, information about material events that reflect on the credit quality of the security.[94]

1. Annual Information

Investors need updated comprehensive information sufficient to enable them to evaluate the financial condition, results of operations and cash flows of the issuer or underlying borrower. Although the issuance of comprehensive annual information has not yet become prevailing practice, it is recommended by industry disclosure guidelines, including those published by the GFOA in connection with its Comprehensive Annual Financial Reports ("CAFRs") award program, NFMA, and the other industry specific guidelines,[95] and is an effective means of providing the market updated information about the issuer and the issue. The GFOA Guidelines for Continuing Disclosure call for, either in an official statement or comprehensive annual report, a description of:

- The issuer and its structure, management, assets and operations;
- The issuer's debt structure (including changes in indebtedness);
- The issuer's finances (including financial condition and results of operations and financial practices of the issuer or the enterprise);
- Legal matters affecting the issuer; including litigation and legislation;
- Ratings; and
- Interests of certain persons.

The GFOA Guidelines also specify additional information to be provided by conduit borrowers. The eligibility criteria for a Certificate of Achievement from GFOA include audited financial statements prepared in accordance with GAAP, reported upon by an independent public auditor. The guidelines for CAFRs include both a financial section and a statistical section.[96]

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[86] See NASACT Blue Ribbon Committee Report at 2, 24; NASACT 1990 Task Force Report at 21.

[87] See Public Statements by Corporate Representatives, Securities Act Release No. 6504 (Jan. 20, 1984) 49 FR 2468, 2469; *In re Ames Dept. Stores Inc. Stock Litigation*, 991 F.2d 953, 965–67 (2d Cir. 1993) (with respect to corporate information).

[88] See Fippinger, *The Securities Law of Public Finance* (2d ed. 1993) at 291 ("[P]ress releases, conversations with analysts, information meetings, official comments on budget negotiations, and even angry reactions by public officials to rating agency downgrades" are subject to antifraud provisions).

[89] *Ames*, 991 F.2d at 963 (corporate information).

[90] NY City Report at Ch. III at 2. The report found that public statements by City officials were misleading, since they were characterized by unwarranted reassurances as to the soundness and attractiveness of the City's securities, including statements that the City's budget problems, no matter how serious, had nothing to do with the City's ability to pay its debts. *Id.* at 110–111.

Municipal issuers should also be sensitive to whether their official statements contain forward-looking statements, such as projections of revenues, that remain alive in the market and may require updating in light of subsequent events. Guides for Disclosure of Projections of Future Economic Performance, Exchange Act Rel. No. 5992 (Nov. 7, 1978), 43 FR 53246. To the extent that the official statement in many cases remains the principal (or perhaps even the sole) source of information concerning an outstanding security, the potential for an obligation to update is of particular importance.

[91] Under notice provisions of indentures, the issuer and trustee generally are required to provide notice to existing bondholders of events of default and other significant matters, such as a draw on reserves, a failure to renew a letter of credit, or a substitution of collateral. ABA 1991 Guidelines at 10. Indeed, trustees often deny requests by market participants for information out of concern for liability arising from exceeding the authority set forth in the indenture. Fippinger at 325. This situation led the American Bankers Association Corporate Trust Committee, in cooperation with the National Association of Bond Lawyers, to develop agreed upon guidelines for indenture provisions permitting the trustee to provide public notice of specified events. See ABA 1991 Guidelines.

[92] See GFOA Guidelines at 91–97; Joint Statement.

[93] National Association of Bond Lawyers and Section of Urban, State and Local Government Law, American Bar Association, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* at 135 (forthcoming 1994) (Pre-publication Draft) ("ABA Disclosure Roles") (noting that many municipal issuers have concluded that post-issuance disclosure in accordance with GFOA guidelines can be more efficient and expose them to less potential liability than ad hoc disclosures).

[94] See GFOA Testimony; Mires, "An Investor's Framework for Examining Disclosure Issues and Possible Solutions," *The Bond Buyer* (Feb. 7, 1994) at 24; NASACT Blue Ribbon Committee Report at 7. *See also* PSA Testimony at 6, supporting annual financial statement filing requirements and submission of information regarding any material fact for issuers who borrow $1 million or more annually.

[95] See ABA Disclosure Roles at 134–136; ABA 1991 Guidelines; Association of Local Housing Guidelines; Healthcare Disclosure Principles. The Disclosure Task Force of the National Council of State Housing Agencies is developing standards for the issuance of audited financial and annual reports.

[96] See GFOA Certificate of Achievement for Excellence in Financial Reporting Program; GFOA Guidelines at 64.

For frequent issuers, current information can be disseminated in official statements for new offerings, and thus is readily available without the preparation of a separate annual financial report. Regardless of the form of document relied upon to provide the marketplace with information concerning the financial condition of the issuer or obligor, to minimize risk of misleading investors, issuers or obligors should provide, as discussed above with respect to primary offerings:

- Financial statements that are audited in accordance with GAAS (or disclosure of the absence of such an audit) and that are either prepared in accordance with GAAP, or accompanied by a quantified explanation of material deviations from GAAP or a full explanation of the accounting principles used;
- Other pertinent financial and operating information (depending on the type of issuer and security sold), as well as the sources for repayment—of course, a variety of information may be appropriate for an issuer with a range of outstanding securities with differing characteristics, from general obligation to revenue and conduit bonds; and
- A narrative discussion that analyzes the issuer's or obligor's financial condition, and results of operations, as well as facts likely to have a material impact on the issuer or obligor.

Clarity and conciseness are equally relevant concerns with respect to ongoing disclosures, as with official statements.

As discussed above with respect to offering statements, as a general matter, the annual financial information may reasonably be expected to be made available within six months of the issuer's fiscal year end.[97] For some conduit entities, annual information may not be sufficient and investors may need more frequent periodic financial information. Under guidelines developed by the National Council of State Housing Agencies, for example, current information on loan portfolio status is compiled and disseminated to information repositories on a quarterly basis.[98] Similar ongoing disclosure on a periodic basis appears appropriate for analogous conduit municipal financings such as structured student loan programs, housing and health care financings.

2. Event Disclosure

In addition to periodic information, to assure that participants in the secondary market base their investment decisions on current information, commentators have called for timely disclosure of events that materially reflect on the creditworthiness of municipal securities issuers and obligors and the terms of their securities. There is a general consensus among participants in the municipal securities market that investors need information about the following events, among others, where material:[99]

a. Principal and interest payment delinquencies
b. Nonpayment-related defaults
c. Unscheduled draws on reserves
d. Unscheduled draws on credit enhancements
e. Substitution of credit or liquidity providers, or their failure to perform
f. Adverse tax opinions or events affecting the tax-exempt status of the security
g. Modifications to rights of security holders
h. Bond calls
i. Defeasances
j. Matters affecting collateral
k. Rating changes

3. Dissemination

As discussed above, the municipal market today lacks an effective mechanism for dissemination of material information to investors and the marketplace. To be effective in minimizing the issuer's risk under the antifraud provisions, the annual financial information and event disclosure should be disseminated in a manner reasonably designed to inform the holders of the issuer's securities and the market for those securities.

Trustees can serve as cost effective disseminators of information to the market due to the capacity and duties of trustees under the terms of the indentures, which positions them to have knowledge of the events requiring disclosure, and the ability and authority to communicate with bondholders.[100] The Commission encourages the inclusion of provisions in trust indentures that authorize trustees to transmit information to the market, particularly in structured financings where the issuer's obligations generally are delegated to various participants. Trustees also may provide a service to other small issuers, by enabling them to notify the market in a timely manner and at a lower cost.

The common denominator for current proposals to improve secondary market disclosure for municipal securities is the establishment and designation of one or more information repositories to serve as a collection and access point for annual and current information.[101] Such repositories would serve as predetermined sources for information concerning a particular issuer, allowing participants to verify that they have the latest available information concerning the issuer before recommending, purchasing, or bidding for a security. The repositories would supplement, not substitute for, the existing access bondholders may have to issuers to obtain current information.[102]

In the Companion Release, the Commission is proposing an amendment to Rule 15c2–12 to prohibit, as suggested by the Joint Statement, underwriting of a municipal securities issue unless the issuer of the municipal security has covenanted to provide annual and ongoing disclosure to a repository.

## V. Interpretive Guidance With Respect to Obligations of Municipal Securities Dealers

In the Proposing and Adopting Releases for Rule 15c2–12, the

[97] See Section III.C.3.d. above.

[98] State Housing Guidelines.

[99] In 1990, the American Bankers Association Corporate Trust Committee drafted a proposal identifying 16 factors that it believed were important for issuers to disclose to bondholders and the marketplace. American Bankers Association Corporate Trust Committee, *Proposed Disclosure Guidelines for Corporate Trustees* (ABA Draft for Discussion Purposes) (June 12, 1990) ("ABA 1990 Guidelines"). As published in final form in September of 1991 ("ABA 1991 Guidelines"), the Guidelines contained a nonexclusive list of five types of events that could be disclosed by notice to a repository. Numerous market participants have referenced the ABA draft proposal, or variations of that proposal, as a starting point for identifying straightforward, nonjudgmental, categories of events that call for prompt disclosure. An addendum to the Joint Statement provided four examples of "significant information" that the participants considered appropriate for disclosure. The nonexclusive examples were (1) nontechnical defaults, (2) draws from a debt service reserve fund, (3) failure to make a regularly scheduled payment, and (4) any draws on any credit enhancement. Joint Statement, Addendum. The list set forth above is drawn from these proposals.

[100] See ABA 1991 Guidelines at 3.

[101] Consistent with the recent recommendation of the Joint Statement, the GFOA Guidelines call for lodging secondary market disclosure with a repository, as did the ABA guidelines published in 1991. GFOA Guidelines, Procedural Statement No. 8; ABA 1991 Guidelines at 3.

[102] The American Bankers Association Corporate Trust Committee and the National Association of Bond Lawyers, as well as the Joint Statement, have expressed concern that securities depositories and their participants do not retransmit notices they receive from trustees and issuers to the beneficial owners of the issuer's securities. The ABA Corporate Trust Committee sought to address the problem by calling for simultaneous dissemination of the information to the marketplace through an information repository. The National Association of Bond Lawyers has suggested that the Commission promulgate a rule mandating that all depositories and their direct and indirect participants promptly retransmit notices received from the issuer or indenture trustee. While the establishment of information repositories may address the problem to some extent, the Commission staff intends to work with the relevant organizations to assure that steps are taken to provide for consistent retransmission of the information.

Commission set forth its interpretation of the obligation of municipal underwriters under the antifraud provisions of the federal securities laws. The interpretation discussed the duty of underwriters to the investing public to have a reasonable basis for recommending any municipal securities, and their responsibility, in fulfilling that obligation, to review in a professional manner the accuracy of statements made in connection with the offering. The interpretation was set out in the Proposing Release, and modified slightly in the Adopting Release. The Commission reaffirms its Interpretation with respect to underwriters' responsibilities under the antifraud provisions of the federal securities laws.[103]

Furthermore, the Commission believes that it is also appropriate to emphasize the responsibilities of brokers and dealers in trading municipal securities in the secondary market. The Commission historically has taken the position that a broker-dealer recommending securities to investors implies by its recommendation that it has an adequate basis for the recommendation.[104] A dealer, unlike an underwriter, ordinarily is not obligated to contact the issuer to verify information. A dealer must, however, have a reasonable basis for its recommendation.[105] If, based on publicly available information, a dealer discovers any factors that indicate the disclosure is inaccurate or incomplete, or signal the need for further inquiry, a municipal securities dealer may need to obtain additional information, or seek to verify existing information.[106]

One of the rules proposed simultaneously with the issuance of this release would require a broker, dealer or municipal securities dealer to review current information provided by the issuer prior to recommending a transaction in a municipal security. In the absence of such current information, the dealer could not recommend a transaction in the issuer's securities. That rule, which would be applicable to municipal securities issued subsequent to the effective date of the proposed rule, would reinforce the obligations of dealers under the antifraud provisions of the federal securities laws to have a reasonable basis for recommendations of outstanding municipal securities.

The Joint Statement also called for a strengthening of the suitability rules to require disclosure of ratings and whether the issuer has committed to provide annual financial reports. Today, the Commission is proposing amendments to its confirmation rules to require disclosure of the absence of a rating in confirmations. The MSRB has indicated it has under consideration a plan requiring municipal securities dealers to disclose to their customers the importance of secondary market information and whether the issuer has agreed to voluntarily provide such disclosures.[107] The Commission will defer to the MSRB's reexamination of its suitability rules in implementing those aspects of the Joint Statement.

## VI. Request for Comments

The Commission intends to continue to monitor developments in municipal securities disclosure practices. Comment is requested regarding the disclosure items discussed in this release, and in particular, items warranting event disclosure. Comment also is requested regarding additional action that should be taken with respect to disclosure in the municipal securities market by the Commission, the MSRB, or Congress.

## List of Subjects in 17 CFR Parts 211, 231 and 241

Securities.

## Amendment of the Code of Federal Regulations

For the reasons set out in the preamble, title 17 chapter II of the Code of Federal Regulations is amended as set forth below:

## PART 211—INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

1. Part 211, Subpart A, is amended by adding Release No. FR–42 and the release date of March 9, 1994, to the list of interpretive releases.

## PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

2. Part 231 is amended by adding Release No. 33–7049 and the release date of March 9, 1994, to the list of interpretive releases.

## PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

3. Part 241 is amended by adding Release No. 34–33741 and the release date of March 9, 1994, to the list of interpretive releases.

By the Commission.

Dated: March 9, 1994.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–5922 Filed 3–16–94; 8:45 am]

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[103] In light of the underwriter's obligation, as discussed in the prior releases, to review the official statement and to have a reasonable basis for its belief in the accuracy and completeness of the official statement's key representations, disclaimers by underwriters of responsibility for the information provided by the issuer or other parties, without further clarification regarding the underwriter's belief as to accuracy, and the basis therefor, are misleading and should not be included in official statements.

[104] See *Donald T. Sheldon*, Securities Exchange Act Release No. 31475 (Nov. 18, 1992); *Elizabeth Bamberg*, Securities Exchange Act Release No. 27672 (Feb. 5, 1990); *Feeney* v. *SEC*, 564 F.2d 260 (8th Cir. 1977); *Nassar & Co.*, Securities Exchange Act Release No. 15347 (Nov. 22, 1978). *See also* Proposing Release, 53 FR at 37787, n.72–73.

[105] *Richard J. Buck & Co.*, 43 SEC 998 (1968), *aff'd sub nom. Hanley* v. *SEC*, 416 F.2d 589 (2d Cir. 1969). *See also* The Obligations of Underwriters, Brokers and Dealers in Distributing and Trading Securities, Particularly of New High Risk Ventures, Securities Act Release No. 5275 (Aug. 9, 1972) 37 FR 16011, 16012–13; *In Re Blumenfeld*. Securities Exchange Act Release No. 16437 (Dec. 19, 1979) (broker-dealer charged unfair mark-ups and recommended transactions in municipal securities without a reasonable basis); *J.A. Winston & Co., Inc.*, 42 S.E.C. 62 (1964) (broker-dealer recommended transactions without a reasonable basis, and made representations that were false and misleading).

[106] *See Merrill, Lynch, Pierce, Fenner & Smith*, Securities Exchange Act Release No. 14149 (Nov. 9, 1977) ("A recommendation by a broker-dealer is perceived by a customer as (and in fact it should be) the product of an objective analysis [which] can only be achieved when the scope of an investigation is extended beyond the company's management); *John R. Brick*, Securities Exchange Act Release No. 11763 (Oct. 24, 1975) ("the professional...is not an issuer. But he is under a duty to investigate and see that his recommendations have a reasonable basis"); *M.G. Davis & Co.*, 44 SEC 153, 157–58 (1970) (broker-dealer registration revoked because "representations and predictions" made and market letter relied on by registrant "were without reasonable basis," and "registrant could not reasonably accept all of the statements in the [market letter] without further investigation"), *aff'd sub nom. Levine* v. *SEC*, 436 F.2d 88 (2d Cir. 1971). *See also Merrill, Lynch, Pierce, Fenner & Smith*, Securities Exchange Act Release No. 14149 (Nov. 9, 1977) (noting that if a broker-dealer lacks sufficient information to make a recommendation, the lack of information is material and should be disclosed).

[107] *See supra* n. 62.

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 240**

**Release No. 34–33742; File No. S7–5–94]**

**RIN 3235–AG13**

## Municipal Securities Disclosure

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rulemaking.

**SUMMARY:** The Securities and Exchange Commission ("SEC" or "Commission") is publishing for comment proposed amendments to Rule 15c2–12 under the Securities Exchange Act of 1934 ("Exchange Act"), which would make it unlawful for a broker, dealer, or municipal securities dealer to act as an underwriter of an issue of municipal securities unless the broker, dealer, or municipal securities dealer has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of the holders of such municipal securities to provide certain information to a nationally recognized municipal securities information repository; or to recommend the purchase or sale of a municipal security, without having reviewed the information the issuer of the municipal security has undertaken to provide. The purpose of the proposed amendments is to further deter fraud and manipulation in the municipal securities market by prohibiting the underwriting and subsequent recommendation of securities for which adequate information is not available.

**DATES:** Comments must be received on or before July 15, 1994.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. All comment letters should refer to File No. S7–5–94. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

**FOR FURTHER INFORMATION CONTACT:** Catherine McGuire, Esq., Chief Counsel, or Janet W. Russell-Hunter, Esq., Attorney, Office of Chief Counsel (concerning the rule and release generally), (202) 504–2418, Division of Market Regulation, Securities and Exchange Commission, Mail Stop 7–10, 450 Fifth Street, NW., Washington, DC 20549; and Amy Meltzer Starr, Esq., Attorney, Division of Corporation Finance (concerning the definitions of "final official statement" and "significant obligor," and concerning annual financial information and material events generally), (202) 272–3654, Division of Corporation Finance, Securities and Exchange Commission, Mail Stop 7–6, 450 Fifth Street, NW., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

In a recent report to Congress,[1] the staff of the Division of Market Regulation ("Staff") reviewed many aspects of the municipal securities market, including whether opportunities exist for overreaching and investor deception. The Staff found that investors need sufficient current information about issuers and significant obligors to better protect themselves from fraud and manipulation, to better evaluate offering prices, to decide which municipal securities to buy, and to decide when to sell.[2] Moreover, the Staff found that the growing participation of individuals as both direct and indirect purchasers of municipal securities underscores the need for sound recommendations by brokers, dealers, and municipal securities dealers.[3]

Based on these findings, the Staff recommended that the Commission use its interpretive authority to provide guidance regarding the disclosure required by the antifraud provisions of the federal securities laws.[4] Today, in a companion release,[5] the Commission is interpreting the disclosure obligations of municipal securities issuers. The Companion Release also addresses the obligations under the antifraud provisions of brokers, dealers, and municipal securities dealers who underwrite and sell municipal securities, and the information dissemination requirements of Rule 15c2–12.[6]

In addition, the Staff recommended in the *Staff Report* that Rule 15c2–12 be amended, or that similar rules be adopted, to prohibit municipal securities dealers from recommending outstanding municipal securities unless the issuer has committed to make available ongoing information regarding its financial condition.[7] This release proposes to implement the Staff's recommendation.

Section 15(c)(2) of the Exchange Act prohibits municipal securities dealers from effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any municipal security by means of a "fraudulent, deceptive, or manipulative act or practice."[8] This section specifically authorizes the Commission to promulgate rules and regulations to define, and prescribe means reasonably designed to prevent, such acts and practices. Pursuant to this authority, the Commission adopted Rule 15c2–12 in 1989 for the purpose of preventing fraud by enhancing the quality, timing, and

[1] Securities and Exchange Commission, Division of Market Regulation, *Staff Report on the Municipal Securities Market* (Sept. 1993) ("*Staff Report*"). The *Staff Report* was prepared at the request of the Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, United States House of Representatives, and the Hon. Edward Markey, Chairman, Subcommittee on Telecommunications and Finance, United States House of Representatives. Among the topics discussed in the *Staff Report* were political contributions, sales practices, transparency, audit trails, issuer disclosure, and the regulatory structure for municipal securities. *See* Letter from Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, and Hon. Edward Markey, Chairman, Subcommittee on Telecommunications and Finance to: Mary L. Schapiro, Acting Chairman, SEC; Christopher A. Taylor, Executive Director, Municipal Securities Rulemaking Board ("MSRB"); and Joseph R. Hardiman, President and Chief Executive Officer, National Association of Securities Dealers, Inc. ("NASD") (May 24, 1993).

[2] *Staff Report, supra* note 1 at 38.

[3] *Id.* at 28.

[4] *Id.* at 40. Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder, apply to "persons," including issuers of municipal securities.

[5] Securities Act Release No. 7049, Exchange Act Release No. 33741, FR–42 (March 9, 1994) ("Companion Release").

[6] 17 CFR 240.15c2–12. *See* Securities Exchange Act Release No. 26100 (Sept. 22, 1988), 53 FR 37778 ("Proposing Release"); Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 ("Adopting Release"). Rule 15c2–12 requires an underwriter of municipal securities (1) to obtain and review an issuer's official statement that, except for certain information, is "deemed final" by an issuer, prior to making a purchase, offer, or sale of municipal securities; (2) in negotiated sales, to provide the issuer's most recent preliminary official statement (if one exists) to potential customers; (3) to deliver to customers, upon request, copies of the final official statement for a specified period of time; and (4) to contract to receive, within a specified time, sufficient copies of the issuer's final official statement to comply with the rule's delivery requirement, and the requirements of MSRB rules. Rule 15c2–12 also contains specific exemptions for three types of municipal securities offerings.

[7] *Staff Report, supra* note 1 at 40. *See also* Testimony of Arthur Levitt, Chairman, SEC, Concerning the Municipal Securities Market, Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, United States House of Representatives (Sept. 9, 1993) at 5–7; Remarks of Arthur Levitt, Chairman, SEC, The Bond Buyer Ethics in Public Finance Conference (Jan. 24, 1994) at 6; Remarks of Richard Y. Roberts, Commissioner, SEC, "Alternatives for Improving Municipal Secondary Market Disclosure," The Southern Municipal Finance Society 13th Annual Fall Conference (Sept. 15, 1993) at 9–12.

[8] Exchange Act Section 15(c)(2), 15 U.S.C. 78*o*(c)(2).

dissemination of disclosure in the municipal securities market.[9]

The Commission proposes to amend Rule 15c2–12 to further deter fraud and manipulation in the primary and secondary municipal securities markets by prohibiting the underwriting and subsequent recommendation of securities for which adequate information is not available.[10] For many years, the courts and the Commission have emphasized that, under the antifraud provisions, a broker-dealer recommending securities to investors implies by its recommendation that it has an adequate basis for making the recommendation.[11] In the Proposing Release and the Adopting Release, the Commission discussed broker-dealers' obligation to have a reasonable belief in the accuracy of statements made when underwriting securities.[12] When recommendations in the secondary market are made, they must be based on information that is up-to-date and accessible.

The proposed amendments to Rule 15c2–12 will assist brokers, dealers, and municipal securities dealers in satisfying their obligations under the antifraud provisions of the federal securities laws, and specifically under section 15(c)(2), by conditioning the underwriting and recommendation of municipal securities on the availability of current issuer information. By providing an efficient and timely means of access to disclosure, the proposed amendments will ensure that information will be available in the future regarding underwritten securities. As a result, brokers, dealers, and municipal securities dealers will be better able to recommend municipal securities in the secondary market based on current issuer information. Fraud and manipulation in both the primary and secondary markets for municipal securities thus will be deterred. Furthermore, the availability of secondary market disclosure to all municipal securities market participants will assist investors in protecting themselves from misrepresentation or other fraudulent activities by brokers, dealers, and municipal securities dealers.

For these reasons, the Commission proposes to amend Rule 15c2–12 to prohibit a broker, dealer, or municipal securities dealer ("Participating Underwriter")[13] from purchasing or selling municipal securities in connection with a primary offering of municipal securities with an aggregate principal amount of $1,000,000 or more ("Offering")[14] unless the Participating Underwriter has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of the holders of such municipal securities to provide certain information to a nationally recognized municipal securities information repository ("NRMSIR"). The prohibition would apply to underwriters that have committed contractually to act as an underwriter in an Offering on or after the effective date of the rule amendment. This proposal responds, in part, to a suggestion in the *Joint Statement on Improvements in Municipal Securities Market Disclosure*,[15] in which a broad spectrum of municipal securities market participants supported wider dissemination of issuer information and improved mechanisms for such dissemination, to assure that securities professionals have a sufficient factual basis on which to recommend secondary market transactions.

The Commission is proposing further to amend Rule 15c2–12 to require brokers, dealers, and municipal securities dealers, prior to recommending the purchase or sale of a municipal security, to review the information the issuer of the municipal security has undertaken to provide. This amendment would apply to municipal securities issued on or after the effective date of the proposed amendment discussed in the preceding paragraph.

Finally, the proposed amendments would define the term "significant obligor," and amend the definition of the term "final official statement" for purposes of Rule 15c2–12.

## II. Description of the Proposed Amendments to Rule 15c2–12

### *A. Underwriting Requirement*

One amendment proposed today would add paragraph (b)(5) to Rule 15c2–12. This paragraph would prohibit a Participating Underwriter from purchasing or selling municipal securities in connection with an Offering, unless the Participating Underwriter has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of holders of such municipal securities to provide certain information to a NRMSIR. In using the terms "purchase" or "sale," the proposed amendment contemplates that, at such time as the issuer of municipal securities delivers the securities to the Participating Underwriters, the issuer will have undertaken, in a written contract or agreement for the benefit of holders of the municipal securities, to provide information to a NRMSIR.[16]

With the exception of general obligation bonds, most offerings include a trust indenture which sets forth the undertakings between the issuer and the holders of municipal securities, and thus delineates the bondholders' rights. If there is no trust indenture, as in a general obligation bond offering, a bond resolution, ordinance, or written agreement or contract sets out the undertakings by the issuer for the benefit of the holders of the municipal securities. In order to satisfy its

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[9] See Adopting Release, *supra* note 6 at 54 FR 28800.

[10] Under the antifraud provisions of the federal securities laws, issuer disclosure not only must be accurate in all material respects, but also must not omit information necessary to make the statements made, in light of the circumstances, not misleading. The proposed amendment will assist issuers in satisfying their obligations under the antifraud provisions by creating a mechanism for the dissemination of primary and secondary market disclosure. See Companion Release, *supra* note 5 at Section III.A.

[11] See *e.g. Feeney v. SEC*, 564 F.2d 260 (8th Cir. 1977); *Cortlandt Investing Corporation*, 44 SEC 45 (1969); *Crow, Bourman & Chotkin, Inc.*, 42 SEC 938 (1966); *Shearson, Hammill & Co.*, 42 SEC 811 (1965).

[12] See Proposing Release, *supra* note 6 at 53 FR 37787; Adopting Release, *supra* note 6 at 54 FR 28811. *See also See Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1069–70 (7th Cir. 1973) (noting underwriter's heightened obligation when it has an opportunity to require disclosure from the issuer, and when there are special selling pressures involved in underwriting a security), *vacated and remanded on other grounds*, 425 U.S. 929 (1976), *on remand*, 554 F.2d 790 (7th Cir. 1977), *reh'g denied*, 619 F.2d 1222 (7th Cir. 1980), *cert. denied* 450 U.S. 1005 (1981); *Donaldson, Lufkin & Jenrette Securities Corp.*, Securities Exchange Act Release No. 31207 (Sept. 22, 1992); *Hamilton Grant & Co.*, Securities Exchange Act Release No. 24679 (July 7, 1987); *Walston & Co.*, Securities Exchange Act Release No. 8165 (Sept. 22, 1967) (stating that it is incumbent on dealers participating in offerings, as well as on dealers recommending municipal bonds, to make a diligent inquiry as to material facts relating to the issuer and bearing on the issuer's ability to service the bonds).

[13] See Rule 15c2–12(a).

[14] The proposed amendments also include an exemption for small and infrequent issuers. See Section II.D., *infra*.

[15] *Joint Statement on Improvements in Municipal Securities Market Disclosure* (Dec. 20, 1993) ("*Joint Statement*") at 2–3. The Joint Statement was issued by twelve groups representing participants in all aspects of the municipal securities market. The groups included were the American Bankers Association's Corporate Trust Committee; the American Public Power Association; the Association of Local Housing Finance Agencies; the Council of Infrastructure Financing Authorities; the Government Finance Officers Association; the National Association of Bond Lawyers; the National Association of Counties; the National Association of State Auditors, Comptrollers and Treasurers; the National Association of State Treasurers; the National Council of State Housing Agencies; the National Federation of Municipal Analysts; and the Public Securities Association.

[16] A Participating Underwriter would need to receive assurances from the issuer that such undertakings would be made before agreeing to act as an underwriter.

obligation under the rule, a Participating Underwriter would need to look to these documents for undertakings by the issuer to supply secondary market disclosure to a NRMSIR. A Participating Underwriter will have satisfied its obligation under proposed paragraph (b)(5), so long as it can conclude that all of the appropriate undertakings have been made. While the issuer's duty will be to its bondholders, all participants in the municipal securities market will benefit from having access to this information.

Comment is requested on the use of a written agreement or contract for the provision of secondary market information by issuers for the benefit of holders of municipal securities, particularly in light of the provisions of proposed paragraph (c) prohibiting the recommendation by brokers, dealers, and municipal securities dealers of municipal securities when issuer information is unavailable. Comments should address specifically the consequences of a failure by an issuer to comply with its secondary market disclosure undertakings after the initial issuance of municipal securities. Comment is requested on whether the use of the issuer's undertakings is a necessary or appropriate approach to implementing procedures for providing information to the municipal securities market. Comment also is requested on whether, as an alternative to written undertakings, a statement in the final official statement of the issuer of municipal securities that it will provide secondary market disclosure would be sufficient. In addition, commenters are requested to address whether the use of written undertakings provides sufficient flexibility for issuers that, in the future, wish to change the type, timing, or presentation of the information, or whether some alternative mechanism should be used.

1. Annual Information

Proposed paragraph (b)(5)(i)(A) would prohibit Participating Underwriters from purchasing or selling municipal securities in connection with an Offering unless the Participating Underwriter has reasonably determined that the issuer or its designated agent has undertaken to provide to a NRMSIR, at least annually, current financial information concerning the issuer of the municipal security and any significant obligors, including annual audited financial statements and pertinent operating information.

Current annual financial information is an important source of updated information for the market. The format for presenting such information is not specified in the proposed amendment, and may be accomplished through any disclosure document, whatever its form or principal purpose, that includes annual audited financial statements and pertinent operating information. The proposed amendment contemplates that sequential final official statements prepared by frequent issuers of municipal securities may meet the standards of the rule. Similarly, the audited financial statements should fairly present the current financial condition, the results of operations, and cash flows of the municipal issuer and any significant obligor. Proposed paragraph (b)(5) also does not dictate the content of the annual financial information, other than the audited financial statements. Rather, it provides discretion to offering participants.

The Commission recognizes that there is great diversity in the municipal marketplace, both in terms of the types of issuers and the types of issues of municipal securities. The proposed amendment is, therefore, intended to permit issuers the flexibility to address the needs of the market by specifying in the written agreement or contract the particular financial and operating information that is to be provided on an annual basis, in addition to the annual audited financial statements. The Commission anticipates that issuers and offering participants will look to various voluntary guidelines, as well as the guidance provided in the Companion Release, in establishing an appropriate level of disclosure for each municipal securities issue. Of course, additional information, such as unaudited quarterly information, also could be specified.

Under the proposed amendment, in paragraph (b)(5)(ii), the issuer of the municipal security also would be required to specify what accounting principles will be used in the preparation of the audited financial statements, the time within which the annual information for each year will be available, and the specific operating and financial information that will be provided on an annual basis, in addition to the audited financial statements. The covenant would not limit the issuer in its ability to supplement the specific information, where necessary or appropriate.

Proposed paragraph (b)(5)(ii) does not specify the timing of availability of the annual financial information in each year. Rather, any written contract or agreement would be required to specify the annual time frame in which the current financial information covering the previous fiscal year will be provided by the issuer of the municipal security and any significant obligors. As noted above, this permits issuers some flexibility in disseminating this information, and also allows investors and the marketplace to know when such information will be available.

Comment is requested on whether the rule should specify the minimum content of the information to be provided on an annual basis. Comment is requested on whether audited financial statements should be required, and whether they should be required to be audited using GAAS. Comment also is requested on whether the financial statements should be required to conform to generally accepted accounting principles ("GAAP") or should include discussions of material deviations from GAAP if prepared on some other basis. Further, comment is requested on whether the rule should specify the time frame, such as six months or nine months after the fiscal year end, in which the annual financial information should be made available in each year.

2. Material Events

Proposed paragraph (b)(5)(i)(B) requires that Participating Underwriters assure themselves that issuers have undertaken to provide, in a timely manner, notice of any of the following events, if material:

(*1*) Principal and interest payment delinquencies;

(*2*) Non-payment related defaults;

(*3*) Unscheduled draws on debt service reserves reflecting financial difficulties;

(*4*) Unscheduled draws on credit enhancements reflecting financial difficulties;

(*5*) Substitution of credit or liquidity providers, or their failure to perform;

(*6*) Adverse tax opinions or events affecting the tax-exempt status of the security;

(*7*) Modifications to rights of security holders;

(*8*) Bond calls;

(*9*) Defeasances;

(*10*) Matters affecting collateral; and

(*11*) Rating changes.

This portion of the proposed amendment, like that addressing annual financial information, is intended to provide guidance to issuers and other participants in the municipal securities market regarding the dissemination of notices of material events. As discussed in the Companion Release,[17] this list consists of recognized material events that reflect on the creditworthiness of the issuer of the municipal security or

[17] Companion Release, *supra* note 5, at Section IV.B.2.

any significant obligor, as well as on the terms of the securities they issue. The issuer must determine whether information needs to be disseminated about a listed event in any particular situation, and if so, when the information dissemination should occur in order to be "timely." For example, an issuer would be free to determine that a *de minimis* draw on a reserve fund by an issuer financing agency resulting from a delay by the obligor in transmitting a payment, where the draw is replaced immediately and is not the result of the obligor's financial difficulties, is not a material event requiring notice to the market.

Comment is requested as to whether the listed items of material events should be expanded. Comment also is requested on whether timing, for example, within a certain number of days, for the dissemination of notice of these events should be specified as part of the undertaking.

*B. Recommendations Without Specified Information*

As proposed, a new paragraph (c) would be added to the rule, which would prohibit any broker, dealer, or municipal securities dealer from recommending the purchase or sale of a municipal security unless such broker, dealer, or municipal securities dealer has reviewed the information the issuer of such municipal security has undertaken to provide pursuant to paragraph (b)(5).

As noted above, broker-dealers imply by recommending securities that they have a reasonable basis for making such recommendations. In the Commission's view, most situations in which a broker, dealer, or municipal securities dealer brings a municipal security to the attention of a customer involve an implicit recommendation of the security to the customer.

The proposed amendment neither specifies the form in which information must be reviewed, nor specifies which documents must be obtained.[18] Rather, it requires brokers, dealers, and municipal securities dealers to review the information that the issuer of the municipal security has agreed to provide. The proposed amendment is intended to allow this information to be obtained and reviewed through any means of dissemination used by participants in the municipal securities market.[19] While the information may be available from documents placed in a NRMSIR, this may not be the only source of information. Thus, to satisfy the requirements of the rule, brokers, dealers, and municipal securities dealers may obtain this information directly from the issuer, from professionals such as attorneys, accountants, or other municipal securities dealers, or from any other reliable source. If, in reviewing this information, they discover any factors that suggest that disclosure is inaccurate or incomplete, or that signal the need for additional investigation, brokers, dealers, and municipal securities dealers may need to obtain additional information, or seek to verify existing information.[20] If, however, the rating is known and information placed with a NRMSIR has been reviewed and raises no questions, a broker, dealer, or municipal securities dealer would need to look no further for information about the security recommended. Furthermore, a broker, dealer, or municipal securities dealer would not be prohibited from recommending the purchase or sale of a municipal security solely because of the existence of material events of which, after its review, it has no knowledge. This could occur if an issuer failed to disclose the occurrence of a material event to a NRMSIR or to disseminate notice of such an occurrence in any other manner. Under paragraph (c), if the specified information is not available, no recommendation may be made.

Comment is requested on the provisions of proposed paragraph (c). Specifically, comment is requested on the application of the term "recommend," and whether the requirement to review information is burdensome, or requires further clarification.

In view of the importance of ensuring the secondary market liquidity of municipal issues, comment also is requested on whether market participants believe that the proposed amendments would have a substantial or long-lasting effect on market liquidity. Questions have been raised about whether municipal securities dealers will be willing to effect secondary market transactions in a broad range of municipal securities in light of the specificity with which the requirement of paragraph (c) is articulated. The Commission is of the view that once the proposed amendments are in effect, and dissemination systems are operating, liquidity will not be affected, and that municipal securities dealers will be willing and able to purchase and sell as broad a range of securities as before. Commenters should consider this analysis and suggest any factors that may have effects on liquidity, and what operational changes or repository arrangements, or changes to the proposed amendment to the rule, would reduce these effects.

*C. Definitions*

**1. Final Official Statement**

Rule 15c2–12(e)(3) presently defines the term "final official statement" as a document or set of documents prepared by the issuer or its representatives setting forth information concerning the issuer and the securities to be issued that is complete as of the date the document is delivered to the Participating Underwriter. The definition does not prescribe the specific information required to be included in the documents. In order to ensure that the purposes of Rule 15c2–12 are met, and in light of the proposed amendment obligating Participating Underwriters to assure that issuers have undertaken to provide to a repository issuer-identified minimum annual financial information, as well as notices of material events, the Commission is proposing to amend the definition of final official statement to include an information requirement. The definition of final official statement also governs the items of information to be included in the near final official statement, subject to availability considerations.[21]

[18] *C.f.* Rule 15c2–11, 17 CFR 270.15c2–11. Rule 15c2–11 requires that brokers and dealers, prior to entering quotations for securities in a "quotation medium", have in their records certain specific information, and, based on a review of this information, have a reasonable basis under the circumstances for believing that the information is accurate in all material respects, and that the sources of the information are reliable. Submissions of quotations respecting municipal securities are exempt from the application of Rule 15c2–11. Rule 15c2–11(f)(4).

[19] Therefore, brokers, dealers, and municipal securities dealers could review information received through electronic dissemination, in response to telephone inquiries, facsimile, by mail, or by messenger service, so long as the information is complete.

[20] See *M.G. Davis & Co.*, 44 SEC 153, 157–58 (1970)(broker-dealer registration revoked because "representations and predictions" made and market letter relied on by registrant "were without reasonable basis," and "registrant could not reasonably accept all of the statements in the [market letter] without further investigation"), *aff'd sub nom. Levine* v. *SEC*, 436 F.2d 88 (2d Cir. 1971); *Merrill, Lynch, Pierce, Fenner & Smith*, Securities Exchange Act Release No. 14149 (Nov. 9, 1977) (noting that if a broker-dealer lacks sufficient information to make a recommendation, the lack of information is material and should be disclosed). *See also* Companion Release, *supra* note 5 at Section V (discussing the obligations of brokers, dealers, and municipal securities dealers to investigate information in order to have a reasonable basis for making a recommendation).

[21] See *Public Securities Association* (Aug. 24, 1992) (interpretation regarding the information to be contained in near final official statement obtained and reviewed by underwriters pursuant to Rule 15c2–12(b)(1)).

Having a standard with which to compare the contents of near final official statements should assist Participating Underwriters in satisfying their obligation to have a reasonable basis on which to recommend securities.[22]

The proposed amendment would define the final official statement to include information concerning the terms of the proposed issue of securities, and financial and operating information concerning the issuer that is adequate to provide a fair presentation of the issuer's current financial condition and results of operations and cash flows, including audited financial statements. Financial and operating information also would be required for any "significant obligor" with respect to the municipal security. The term "significant obligor" is defined in the proposed amendment, and is discussed below. As discussed in the Companion Release, reliable financial information, prepared on a consistent basis, that fairly presents the issuer's and any significant obligor's financial position, is an important component of a disclosure scheme designed to prevent fraud.

Comment is requested on whether an amendment to the definition of final official statement is necessary. If commenters consider amendment necessary, comment is requested on whether audited financial statements should be required, whether audited financial statements should be required to be audited using GAAS, the number of years of audited financial statements that should be included, if any, and if audited financial statements are included, whether unaudited financial statements covering interim periods also should be included. Comment also is requested on whether the definition should be amended to require that the financial statements conform to GAAP, or should include discussions of material deviations from GAAP if prepared on some other basis.

The final official statement can be composed of a set of documents. Comment is requested on whether a seasoned issuer should be permitted to incorporate previously prepared documents by reference into the final official statement and, if incorporation by reference is permitted, what limitations or requirements should be imposed. Comment is requested on whether seasoned issuers should be required to provide documents incorporated by reference upon request and at no charge, and on what definition should be used for "seasoned issuers." For example, seasoned issuers could be defined as repeat issuers having in excess of a specified dollar amount of outstanding securities.

2. Significant Obligors

Proposed paragraph (b)(5) of the amendment would require financial and operating information on "significant obligors" of an issuer of a municipal security to be provided in the final official statement and in annual financial information. The proposed amendments, in paragraph (f)(9), also would define the term "significant obligor."

An obligor is any person who, directly or indirectly, under a lease, loan, sale, or other agreement or arrangement, is obligated to make payments to the issuer, which cash payments are the source of the cash flow servicing the obligations on municipal securities. The term "obligor" is not limited to issuers of separate securities under Rule 3b–5 under the Exchange Act and Rule 131 under the Securities Act.[23] Under the proposed definition, an obligor would be viewed as "significant" if it is the source of 20 percent or more of the cash flow servicing the obligations on the municipal securities.

This definition is designed to make available to the municipal securities market, at the time of issuance and on an annual basis, information on persons who ultimately are responsible for the cash flow servicing the municipal securities. The proposed definition recognizes that, with portfolio and concentration risk diversification, the "significant obligor" of an issuer of a municipal security may not be constant, but may change from year to year.

Comment is requested on whether 20 percent is an appropriate threshold level of cash flow to require disclosure concerning a significant obligor, or whether a different threshold, such as 10, 15, or 30 percent, should be used. Comment also is requested on whether this standard should differ for a final official statement and annual financial information. Finally, comment is requested as to whether the issuer's obligation to provide information concerning significant obligors should be conditioned on a minimum threshold, for example, payment obligations in excess of $1,000,000, or some other dollar threshold.

*D. Exemptions*

Consistent with other provisions of Rule 15c2–12, the proposed amendments are limited in application to primary offerings of municipal securities with an aggregate principal amount of $1,000,000 or more.

The proposed amendments include a new exemption in paragraph (d)(2), applicable to paragraph (b)(5). This new exemption would provide that, in addition to the $1,000,000 threshold applicable to Rule 15c2–12 generally, Offerings would be exempt from the operation of paragraph (b)(5) if, at such time as the issuer of municipal securities delivers the securities to the Participating Underwriter, the issuer: (a) will have less than $10,000,000 in aggregate amount of municipal securities outstanding, including the offered securities; and (b) the issuer will have issued less than $3,000,000 in aggregate amount of municipal securities in the most recent 48 months preceding the Offering. This exemption is designed to exclude from the application of paragraph (b)(5) small issuers that do not frequently issue municipal securities. Comment is requested on the use of these thresholds. Comment also is requested on whether a different or additional threshold should be applicable to paragraph (b)(5). Such a threshold could be based on the number of holders of municipal securities, or on the number of holders falling below a certain level at the end of a fiscal year, for example, 300 or 500 debt holders. Comment is requested on whether issuers of conduit securities that are non-governmental private activity bonds should be excepted from this exemption, or if lower or different thresholds should be used for such issuers. Comment also is requested on whether the exemption in proposed paragraph (d)(2) is appropriate for conduit financings, in light of the fact that, in many instances, issuing authorities are created for the sole purpose of issuing bonds to finance a particular facility.

The proposed amendments also include a new exemption in paragraph (d)(3), exempting from the application of paragraph (c) of the rule a primary offering of municipal securities (1) not sold in an Offering to which paragraph (b)(5) applied, or (2) sold in an Offering exempt under paragraph (d)(1) or paragraph (d)(2). The purpose of this exemption is to permit the recommendation in the secondary market of securities that were not subject to paragraph (b)(5), either

[22] For a discussion of the delivery requirement of a near final official statement pursuant to Rule 15c2–12(b)(1), *see* Companion Release, *supra* note 5, at Section III.E.6.

[23] An obligor is not only an industrial or commercial enterprise, but may include governmental and nonprofit entities as well. *See* the definition of issuer in Rule 15c2–12(e)(4), 17 CFR 240.15c2–12(e)(4); Rule 3b–5, 17 CFR 240.3b–5, and Rule 131, 17 CFR 230.131, under the Securities Act.

because they were sold in a primary offering of municipal securities with an aggregate principal amount of less than $1,000,000, or because they came within the existing exemptions under newly designated paragraph (d)(1) for limited placements, short-term securities, and securities with demand features, or within the exemption in new paragraph (d)(2) for small, infrequent issuers. Comment is requested on this exemption. Specifically, comment is requested on whether paragraph (c) of the proposed amendments should be made applicable to all outstanding issues of municipal securities. The existing transactional exemption in newly designated paragraph (d) would apply to the amendments.

*E. Transitional Provision*

Newly designated paragraph (g) of the rule would contain a transitional provision for the proposed amendments. The provisions of paragraph (b)(5) would apply to a Participating Underwriter that had contractually committed to act as an underwriter in an Offering on or after the effective date of the rule. Comment is requested on whether this transitional provision is appropriate, and on whether the effective date of the proposed amendments should be delayed.

**III. Nationally Recognized Municipal Securities Information Repositories**

While the term "NRMSIR" currently is used in paragraph (b)(4) of Rule 15c2–12, it is not defined in the rule. In proposing the rule, however, the Commission requested comment on the creation of one or more repositories for municipal securities disclosure documents.[24] At that time, the Commission strongly supported the development of one or more central repositories.[25] Of the more than sixty comment letters that the Commission received, forty-five expressed views regarding the concept of repositories. Forty of the forty-five commenters expressed support for some form of a central repository.[26]

NRMSIRs were discussed in the Adopting Release, where the Commission noted that in determining whether a particular entity is a NRMSIR, it would look, among other things, at whether the repository: (1) Is national in scope; (2) maintains current, accurate information about municipal offerings in the form of official statements; (3) has effective retrieval and dissemination systems; (4) places no limits on the issuers from which it will accept official statements or related information; (5) provides access to the documents deposited with it to anyone willing and able to pay the applicable fees; and (6) charges reasonable fees.[27] The *Joint Statement* has further refined the concept to suggest the designation of state-based repositories, and the creation of an index, maintained by the MSRB, for market participants to learn of the availability of information provided to the MSRB or to a NRMSIR.[28]

The proposed amendments do not define the term NRMSIR. The Commission requests comment on whether NRMSIR should be defined in the rule, with specific standards established for NRMSIRs. If standards were established, the Commission believes the following standards are appropriate. It requests comment on these standards.

NRMSIRs should maintain current, accurate information about municipal securities, including final official statements, the issuers' annual financial information, and issuers' notices of material events. Moreover, NRMSIRs should have effective systems for the timely collection, indexing, storage, and retrieval of these documents.

NRMSIRs should be capable of national dissemination of final official statements, annual financial information, and notices of material events through electronic dissemination systems, in response to telephone inquiries, and hard copy delivery via facsimile, by mail, and by messenger service. Specific dissemination systems and standards should be delineated in order to emphasize the importance of effective information dissemination. Timely public availability upon receipt of information by a NRMSIR also is important. For example, final official statements and annual financial information could be made available by the next business day after their receipt by a NRMSIR, and notices of material events could be made available within fifteen minutes of their receipt by a NRMSIR. Comment is requested on the provision by NRMSIRs of electronic dissemination of information, and on the suggested timing requirements for availability of documents for dissemination.

Repositories created and operated by states would be required to accept submissions from all issuers within their own states, and would not be permitted to accept documents from issuers in any other state. National dissemination requirements, however, would be applicable to single-state repositories. All other repositories would not be permitted to limit the issuers from which they will accept final official statements, annual financial information, and reports of material events. Comment is requested on whether state-based repositories can serve as an effective means to disseminate information to the market for a nationally traded security, so the issuer of that security can meet its disclosure obligations using a state-based repository. Comment also is requested on whether a significant number of states are willing to make the necessary financial commitment to create a state-based system. NRMSIRs would not be permitted to discriminate on the basis of the requestor in providing documents, and would be required to charge reasonable fees.

Finally, in order to implement the indexing system suggested by the *Joint*

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[24] Proposing Release, *supra* note 6 at 54 FR 37791.

[25] Adopting Release, *supra* note 6 at 54 FR 28807. The Commission recognized the benefits that would accrue from the creation of competing private repositories. *Id.*

In 1989, the MSRB announced its intention to establish and manage a central repository to provide for the collection and dissemination of official statements and refunding documents. Letter from John W. Rowe, Chairman, MSRB, to Jonathan G. Katz, Secretary, SEC (June 1, 1989). The MSRB developed its Municipal Securities Information Library ("MSIL") system, which presently collects information and disseminates it electronically to market participants and information vendors. Securities Exchange Act Release No. 29298 (June 13, 1991), 56 FR 28194.

In January 1993, the MSRB began operating its Continuing Disclosure Information pilot system ("CDI System"), which is a central repository for voluntarily submitted official continuing disclosure documents relating to outstanding municipal securities issues. Securities Exchange Act Release No. 30556 (April 6, 1992), 57 FR 12534. The CDI System operates as part of MSIL, and currently is capable of accepting documents of three or fewer pages in length.

Neither MSIL nor the CDI System is a NRMSIR. In considering the approval of MSRB rule G–36, which requires underwriters to provide the MSRB with copies of final official statements and certain other information prepared by issuers, the Commission noted that the MSRB did not intend to seek NRMSIR status. The Commission noted that if the MSRB sought NRMSIR status, it would consider the competitive implications of such a request. See Securities Exchange Act Release No. 28081 (June 1, 1990), 55 FR 23333, 23337 n.26.

[26] *See* Adopting Release, *supra* note 6 at 54 FR 28807.

[27] *See* Adopting Release, *supra* note 6 at 54 FR 28808, n.65.

[28] The *Joint Statement* suggested that in order to be recognized as a NRMSIR, a repository should, among other things: (1) maintain current, accurate information about municipal securities in the form of annual financial reports, operating data, and other current information; (2) have an effective retrieval and dissemination system; (3) place no limits on the issuers from which it will accept information unless it is a single-state repository; (4) provide access to the documents to anyone willing and able to pay the applicable fee; (5) charge reasonable fees; (6) collect information on at least a state-wide basis; and (7) provide for timely notification to an MSRB index of names of issuers about which it is to receive information. *Joint Statement, supra* note 15 at Addendum.

*Statement*, a NRMSIR would be required to provide notice to the MSRB of its designation by an issuer as the repository for the issuer's final official statements, annual financial information, and notices of material events. This would allow the creation of an index by the MSRB for informing the municipal securities market of where an issuer is sending its secondary market disclosure. Comment is requested on the feasibility of expanding this provision to require a NRMSIR to inform the MSRB whenever it receives information from an issuer. Comment also is requested on whether documents should be required to be placed with the MSRB either in addition to or in lieu of a NRMSIR.[29]

The MSRB has expressed concern that permitting issuers to place documents with multiple NRMSIRs may result in repositories receiving information at different times. This raises the issue of when the information becomes "public," and thus when dealers are considered accountable for it.[30] Comment is requested on these issues, and, in particular, on how to assure that NRMSIRs simultaneously receive secondary market disclosure. Comment also is requested on whether any proposal should require that secondary market disclosure is deposited with *all* designated NRMSIRs. In addition, comment is requested on whether the proposal should designate specific methods for sending information to NRMSIRs.

Since the Commission adopted Rule 15c2–12, the Division of Market Regulation has issued three letters taking no-action positions recognizing national information vendors as NRMSIRS, based on the standards set out in the Adopting Release.[31] The Commission anticipates that if standards for NRMSIRs were adopted, these NRMSIRs, as well as new NRMSIRs, would be required to have their operations meet the new standards. Comment is requested on the ability and willingness of both potential NRMSIRs, and those presently operating under no-action letters, to meet the standards described. Furthermore, comment is requested as to whether designation by Commission order, pursuant to standards set out in Rule 15c2–12, is an appropriate method for recognizing NRMSIRs, or whether it is appropriate to continue the current no-action policies of the Division.

## IV. Application of the Tower Amendment

With the passage of the Securities Acts Amendments of 1975 ("1975 Amendments"), Congress provided for a limited regulatory scheme for municipal securities.[32] Prior to the passage of the 1975 Amendments, municipal issuers were exempt from the registration and continuous reporting provisions of both the Securities Act and the Exchange Act. While municipal issuers continued to be exempt from all but the antifraud provisions of the federal securities laws, the 1975 Amendments required the registration of municipal securities brokers and dealers,[33] and established the MSRB,[34] granting it the authority to promulgate rules governing the sale of municipal securities.

In so crafting the 1975 Amendments, Congress struck a balance between investor protection and intergovernmental comity. This concern is reflected in Section 15B(d)(1) of the Exchange Act, which prohibits the MSRB from requiring "any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document, in connection with the issuance, sale, or distribution of such securities."[35] While narrowly tailoring the authority of the MSRB to require that disclosure documents be provided to investors,[36] Congress was careful to preserve the authority of the Commission under Section 15(c)(2) of the Exchange Act.[37]

Moreover, Section 15B(d)(2) expressly indicates that "[n]othing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title."[38] Thus, while prohibiting the Commission from requiring municipal issuers to file reports or documents prior to issuing securities in Section 15B(d)(1),[39] Congress expanded the Commission's authority to adopt rules reasonably designed to prevent fraud. The Commission believes that the proposed amendments to Rule 15c2–12 are consistent with its Congressional mandate to adopt rules reasonably designed to prevent fraud in the municipal securities market.[40]

## V. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Exchange Act[41] requires the Commission, in adopting rules under the Act, to consider the anticompetitive effects of those rules, if any, and to balance that impact against the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission preliminarily is of the view that adoption of the proposed amendments to Rule 15c2–12 would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission requests comment, however, on any competitive burdens that might result from amendment of the rule. Moreover, while the amendments apply equally to all brokers, dealers, and municipal securities dealers, the Commission is interested in receiving comments on the extent to which the proposed dollar threshold in the new exemption in paragraph (e) would burden one segment of the industry more than another.

In addition, the Commission has prepared an initial regulatory flexibility analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act[42] regarding the proposed amendments to Rule 15c2–12. The IRFA indicates that the amendments to the rule could impose some additional costs on small broker-dealers and municipal issuers. Nonetheless, the Commission is of the view that many of the substantive requirements of the rule amendments already are observed by broker-dealers and issuers as a matter of business practice, or to fulfill their existing obligations under the general antifraud

[29] *See supra* note 25 (regarding the competitive implications of the MSRB's seeking NRMSIR status).

[30] Letter from Christopher A. Taylor, Executive Director, MSRB, to Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC (December 20, 1993).

[31] Letters from Richard G. Ketchum, Director, Division of Market Regulation, SEC, to: Joseph V. Riccobono, Executive Vice-President, American Banker-Bond Buyer (Jan. 4, 1990); J. Kevin Kenny, President, Chief Executive Officer, J.J. Kenny Co. (Jan. 4, 1990); and Michael R. Bloomberg, President, Bloomberg, L.P. (Jan. 11, 1990).

[32] The Securities Acts Amendments of 1975, Pub. L. 94–29, 89 Stat. 97 (June 4, 1975).

[33] 15 U.S.C. 78*o*–4(a)(1).

[34] 15 U.S.C. 78*o*–4(b)(1).

[35] 15 U.S.C. 78 *o*–4(d)(1).

[36] The so-called "Tower Amendment," adding section 15B(d)(2), 15 U.S.C. 78*o*–4(d)(2) to the Exchange Act, prohibits the MSRB from requiring municipal issuers, directly or indirectly, through municipal securities broker-dealers or otherwise, to furnish the MSRB or prospective investors with any documents, including official statements. The MSRB specifically is permitted, however, to require that official statements or other documents that are available from sources other than the issuer, such as the underwriter, be provided to investors.

[37] 15 U.S.C. 78*o*(c)(2).

[38] 15 U.S.C. 78*o*–4(d)(2).

[39] 15 U.S.C. 78*o*–4(d)(1).

[40] Rule 15c2–12 was adopted pursuant to the Commission's authority under Exchange Act Sections 2, 3, 10, 15, 15B, and 23; 15 U.S.C. 78b, 78c, 78j, 78*o*, 78*o*–4, 78q, and 78w.

[41] 15 U.S.C. 78w(a)(2).

[42] 5 U.S.C. 604.

provisions of the federal securities laws. The Commission requests comment on the extent to which current practice deviates from the requirements of the proposed amendments, and the extent to which additional costs may be imposed on small broker-dealers and municipal issuers if the amendments are adopted as proposed.

A copy of the IRFA may be obtained from Janet W. Russell-Hunter, Esq., Attorney, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 7–10, Washington, DC 20549, (202) 504–2418.

**List of Subjects in 17 CFR part 240**

Reporting and recordkeeping requirements, Securities

**Text of Proposed Amendments to Rule 15c2–12**

In accordance with the foregoing, title 17, chapter II of title 17 of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. Section 240.15c2–12 is amended by adding a Preliminary Note preceding paragraph (a); adding paragraph (b)(5); redesignating paragraph (c) through paragraph (f) as paragraph (d) through paragraph (g); adding paragraph (c); revising newly designated paragraph (d) and paragraph (f)(3); adding paragraph (f)(9); and adding one sentence to the end of newly designated paragraph (g) to read as follows:

**§ 240.15c2–12 Municipal securities disclosure.**

*Preliminary Note:* For a discussion of disclosure obligations relating to municipal securities, issuers, brokers, dealers, and municipal securities dealers should refer to Securities Act Release No. 7049, Exchange Act Release No. 33741, FR–42 (March 9, 1994). For a discussion of the obligations of underwriters to have a reasonable basis for recommendations of municipal securities, brokers, dealers, and municipal securities dealers should refer to Securities Exchange Act Release No. 26100 (Sept. 22, 1988) and Securities Exchange Act Release No. 26985 (June 28, 1989).

* * * * *

(b) *Requirements.* * * *

(5)(i) A Participating Underwriter shall not purchase or sell municipal securities in connection with an Offering unless the Participating Underwriter has reasonably determined that the issuer or its designated agent has undertaken in a written agreement or contract for the benefit of holders of such securities, to provide to a nationally recognized municipal securities information repository:

(A) At least annually, current financial information concerning the issuer of the municipal securities and any significant obligors, including annual audited financial statements and pertinent operating information; and

(B) In a timely manner, notice of any of the following events, if material:

(*1*) Principal and interest payment delinquencies;

(*2*) Non-payment related defaults;

(*3*) Unscheduled draws on debt service reserves reflecting financial difficulties;

(*4*) Unscheduled draws on credit enhancements reflecting financial difficulties;

(*5*) Substitution of credit or liquidity providers, or their failure to perform;

(*6*) Adverse tax opinions or events affecting the tax-exempt status of the security;

(*7*) Modifications to rights of security holders;

(*8*) Bond calls;

(*9*) Defeasances;

(*10*) Matters affecting collateral; and

(*11*) Rating changes.

(ii) Such written agreement or contract for the benefit of holders of such securities shall also specify:

(A) The accounting principles pursuant to which the audited financial statements will be prepared;

(B) The financial and pertinent operating information to be provided on an annual basis, in addition to audited financial statements; and

(C) The time within which the annual information for the preceding year will be provided to the repository.

(c) *Recommendations without specified information.* As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for any broker, dealer, or municipal securities dealer to recommend the purchase or sale of a municipal security unless such broker, dealer, or municipal securities dealer has reviewed the information the issuer of the municipal security has undertaken to provide pursuant to paragraph (b)(5) of this section.

(d) *Exemptions.* (1) This section shall not apply to a primary offering of municipal securities in authorized denominations of $100,000 or more, if such securities:

(i) Are sold to no more than thirty five persons each of whom the Participating Underwriter reasonably believes:

(A) Has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment; and

(B) Is not purchasing for more than one account or with a view to distributing the securities; or

(ii) Have a maturity of nine months or less; or

(iii) At the option of the holder thereof may be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent.

(2) Paragraph (b)(5) of this section shall not apply to an Offering of municipal securities if, at such time as the issuer of municipal securities delivers the securities to the Participating Underwriters:

(i) The issuer will have less than $10,000,000 in aggregate amount of municipal securities outstanding, including the offered securities; and

(ii) The issuer will have issued less than $3,000,000 in aggregate amount, in the 48 months preceding the Offering.

(3) The provisions of paragraph (c) of this section shall not apply to a primary offering of municipal securities:

(i) Not sold in an Offering to which paragraph (b)(5) of this section applied; or

(ii) Sold in an Offering exempt under paragraph (d)(1) or paragraph (d)(2) of this section.

* * * * *

(f) *Definitions.* * * *

(3) The term *final official statement* means a document or set of documents prepared by the issuer of municipal securities or its representatives setting forth, among other matters, information concerning the terms of the proposed issue of securities, and financial and operating information adequate to provide a fair presentation of the issuer's and any significant obligor's current financial condition and results of operations, and cash flows, including audited financial statements, that is complete as of the date delivered to the Participating Underwriter.

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(9) The term *significant obligor* means any person who, directly or indirectly, is the source of 20 percent or more of the cash flow servicing the obligations on the municipal securities.

(g) *Transitional Provision.* * * * Paragraph (b)(5) of this section shall not apply to a Participating Underwriter that has contractually committed to act as an underwriter in an Offering of municipal securities before [effective date of final rule].

By the Commission.

Dated: March 9, 1994.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–5927 Filed 3–16–94; 8:45 am]

BILLING CODE 8010–01–P

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**17 CFR Part 240**

**[Release No. 34–33743, File No. S7–6–94]**

**RIN 3235–AF84; 3235–AG12**

## Confirmation of Transactions

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed amendments to Rule 10b-10 and proposed rulemaking.

**SUMMARY:** The Securities and Exchange Commission is publishing for comment amendments to Rule 10b-10 and proposed Rule 15c2–13 under the Securities Exchange Act of 1934. The proposed amendments to Rule 10b-10 are designed to clarify the operation of the Rule, particularly in light of changes in the securities markets and the development of new securities products. The amendments and new rule are designed to enhance the disclosure given to customers so that customers can better evaluate their securities transactions. The Commission is seeking comment on the function of the confirmation in the context of a three day settlement period, and the adequacy and readability of customer periodic statements.

**DATES:** Comments should be received on or before June 15, 1994.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 6–9, Washington, DC 20549. Comment letters should refer to File No. S7–6–94. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

**FOR FURTHER INFORMATION CONTACT:** Robert Colby, Deputy Director, (202/272–2790), Catherine McGuire, Chief Counsel, (202/272–2844), or C. Dirk Peterson, Attorney, (202/504–2418), Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 5–1, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission ("SEC" or "Commission") proposes to amend the confirmation requirements under Rule 10b-10 [1] of the Securities Exchange Act of 1934 ("Exchange Act") [2] to strengthen its investor protection function. Generally, Rule 10b-10 requires a broker-dealer that effects transactions for customers in securities, other than U.S. Savings Bonds or municipal securities, to provide a written notification to the customer, at or before completion of the transaction, that discloses information about the transaction.[3] Confirmation of a securities transaction provides basic customer protection, the importance of which was recognized by the Commission as early as 1937.[4]

The proposed amendments to Rule 10b-10 would: (1) Require confirmation disclosure of mark-ups and mark-downs for riskless principal transactions in debt securities; (2) require disclosure of the fact that a debt security is not rated by a nationally recognized statistical rating organization; (3) require confirmation disclosure of mark-ups and mark-downs in Nasdaq and exchange-listed securities; (4) require disclosure regarding whether broker-dealers are not members of the Securities Investor Protection Corporation; (5) modify the disclosure requirements with respect to certain collateralized debt securities; (6) add a preliminary note to the Rule indicating that the Rule's disclosure requirements do not limit disclosures necessary under the antifraud provisions of the federal securities laws; and (7) restructure the Rule.

Proposed Rule 15c2–13 would require brokers, dealers, and municipal securities dealers (1) to disclose mark-up information in riskless principal transactions in municipal securities; and (2) to disclose when a particular municipal security is not rated by a nationally recognized statistical rating organization.

The confirmation serves several functions: it acts as a customer invoice; informs investors of the details of a transaction, allowing the investor to check for errors or misunderstandings; provides consumer information, allowing investors to evaluate the cost and quality of the services provided by broker-dealers; discloses to investors possible conflicts of interest between them and the broker-dealer; and acts as a safeguard against fraud, by permitting the customer to detect problems associated with a transaction.

Implementation of a settlement period of three days ("T+3") may alter the confirmation's utility as a customer invoice because normal confirmation delivery and the transfer of customer funds and securities may not be possible within the three day settlement period. Under the previous settlement period of five days, confirmations generally reached customers in time for the customer to review them prior to transferring funds or securities to the transacting broker-dealer. Under T+3, the customer frequently will not receive the confirmation through the mails by day three;[5] thus, shortening the settlement period may require broker-dealers either to demand funds or securities from the customer earlier than at present or to cover the cost of the transaction for a longer period of time.

Although implementation of T+3 does not create compliance problems with regard to Rule 10b-10,[6] the Commission

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[1] 17 CFR 240.10b-10.

[2] 15 U.S.C. 78a *et seq.*

[3] A broker-dealer has an obligation under Rule 10b-10 to send its customers an immediate confirmation with respect to each transaction the broker-dealer effects. In the case of a customer account managed by a fiduciary of the customer, it is important to note that the account is the customer, rather than the fiduciary. *See generally Letter regarding Merrill Lynch, Broadcort Capital Corp. and Wagner Stott Clearing Corp.* (March 25, 1991)[available on LEXIS]. Accordingly, under Rule 10b-10, a broker-dealer must send an immediate confirmation to the account holder, in addition to any confirmation it may send to an account fiduciary. The Commission believes, however, that an account that has given discretionary authority in writing to its fiduciary may agree in writing with the broker-dealer effecting its trades to waive the receipt of an immediate confirmation required by Rule 10b-10 if: (1) The broker-dealer sends an immediate confirmation to the account's fiduciary, and (2) a broker-dealer sends the discretionary account a statement no less frequently than quarterly containing all the information required to be disclosed on the immediate confirmation. The customer may not waive this quarterly statement.

[4] Rule 15c1–4, 17 CFR 240.15c1–4, an earlier confirmation rule, was adopted by the Commission in 1937. Securities Exchange Act Release No. 1330 (Aug. 4, 1937). This rule, which solely applied to transactions in securities in the over-the-counter market, was replaced in 1978 by Rule 10b-10, which extended the Commission's confirmation requirements to trades conducted on a securities exchange. Securities Exchange Act Release No. 15219 (Oct. 6, 1978), 43 FR 47495. Rule 10b-10 initially was adopted in part in May 1977. Securities Exchange Act Release No. 13508 (May 5, 1977), 42 FR 25318 ("Adopting Release").

[5] Broker-dealers may alleviate the concerns of mail delay, for example, by sending confirmations by facsimile.

[6] Some commentators suggested that substantive changes to Rule 10b-10 will be necessary as a result of the adoption of Rule 15c6–1 of the Exchange Act, 17 CFR 240.15c6–1, which implemented T+3. Because Rule 10b-10 requires a broker-dealer to send a customer written confirmation "at or before completion of the transaction," some have argued that a T+3 settlement period will make compliance with Rule 10b-10 impossible. The Commission

Continued

requests comment on its effect on the confirmation's investor protection functions. If the confirmation is used less frequently as an invoice, should some of the confirmation's content be shifted to periodic account statements?[7]

In this connection, the Commission solicits comment on the adequacy and readability of periodic statements of account generally and whether these account statements are read and relied upon by investors in monitoring their accounts.

### 1. Disclosure of Mark-Ups in Riskless Principal Transactions in Debt Securities

Rule 10b-10 currently requires disclosures of broker-dealer compensation in agency and specified principal trades. In agency trades, the confirmation must disclose both the transaction price and the commission charged.[8] In principal trades involving "Reported Securities,"[9] the confirmation must disclose the trade price reported by the broker-dealer for that transaction and the mark-up calculated from the reported price.[10] In "riskless" principal trades in non-reported equity securities,[11] Rule 10b-10 requires brokers and dealers, other than market makers, to disclose the amount of any mark-up received.[12] The Commission is proposing to amend Rule 10b-10 to require the disclosure of mark-up information for riskless principal trades in debt securities, other than U.S. Savings Bonds and municipal securities. The Commission also is proposing Rule 15c2–13 to require disclosure of mark-up information in riskless principal trades in municipal securities. Rule 10b-10 currently requires confirmations for transactions in debt securities to disclose to the customer the net dollar price and yield, but not separate disclosure of compensation information.[13] The Commission believes that investors in debt securities, like investors in equity securities, should be informed of the costs in riskless principal trades because, despite the legal distinctions, these trades are the functional equivalent of transactions effected on an agency basis.

On three previous occasions, the Commission proposed amendments to Rule 10b–10 that would have required disclosure of mark-ups for riskless principal trades involving debt securities, including municipal securities.[14] Commentators argued against adoption of mark-up disclosure for riskless principal debt trades saying that: (1) The amount of a mark-up was not material to investors; (2) adoption of the proposal would have a detrimental, disproportionate effect on small broker-dealers; and (3) the amendment would present compliance and enforcement difficulties because of differences between the debt and equity markets.[15] The Commission withdrew the proposal in 1982,[16] and subsequently adopted amendments requiring that confirmations contain disclosures concerning the yield of debt securities.[17]

In light of the increasing size of the debt market,[18] together with experience with mark-up disclosure in riskless

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notes, however, that broker-dealers can comply with Rule 10b-10 even under a T+3 settlement period. Rule 10b-10 requires only that the broker-dealer send written confirmation by settlement date, not that the customer actually receive it by settlement. In the current five days settlement period, broker-dealers typically send customer confirmations the day after trade date, which will satisfy Rule 10b-10 even under a T+3 settlement period.

[7] Six of the exchanges and the National Association of Securities Dealers, Inc. ("NASD") have rules requiring that such periodic statements be sent to customers. The Commission has proposed a rule requiring annual account statements in the payment for order flow context. *See* Securities Exchange Act Release No. 33026 (Oct. 7, 1993), 58 FR 52934 (Oct. 13, 1993).

[8] 17 CFR 240.10b-10(a)(2) and 17 CFR 240.10b-10(a)(7)(ii).

[9] Rule 11Aa3–1(a)(4), 17 CFR 240.11Aa3–1(a)(4), defines "Reported Security" as any exchange-listed equity security or Nasdaq security for which transaction reports are made available on a real-time basis pursuant to an effective transaction reporting plan. An "effective transaction reporting plan" refers to a transaction reporting plan that the Commission has approved pursuant to Rule 11Aa3–1. 17 CFR 240.11Aa3–1(a)(3).

Reported Securities presently include:

1. Nasdaq securities that meet standards set forth in the National Market System Securities Designation Plan ("Nasdaq/NMS securities").

2. Certain securities listed on a national securities exchange that meet standards of the transaction reporting plan known as the Restated Consolidated Tape Association Plan ("CTA Plan"). This would include securities that are registered or admitted to unlisted trading privileges on a national securities exchange, including securities listed on various regional exchanges, and that substantially meet New York Stock Exchange, Inc ("NYSE") or American Stock Exchange, Inc. ("Amex") original listing criteria.

A number of securities that are quoted on Nasdaq and listed on certain regional stock exchanges, however, are not subject to an effective transaction reporting plan. Approximately 1,600 securities traded on Nasdaq do not satisfy the criteria for designation as a Nasdaq/NMS security, and thus are not part of an effective transaction reporting plan. Similarly, a limited number of regional-exchange listed securities are not covered by the CTA Plan.

[10] 17 CFR 240.10b-10(a)(8)(i)(B).

[11] "Riskless" principal trades are transactions in which, after receiving an order to buy or sell from a customer, the broker-dealer purchases the security from another person to offset a contemporaneous purchase by the customer or sells the security to another person to offset a contemporaneous sale by the customer. Although these transactions are characterized as riskless, they still involve counterparty risk. *See* Exchange Act Rule 15c3–1(a)(2)(vi), 17 CFR 240.15c3–1(a)(2)(vi), (relating to net capital requirements).

Rule 10b-10 currently does not require that a broker-dealer acting as a principal, other than in a "riskless" principal capacity, disclose the amount of mark-up for transactions in non-reported securities. *But see, infra* Section 3 for a discussion of mark-up disclosure requirements for non-reported securities that are subject to last-sale reporting.

For purposes of clarity and to conform to Rule 15g-4, 17 CFR 240.15g-4 (requiring riskless principal disclosure for trades involving penny stocks), the Commission proposes to replace the term "amount of any mark-up, mark-down, or similar remuneration received," currently used in Rule 10b-10, with "difference between the price to the customer and such contemporaneous purchase or sale price."

[12] 17 CFR 240.10b-10(a)(8)(i)(A). For purposes of this release, references to mark-ups are equally applicable to mark-downs or commission equivalents.

In determining the broker-dealer's mark-ups for antifraud disclosure purposes, the Commission advises broker-dealers to note that the framework set forth in Alstead, Dempsey & Company, Inc., 47 S.E.C. 1034 (1984), governs the appropriate method for determining the prevailing market price in active or dominated and controlled markets. *See* Securities Exchange Act Release No. 29093 (Apr. 17, 1991), 56 FR 19165, for further discussion of *Alstead* in connection with proposed penny stock rules which are adopted in Securities Exchange Act Release No. 30608 (Apr. 20, 1992), 57 FR 18004. *See also* Meyer Blinder, Securities Exchange Act Release No. 31095, (Aug. 26, 1992), 52 SEC Doc. 1436, *appeal docketed sub. nom.* Gorden v. SEC, No. 92–1554 (D.C. Cir.) appeal dismissed per stipulation (applying the *Alstead* framework to case involving excessive mark-ups in a dominated and controlled market). *See* Securities Exchange Act Release No. 33083 (Oct. 21, 1993).

[13] 17 CFR 240.10b-10(a)(5).

[14] *See* Securities Exchange Act Release No. 15220 (Oct. 6, 1978), 43 FR 47538 (proposing mark-up disclosure for riskless principal trades in municipal securities) ("1978 Release"); Securities Exchange Act Release No. 13661 (June 23, 1977), 42 FR 33348 (proposing mark-up disclosure by non-market makers in riskless principal transactions involving equity and debt securities, but not municipal securities); and Securities Exchange Act Release No. 12806 (Sept. 16, 1976), 41 FR 41432 (proposing mark-up disclosure by non-market makers in riskless principal transactions involving equity and debt securities).

[15] One commentator noted that determining whether a particular firm was a market maker in the debt context was difficult because the market maker definition contemplates an equity environment and does not account for the differences in the debt environment. *See* Letter from Sullivan & Cromwell, to George A. Fitzsimmons, Secretary, SEC, dated January 15, 1979.

[16] Securities Exchange Act Release No. 18987 (Aug. 20, 1982), 47 FR 37919.

[17] Securities Exchange Act Release No. 18988 (Aug. 20, 1982), 47 FR 37920, *adopted in* Securities Exchange Act Release No. 19687 (Apr. 18, 1983), 48 FR 17583.

[18] The amount of outstanding debt in the U.S. is approximately $1.9 trillion in corporate debt, of which $298 billion is held by individual investors (households and mutual funds) in corporate and foreign debt securities (*See* Flow of Fund Accounts, First Quarter, 1993), $4.9 trillion in U.S. government securities, and $1.2 trillion in municipal bonds. Securities Industry Fact Book, Securities Industry Association (1993), at 21. The municipal securities market comprises approximately 50,000 state and local issuers with an outstanding principal amount of securities in excess of $1.2 trillion. *See* SEC Report on the Municipal Securities Market (Sept. 1993), at 1. There are approximately 1.3 million classes of municipal securities spread across 150,000 different issuances. Public Securities Association.

principal trades for equities, the Commission believes that mark-up disclosure for riskless principal trades in debt securities should be revisited.[19] Confirmation disclosure of mark-ups in riskless principal transactions will aid investors by disclosing to them transaction costs. This will assist the client in monitoring brokerage expenses and detecting possible improper practices. For instance, the Commission understands that mark-ups charged in riskless principal trades in long-term securities are substantially greater than mark-ups charged in short-term securities, because the impact on disclosed yield is smaller in the long term trade. The Commission believes that customers should be given the ability to compare mark-ups in these trades.

In withdrawing the riskless principal mark-up disclosure proposal in the 1978 Release, the Commission stated that it would "maintain close scrutiny to prevent excessive mark-ups and take enforcement action where appropriate."[20] Since 1982, the Commission and NASD have undertaken a number of enforcement actions against broker-dealers involving undisclosed, excessive mark-ups in debt securities.[21] Requiring disclosure of mark-ups in riskless principal trades in debt securities would supplement the Commission's and self-regulatory organizations' enforcement programs, by giving investors greater ability to review the mark-ups on their transactions. As a practical matter, the proposed amendment also may permit broker-dealers that consistently observe the highest standards of practice to compete more effectively against broker-dealers that charge excessive mark-ups.[22]

Because riskless principal transactions do not involve holding securities in inventory for any appreciable length of time,[23] the broker-dealer's compensation easily can be calculated by comparing the order tickets for the purchase and sale involved. In addition, a broker-dealer must assess whether its mark-ups violate NASD or Commission mark-up policies. Accordingly, the Commission does not believe that the proposal would be overly burdensome for broker-dealers.

Unlike current disclosure requirements for riskless principal transactions in equity securities, the proposed amendment and Rule 15c2–13 do not include an exclusion for market makers. This exclusion is omitted because market makers have a much more limited function in the debt markets. Typically, dealers in these markets, especially the municipal market, do not display two-sided quotations nor carry inventories of debt securities, as is characteristic of a market maker in equity securities. Because of the tax implications, the lack of dealer inventory, and the relative illiquidity of the market for any particular municipal security, short positioning of municipal securities is difficult and imposes greater risk that a dealer will be unable to cover its short position.[24]

The Commission requests comment on the proposal to disclose mark-ups in riskless principal transactions in debt securities. In particular, the Commission requests comment concerning whether proposals requiring mark-up disclosure in riskless principal transactions in municipal securities should be incorporated in one rule under the authority of the Municipal Securities Rulemaking Board ("MSRB"), rather than the Commission. In addition, comment is sought concerning the proposed definition of riskless principal contained in sub-paragraphs (e)(10) and (b)(3) of Rule 10b-10 and Rule 15c2–13, respectively.[25] The Commission further requests comment concerning the extent to which broker-dealers act as market makers, as defined in Section 3(a)(38), in the debt market and the extent that broker-dealers currently calculate mark-ups in riskless principal debt transactions for business purposes, such as determining the compensation of sales personnel.[26] In addition, the Commission requests comment on whether the proposed requirements for mark-up disclosure in debt securities

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[19] Mark-up disclosure requirements are applicable at present to trades in debt securities convertible into equity securities. Section 3(a)(11), 15 U.S.C. 78c(a)(11), and Rule 3a11–1 of the Exchange Act, 17 CFR 240.3a11–1, define equity security to include any security convertible into an equity security. Debt security is defined to include a convertible security for purposes of certain paragraphs of Rule 10b–10, but not for purposes of mark-up disclosure in riskless principal trades.

[20] Securities Exchange Release No. 18987 (Aug. 20, 1982), 47 FR 37919, at 37920.

[21] See, *e.g.*, F.B. Horner & Associates v. S.E.C., 994 F.2d 61 (2d Cir. 1993) (mark-ups charged of 5% for collateralized mortgage obligations held to be excessive); First Honolulu Securities Corp., mark-ups of 5% for municipal and corporate bonds held to be excessive); Investment Planning, Inc., Securities Exchange Act Release No. 32687 (July 28, 1993) (upholding NASD finding that mark-ups of 4% on certain corporate and municipal bonds were excessive); Lake Securities, Inc., (Securities Exchange Act Release No. 31283 (Oct. 2, 1992) (mark-down of 7.4% on FNMA mortgage-backed securities held to be fraudulent); Hamilton Bohner, 44 S.E.C. Doc. 1297 (1989) (mark-downs ranging from 5.3% to 10.2% in excess of permissible levels and NASD's findings of violations upheld); Donald T. Sheldon, Admin. Proc. File No. 3–6626 (December 2, 1988)[available on LEXIS](undisclosed mark-ups of over 8% for municipal bonds and over 5% for government securities found to be excessive), appeal docketed, No. 93–4405 (11th Cir.); Alan Charles Refkin, Securities Exchange Act Release No. 26311 (Nov. 25, 1988), 42 S.E.C. Doc. 490 (consent decree included findings that certain registered representatives executed transactions involving mark-ups of between 10% and 34% in zero coupon bonds); PaineWebber, Inc., Securities Exchange Act Release No. 25418 (Mar. 4, 1988), 40 S.E.C. Doc. 693 (offer of settlement stated that registrant charged customers undisclosed, excessive mark-ups in transactions involving the sale and repurchase of stripped U.S. Treasury bond coupons); Nicholas A. Codispoti, 48 S.E.C. 842 (1987) (mark-ups of 6.1% to 32.7% on municipal bonds with inactive market found to be excessive); Sutro & Co., Securities Exchange Act Release No. 23663 (Sept. 30, 1986), 36 S.E.C. Docket 1199 (offer of settlement included finding that transactions were executed with mark-ups and mark-downs of between 10% and 34% on U.S. Treasury bonds); Hanauer, Stern & Co., Securities Exchange Act Release No. 21313 (Sept. 11, 1984), 31 S.E.C. Doc. 483 (consent decree included findings of excessive mark-ups on municipal securities transactions); S.E.C. v. MV Securities, Inc. (S.D.N.Y., No. Civ. 1164), Litigation Release No. 10289 (Feb. 21, 1984), 29 S.E.C. Doc. 1591, (defendants enjoined from, *inter alia*, paying or charging unfair prices to customers in municipal bond transactions).

The Commission brought an injunctive action against an unregistered broker-dealer for defrauding his customers by secretly interpositioning himself between customers and dealers in certain government and municipal securities, and appropriating for himself better market prices that should have been made available to his customers. SEC v. Ridenour, 913 F.2d 515 (8th Cir. 1990).

In addition, the Commission has submitted amicus briefs in cases alleging excessive mark-ups in debt securities. *See, e.g., Amicus Curiae* Brief of the SEC and Elysian Federal Savings Bank v. First Interregional Equity Corp., 713 F. Supp. 737 (D. N.J. 1989)(brief arguing that mark-ups ranging from 17.4% to 21.27% for principal only trust certificates were excessive and mark-ups ranging between 5.3% to 7.39% on collateral mortgage obligations were excessive).

[22] The Commission is aware of instances in which the customer, while being correctly informed that no "commission" is involved in a principal transaction in a debt security, has been given the impression that no transaction fee is being charged. *See* "Firms Must Accurately Disclose Bond Trading Charges," *NASD Regulatory & Compliance Alert* (June 1990). Irrespective of current or future Rule 10b-10 disclosure requirements, a misleading statement or a failure to disclose material facts about the compensation received by the broker-dealer constitutes an antifraud violation.

[23] The riskless principal disclosure requirements are intended to apply to offsetting transactions, regardless of the sequencing of the transaction. *See* Securities Exchange Act Release No. 15219 (Oct. 6, 1978), at n. 20; and *Letter regarding Buys-MacGregor, McNaughton-Greenwalt & Co.*, (Feb. 1, 1980), [1980] Fed. Sec. L. Rep. (CCH) ¶76,313.

[24] Short positioning municipal securities is rare because the Internal Revenue Service will not allow both a borrower and lender of a municipal security to claim a tax exemption. In effect, the lender of a municipal security would be trading tax exempt interest for taxable interest. In addition, to the extent that any short positioning occurs with respect to municipal securities, the IRS imposes additional reporting requirements on the participating parties. *See* Internal Revenue Code, § 6045(d).

[25] See, *supra*, note 10 for a discussion of riskless principal transactions.

[26] Salesperson compensation is often determined as a percentage of the gross mark-up charged on a principal transaction.

should cover securities transactions occurring on the same day rather than limiting the disclosure solely to riskless principal transactions.

**2. Disclosure of Unrated Debt Securities**

As proposed, both Rule 10b–10 and Rule 15c2–13 will require broker-dealers to disclose when a debt security, other than securities defined under Section 3(a)(42)(A) and (B) of the Exchange Act,[27] is not rated by a nationally recognized statistical rating organization. The Commission is not requiring the disclosure of the specific rating of a debt security because that information most likely will be disclosed to a customer when a broker-dealer sells such a security. Brokers are less likely to inform customers that a security is not rated. While the Commission recognizes that an unrated bond may not necessarily be unsound or speculative, this information will benefit investors by alerting them that they may want to make further inquiry of the broker-dealer. In the municipal securities market, this information is particularly useful because of the limited secondary market information in that market and the comparatively higher rates of issuer default for unrated municipal bonds.[28] The Commission requests comment whether securities other than U.S. Treasury securities should be excluded from this requirement. In addition, the Commission requests comment on whether this requirement as it relates to municipal securities should be incorporated in one rule under the authority of the MSRB.

**3. Disclosure of Mark-Ups and Mark-downs in Certain Nasdaq and Exchange-Listed Securities**

Since 1985, Rule 10b–10 has required broker-dealers acting as principals in transactions in Reported Securities[29] to disclose on customer confirmations the reported trade price, the price to the customer, and the difference between the two prices.[30] In response to the expansion of last sale reporting to additional securities, the Commission is now proposing to amend Rule 10b–10 to require similar disclosure in principal transactions in Nasdaq equity securities that are not Nasdaq/NMS securities ("Nasdaq Small Cap Securities") and certain exchange-listed securities. These securities are subject to last sale reporting, but are not included in the definition of "Reported Security," as provided in Rule 11Aa3–1 of the Exchange Act.

In April, 1992, the Commission approved a proposal by the NASD[31] to require last sale and volume reporting for all securities traded on Nasdaq.[32] Shortly afterwards, the NASD required its members to disclose to customers on written confirmations the reported trade price, the price to the customer, and the difference between the two prices in a particular Nasdaq Small Cap Securities transaction.[33] The NASD's rule provides customers who trade Nasdaq Small Cap Securities with the same compensation disclosure required under Rule 10b–10 for Nasdaq/NMS securities.

The proposed amendment would consolidate in Rule 10b–10 compensation disclosure applicable to all Nasdaq stocks. It also would extend this compensation disclosure to principal transactions in regional-exchange listed securities subject to last sale reporting.[34] Doing so would treat similar securities consistently and would provide benefits to customers with little additional burden on broker-dealers. Because securities traded through Nasdaq and regional exchanges are subject to last sale reporting requirements, and NASD members are required to disclose on confirmations the reported price, the customer's price, and the difference, capturing and disclosing the same information for purposes of complying with Rule 10b–10 would not appear to require systems changes or additional personnel.

**4. Disclosure of Coverage by the Securities Investor Protection Corporation**

The Commission is proposing to require that the confirmation contain a disclosure concerning coverage under the Securities Investor Protection Act of 1970 ("SIPA").[35] Under SIPA, all brokers or dealers registered with the Commission under Section 15(b) of the Exchange Act, with certain exceptions,[36] are members of the Securities Investor Protection Corporation ("SIPC"). In the event of the financial failure of a SIPC member broker-dealer, SIPC protects each customer up to $500,000 for claims for cash and securities, except that claims for cash are limited to $100,000.

A number of incidents involving the financial failure of registered broker-dealers, and their unregistered affiliates, have illustrated the potential for confusion about the application of SIPC coverage to customers' accounts. In one of these cases, a registered broker-dealer and its government securities affiliate were commonly owned, shared personnel and office facilities, and did not distinguish between the two entities in certain written and oral communications, leading to customer confusion concerning SIPC coverage.[37] Because government securities brokers and dealers registered under section 15C of the Exchange Act are not members of SIPC, their customer accounts are not protected by SIPC.[38]

In order to reduce the potential for confusion regarding whether SIPC coverage exists for accounts with government securities dealers, as well as other cases where an investor might mistakenly assume that SIPC coverage exists, the Commission is proposing to amend Rule 10b–10 to require broker-dealers that are not SIPC members to affirmatively state in the customer confirmation that they are not SIPC

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[27] 15 U.S.C. 78(c)(a)(42)(A) and (B).

[28] Statistics have shown that unrated municipal bonds, which make up approximately one-third of the market, in the aggregate have a higher default rate than do rated bonds. *See Municipal Bond Defaults—The 1980's a Decade in Review* 1–2, at 1, J.J. Kenny Co., Inc. 1993). According to this study on default rates between January 1, 1980 to December 31, 1991, 628 unrated issues defaulted compared with 98 rated issues. *See also*, Public Securities Association, *An Examination of Non-Rated Municipal Defaults 1986–1991* 4 (Jan. 8, 1993).

[29] *See, supra* note 8 for the definition of "Reported Securities."

[30] 17 CFR 240.10b–10(a)(8)(i)(B). The reported trade price is the price at which a broker-dealer reports a trade to NASDAQ or an exchange. Price to the customer means the ultimate price the customer pays or receives for a securities transaction, including any miscellaneous fees imposed by the broker-dealer. This would not include fees, such as taxes, SEC fees, or any other fees required by state or federal law. *See, e.g., Letter regarding Cities Securities Corp.* (Dec. 11, 1991) (available on LEXIS).

[31] Securities Exchange Act Release No. 30392 (Feb. 21, 1992), 57 FR 6880.

[32] Securities Exchange Act Release No. 30569 (Apr. 10, 1992), 57 FR 13396.

[33] NASD Schedule to By-Laws, Schedule D, pt. XI, § 3, NASD Manual (CCH) ¶1867D, *approved in* Securities Exchange Act Release No. 30871 (June 29, 1992), 57 FR 30281.

[34] Typically, these are securities of smaller companies that are listed and traded exclusively on one regional exchange.

[35] Securities Investor Protection Act of 1970. Pub. L. 91–598, 84 Stat. 1836, as amended (codified at 15 U.S.C. 78aaa *et seq.*).

[36] The following broker-dealers are excluded from SIPC membership: (1) Government securities broker-dealers registered under section 15C of the Exchange Act; (2) persons whose principal business in the determination of SIPC (and subject to Commission approval) is conducted outside the United States; and (3) persons whose business consists exclusively of (a) the distribution of shares of registered open-end investment companies or unit investment trusts, (b) the sale of variable annuities, (c) the business of insurance, or (d) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts. SIPA secs. 3(a)(2)(A) and 16(12) 15 U.S.C. 78ccc(a)(2)(A) and 78lll(12).

[37] *See generally*, SEC v. Donald Sheldon Group, Inc. et al., Admin. Pro. File No. 3–6626 (Dec. 2, 1988).

[38] *See, supra* note 33.

members and to require disclosure if the account is carried by a broker or a dealer that is not a SIPC member. This disclosure requirement would be consistent with the authority granted to the Commission concerning SIPC disclosure under the Government Securities Acts Amendments of 1993.[39]

**5. Disclosure for Certain Asset-Backed Securities**

The Commission is proposing to amend the yield disclosure requirements with respect to asset-backed securities. The Rule currently requires broker-dealers that effect transactions in debt securities, other than U.S. Savings Bonds or municipal securities, to disclose: (1) The yield to maturity, if the transaction is effected on the basis of dollar price; (2) if the transaction is effected on a yield basis, then the dollar price calculated from that yield; and (3) if effected on a basis other than dollar price or yield to maturity, and the yield to maturity will be less than the represented yield, then both the yield to maturity and represented yield.

When these amendments were adopted, the Commission noted the importance of yield data to an investor in transactions in debt securities.[40] The yield, or dollar price, at which a transaction is effected in the secondary market will be directly related to the anticipated maturity. Thus, features that cause a debt security to pay sooner or later than expected will alter the actual yield that an investor receives.

In recognition of this effect, the Commission excluded from the actual yield disclosure requirements securities that represent an interest in notes secured by liens upon real estate continuously subject to prepayment.[41] The Commission noted that fluctuations in interest rates may cause mortgage notes underlying participation certificates to prepay at rates faster or slower than anticipated. At the time the Commission adopted the yield amendments, the primary application of the exception was to transactions in securities issued or guaranteed by the Government National Mortgage Association, Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation.

Since 1983, when the yield disclosure provisions were added to the rule, the "structured financing"[42] market has been dramatically increased to include securities backed by mortgage notes, automobile loans, computer leases, consumer debt, and other receivables. Also, broker-dealers now offer a variety of derivative mortgage instruments and structured financing vehicles in which payment to investors is related directly to payments of principal and interest on underlying debt instruments. In many cases, these various asset-based securities subject the investor to the same prepayment risks that are present in mortgage participation certificates. To reduce prepayment exposure from asset backed securities for some investors, collateralized mortgage obligations ("CMOs") have been developed.

CMOs are collateralized by pools of residential mortgage loans. Like other asset-backed securities, the rate of prepayment on the underlying collateral of CMOs is correlated inversely with interest rate changes in the general economy. The actual maturities of CMOs are dependent on these prepayment speeds. CMOs are priced on the basis of the estimated "weighted average life" ("WAL") of individual CMO tranches. As interest rates decline, prepayments increase, with a corresponding shortening of WALs. Conversely, an increase in interest rates results in a lengthening of maturity. Estimated yields cannot be established without some prepayment assumption underlying the WAL; for this reason, disclosure of accurate prepayment assumptions, and an appreciation of their implications, is essential to making a sound investment decision.

CMOs are offered in several tranches of varying maturity and yield that are intended to appeal to a broad spectrum of investors. One or more tranches typically are structured as a planned amortization class ("PAC"). PAC bonds, whose maturities are shielded from both WAL extension and contraction risk, have the maximum protection available in CMOs. Unlike PAC bonds, target amortization class ("TAC") bonds only provide protection against rapid prepayments, *i.e.*, against a shortening of maturity. In CMO offerings there also are "support classes," or "companion classes," of the PAC or TAC bond classes, which bear a disproportionate share of prepayment risk.[43]

In view of the changes in the structured financing market described above, the Commission proposes to revise the yield disclosure requirements for asset backed securities. On the one hand, the Commission proposes to expand the range of debt securities where yield need not be disclosed to include any asset backed security subject to continuous prepayment.[44] Broker-dealers must disclose yield information with respect to debt instruments that are insulated from prepayment risk, or where sufficient certainty exists to permit an accurate forecast of the yield that investors will receive.[45]

On the other hand, the Commission proposes to treat CMOs differently from other debt instruments under the proposed amendments. A broker-dealer effecting transactions in CMOs would be required to disclose, with respect to the security, (1) estimated yield, (2) the weighted average life, and (3) the prepayment assumptions underlying the yield.

The Commission emphasizes that the proposed amendments only would apply to yield disclosure on a confirmation and would not affect the broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose material information, apart from that required by Rule 10b–10, regarding the composition of mortgage pools or other factors that will affect yield.

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[39] 15 U.S.C. 78O–5(a)(4).

[40] Securities Exchange Act Release No. 19687 (April 18, 1983), 49 FR 17583.

[41] For purposes of paragraphs (a)(3) and (a)(4), the term "debt security" is defined in Rule 10b–10(e)(4), 17 CFR 240.10b–10(e)(4), to include a fractional or participation interest in notes. The Commission also excepted securities with a maturity date that may be extended by the issuer.

[42] "Structured financing" is a financing technique whereby a sponsor, which has originated or has purchased certain financial collateral, such as accounts receivable or mortgage loans, transfers such assets to a trust, a limited purpose entity organized solely for purposes of the offering. That entity then issues debt obligations or equity securities with debt-like characteristics. The process also has been termed "securitization."

[43] The PAC bond's cash flow stability is achieved by giving its principal payments a higher priority than those of the CMO "companion" tranches. While PAC bonds generally yield about 50 to 75 basis points above comparable Treasury bonds, companion tranches can yield as much as 150 to 175 basis points above comparable Treasury bonds, an attractive yield for investors seeking alternatives to money market funds and certificates of deposit. As a by-product of PAC or TAC bonds, however, "companion" bonds are more volatile than PAC or TAC bonds. According to Fitch Investors Service, Inc., "companion" bonds generally demonstrate "moderate-to-high volatility, with a very small percentage having low volatility." "CMO Tranche Risk Revealed," Fitch Investors Service, Inc. 3 (April 6, 1992).

[44] This amendment would codify a no-action response issued by the staff in 1988 with respect to mortgage-backed securities, and apply it to asset-backed securities generally. *Letter regarding Merrill Lynch Capital Markets* (Oct. 19, 1988) (available on LEXIS).

[45] For example, the Commission notes that mortgage loans on multi-family housing may contain substantial prepayment penalties, so that a security collateralized by or representing an interest in such notes would be expected to provide a predictable payment stream to investors. Similarly, automobile receivables may provide a predictable payment stream because automobile owners are less likely to prepay their automobile loans. By their nature, certain securities, such as most mortgage-backed bonds, also provide certainty of cash flow.

In this connection, the Commission requests comments concerning the manner in which yields are represented to investors in mortgage-backed securities; the assumptions made by broker-dealers concerning prepayment speed for mortgage pools; and how interest rate risk and foreclosure risk are disclosed to investors in mortgage-backed securities.

The Commission requests comment on the effect of the amendments on customer understanding of the return on their investments. In addition, the Commission requests comment on the advisability of requiring separate disclosure relating to the prepayment assumptions underlying a yield quotation in a CMO and on the written confirmation for a transaction in a CMO.

**6. Preliminary Note to Rule 10b–10**

The Commission proposes to add a preliminary note to Rule 10b–10 to clarify the relationship between the Rule's disclosure requirements and additional disclosures that may be required to satisfy antifraud provisions of the federal securities laws. In several cases over the years, broker-dealer defendants have argued that because Rule 10b–10 did not require disclosure of specific information on a confirmation, it was not material for purposes of the general antifraud provisions of the Exchange Act.[46] Although courts have given short shrift to these arguments, the Commission wishes to reiterate that Rule 10b–10 is not a safe harbor from the general antifraud provisions of the federal securities laws.[47] A broker-dealer has a duty established by federal common law theories[48] independent of the requirements of Rule 10b–10 to disclose material facts to an investor at the time of the investor's investment decision.[49]

In amending Rule 10b–10, the Commission must balance the increased cost to broker-dealers, and ultimately to investors, of compliance against the benefits that added disclosures will provide investors.[50] In some instances, the Commission has declined to adopt proposed amendments to its confirmation requirements because they were considered too costly, or would have been too difficult to apply on a uniform basis.[51] Even when the Commission has not required broker-dealers to disclose specific information to investors pursuant to Rule 10b–10, this information nonetheless may be material to an investor.[52]

Accordingly, the Commission is proposing to add a brief preliminary note to the Rule, expressing the long-standing position that Rule 10b–10 was not intended to codify the universe of disclosure necessary in a transaction.

**7. Restructuring of the Rule**

A variety of non-substantive changes have been made to the rule to enhance its clarity. Headings have been added to each paragraph. Paragraph (a) has been reordered to combine elements dependent on the capacity of the broker or dealer. Paragraphs (b) and (c) have been combined into a single paragraph (c), and one element of former paragraph (b) has been moved to the definition of "investment company plan" in paragraph (e). A definition of riskless principal transaction has been added, and references to broker or dealer have been made gender neutral.

**8. Effects on Competition and Regulatory Flexibility Act Considerations**

Section 23(a)(2) of the Exchange Act[53] requires that the Commission, in adopting rules under the Act, consider the anti-competitive effects of such rules, if any, and balance any anti-competitive impact against the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission is preliminarily of the view that the proposed amendments to Rule 10b–10 will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission requests comment, however, on any competitive burdens that might result from adoption of the amendments or the new rule.

In addition, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), pursuant to the requirements of the Regulatory Flexibility Act,[54] regarding the proposed amendments to Rule 10b–10. The IRFA may be obtained from C. Dirk Peterson, in the Office of Chief Counsel, Division of Market Regulation, (202) 504–2418.

In addition, the Commission has consulted with the Department of the Treasury pursuant to Section 15(c)(2) of the Exchange Act concerning the SIPC disclosure requirements.

**List of Subjects in 17 CFR Part 240**

Reporting and recordkeeping requirements, securities.

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[46] *See, e.g.*, Shivangi v. Dean Witter Reynolds, Inc., 637 F. Supp. 1001 (S.D. Miss. 1986), *aff'd*, 825 F.2d 885 (5th Cir. 1987); Krome v. Merrill Lynch, Pierce, Fenner & Smith Inc., 637 F. Supp. 910, 915–916 (S.D.N.Y. 1986); and Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Fed. Sec. L. Rep. (CCH) ¶93,102 (E.D. Pa. 1986), *rev'd*, 835 F.2d 1031 (3d Cir. 1987).

[47] In the adopting release to Rule 10b–10, the Commission explained that:

The rule does not attempt to set forth all possible categories of material information to be disclosed by broker-dealers in connection with a particular transaction in securities. Rule 10b–10 only mandates the disclosure of information which can generally be expected to be material. Of course, in particular circumstances, additional information may be material and disclosure may be required.

Securities Exchange Release No. 13508, (May 5, 1977), 42 FR 25318, at 25320 n.28.

*See also* Securities Exchange Act Release No. 22397 (Sept. 11, 1985), 50 FR 37648, 37653 n.53 (indicating that disclosure of a "mark-up" for national market system securities under Rule 10b–10 would not control traditional determinations of, among other things, whether the mark-ups are excessive for purposes of the antifraud provisions of the federal securities laws).

[48] Two theories, the fiduciary and shingle theory, establish an obligation on the part of a broker-dealer to deal with customers fairly. In cases where a broker-dealer has established a customer relationship based upon trust and confidence, and the customer depends upon and follows the broker-dealer's advice, a fiduciary relationship is established between the broker-dealer and customer. As a fiduciary, the broker-dealer also is obligated to disclose all the material facts of a customer's transaction. *See* In re Arleen W. Hughes, 27 S.E.C. 627 (1948), *aff'd*, 174 F.2d 969 (D.C. Cir. 1949).

Closely related to the fiduciary theory is a duty to the customer established by the "shingle theory." According to the shingle theory, a broker-dealer impliedly represents at the outset of a securities transaction that it will deal with its customers fairly and in accordance with the standards of the industry. Duker & Duker, 6 S.E.C. 386, 388–89 (1939).

[49] The fact that a broker-dealer has met the requirements of Rule 10b–10 should begin the analysis, not end it. The confirmation is delivered after the contract is created. Thus, irrespective of the content of the confirmation, specific terms of the transaction that may affect the customer's investment decision should be disclosed at the time of a purchase or sale of a security. *See, e.g.*, Norris & Hirshberg v. S.E.C., 177 F.2d 228 (D.C. Cir. 1949) (affirming a Commission decision holding that the failure of a broker-dealer to disclose its true capacity at the time of a transaction, as principal rather than as agent, was, among other things, a violation of Section 10(b) of the Exchange Act, notwithstanding the fact that the broker-dealer had disclosed that it was acting as principal in confirmations sent to investors).

[50] For example, the Commission noted in the release proposing Rule 10b–10 that:

Since the costs of regulation designed to promote investor protection are in the final analysis paid for in large part by the investor, the Commission is endeavoring to adjust regulatory requirements to eliminate those for which compliance costs appear to be disproportionate to the practical benefits of investor protection thereby obtained.

Securities Exchange Act Release No. 12806 (Sept. 16, 1976), 41 FR 41432.

[51] *See* Securities Exchange Act Release No. 18987 (Aug. 20, 1982), 47 FR 37919.

[52] The Commission reiterated this point in a release concerning disclosure of mark-ups in zero-coupon instruments. Securities Exchange Act Release No. 24368 (Apr. 21, 1987), 52 FR 15575. *See also Amicus Curiae* Brief of the SEC and Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 835 F.2d 1031 (3d Cir. 1987).

[53] 15 U.S.C. 78w(a)(2).

[54] 5 U.S.C. 603.

**Text of Proposed Amendments**

For the reasons set forth in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78o–5, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2.240.1b Section 240.10b–10 is amended by adding a preliminary note prior to paragraph (a), revising paragraphs (a) and (b), removing paragraph (c), redesignating paragraphs (d) through (f) as paragraphs (c) through (e), adding a heading to newly designated paragraph (d), revising the introductory text of paragraph (d) and the introductory text of paragraph (d)(6), and adding paragraphs (d)(9) and (d)(10) to read as follows:

**§ 240.10b–10 Confirmation of transactions.**

*Preliminary Note.* This section requires broker-dealers to disclose specified information in writing to customers at or before the completion of a transaction. The requirements under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision.

(a) *Disclosure requirement.* It shall be unlawful for any broker or dealer to effect for or with the account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security (other than U.S. Savings Bonds or municipal securities) unless such broker or dealer, at or before completion of such transaction, gives or sends to such customer written notification disclosing:

(1) The date and time of the transaction (or the fact that the time of the transaction will be furnished upon written request of such customer) and the identity, price, and number of shares or units (or principal amount) of such security purchased or sold by such customer; and

(2) Whether the broker or dealer is acting as agent for such customer, as agent for some other person, as agent for both such customer and some other person, or as principal for its own account; and if the broker or dealer is acting as principal, whether it is a market maker in the security (other than by reason of acting as a block positioner); and:

(i) If the broker or dealer is acting as agent for such customer, for some other person, or for both such customer and some other person:

(A) The name of the person from whom the security was purchased, or to whom it was sold, for such customer or the fact that such information will be furnished upon written request of such customer; and

(B) The amount of any remuneration received or to be received by the broker from such customer in connection with the transaction unless remuneration paid by such customer is determined, pursuant to a written agreement with such customer, otherwise than on a transaction basis; and

(C) The source and amount of any other remuneration received or to be received by the broker in connection with the transaction: *Provided, however,* That if, in the case of a purchase, the broker was not participating in a distribution, or in the case of a sale, was not participating in a tender offer, the written notification may state whether any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer; or

(ii) If the broker or dealer is acting as principal for its own account:

(A) In the case of a riskless principal transaction, except where the dealer is a market maker in an equity security, the difference between the price to the customer and the dealer's contemporaneous purchase (for customer purchases) or sale price (for customer sales); or

(B) In the case of any other transaction in a reported security, or an equity security that is quoted on Nasdaq or traded on a national securities exchange, and that is subject to last sale reporting, the reported trade price, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer; and

(3) Whether any odd-lot differential or equivalent fee has been paid by such customer in connection with the execution of an order for an odd-lot number of shares or units (or principal amount) of a security and that the amount of any such differential or fee will be furnished upon oral or written request: *Provided, however,* That such disclosure need not be made if the differential or fee is included in the remuneration disclosure, or exempted from disclosure, pursuant to paragraph (a)(2)(ii)(B) of this section; and

(4) In the case of any transaction in a debt security subject to redemption before maturity, a statement to the effect that such debt security may be redeemed in whole or in part before maturity, that such a redemption could affect the yield represented and that additional information is available upon request; and

(5) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price; *provided, however,* that this paragraph (a)(5)(ii) shall not apply to a transaction in a debt security that either:

(A) Has a maturity date that may be extended by the issuer thereof; or

(B)(*1*) That represents an interest in, or is secured by, notes or other receivables continuously subject to prepayment, where payments to security holders are reasonably related to payments on such notes or receivables; and

(*2*) The written statement prominently indicates that the actual yield received by the customer may vary according to the rate at which the underlying notes or receivables are prepaid; and

(6) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (*e.g.*, current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield: *Provided,* however, that this paragraph (a)(6)(iii) shall not apply to a transaction in a debt security which either:

(A) Has a maturity date that may be extended by the issuer thereof, with a variable interest rate payable thereon; or

(B)(*1*) That represents an interest in, or is secured by notes or other receivables continuously subject to prepayment, where payments to security holders are reasonably related to payments on such notes or receivables; and

(*2*) The written statement prominently indicates that the actual yield received by the customer may vary according to the rate at which underlying notes or receivables are prepaid; and

(7) In the case of a debt security that is a collateralized mortgage obligation, the yield to maturity calculated on the basis of the "weighted average life" of the security; the weighted average life; and the prepayment assumption underlying this yield; and

(8) In the case of a transaction in a debt security, other than a security defined under section 3(a)(42) (A) and (B) of this Act (15 U.S.C. 78(c)(a)(42) (A) and (B)), that the security is unrated by a nationally recognized statistical rating organization, if such is the case; and

(9) That the broker or dealer is not a member of the Securities Investor Protection Corporation, or that the broker or dealer clearing or carrying the customer account is not a member of the Securities Investor Protection Corporation, if such is the case.

(b) *Alternative periodic reporting.* A broker or dealer may effect transactions for or with the account of a customer without giving or sending to such customer the written notification described in paragraph (a) of this section if:

(1) Such transactions are effected pursuant to a periodic plan or an investment company plan, or are effected in shares of any no-load open-end investment company registered under the Investment Company Act of 1940 that attempts to maintain a constant net asset value per share and that holds itself out to be a "money market" fund or has an investment policy calling for investment of at least 80% of its assets in debt securities maturing in 13 months or less; and

(2) Such broker or dealer gives or sends to such customer within five business days after the end of each *quarterly* period, for transactions involving investment company and periodic plans, and after the end of each *monthly* period, for other transactions described in paragraph (c)(1) of this section, a written statement disclosing each purchase or redemption, effected for or with, and each dividend or distribution credited to or reinvested for, the account of such customer during the month; the date of each such transaction; the identity, number, and price of any securities purchased or redeemed by such customer in each such transaction; the total number of shares of such securities in such customer's account; any remuneration received or to be received by the broker or dealer in connection therewith; and that any other information required by paragraph (a) of this section will be furnished upon written request: *Provided*, however, that the written statement may be delivered to some other person designated by the customer for distribution to the customer; and

(3) Such customer is provided with prior notification in writing disclosing the intention to send the written information referred to in paragraph (c)(1) of this section in lieu of an immediate confirmation.

* * * * *

(d) *Definitions.* For the purposes of this section:

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(6) *Investment company plan* means any plan under which securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 are purchased by a customer (the payments being made directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company), or sold by a customer pursuant to:

* * * * *

(9) *Collateralized mortgage obligation* means any debt security with two or more classes that:

(i) Requires payment to be made to holders of each class in accordance with a schedule specifying the relative priorities of payment to holders of all classes of the security;

(ii) Is secured by one or more mortgage notes or certificates of interest or participations in such notes; and (iii) By its terms provides for payments in relation to payments, or reasonable projections of payments, on such mortgage notes or certificates of interest or participations in such notes.

(10) *Riskless principal transaction* means a transaction in which a dealer, after having received a buy order from a customer, purchases the security as principal from another person to offset a contemporaneous sale to such customer, or after having received a sell order from a customer, sells the security as principal to another person to offset a contemporaneous purchase from such customer.

* * * * *

3. By adding § 240.15c2–13 to read as follows:

**§ 240.15c2–13 Confirmation of municipal securities transaction.**

(a) It shall be unlawful for any broker, dealer, or municipal securities dealer, acting as principal for its own account, to effect with the account of a customer any transaction in any municipal security unless the broker, dealer, or municipal securities dealer, at or before completion of the transaction, gives or sends to the customer written notification disclosing:

(1) In the case of a riskless principal transaction, the difference between the price to the customer and the dealer's contemporaneous purchase (for customer purchases) or sale price (for customer sales); and

(2) Whether the municipal security is unrated by a nationally recognized statistical rating organization.

(b) For purposes of this section:

(1) *Customer* shall not include a broker, dealer, or municipal securities dealer.

(2) *Completion of the transaction* shall have the meaning provided in § 240.15c1–1 of this section.

(3) *Riskless principal transaction* means a transaction in which a dealer, after having received a buy order from a customer, purchases the security as principal from another person to offset a contemporaneous sale to such customer, or after having received a sell order from a customer, sells the security as principal to another person to offset a contemporaneous purchase from such customer.

By the Commission.

Dated: March 9, 1994.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 94–5928 Filed 3–16–94; 8:45 am]

BILLING CODE 8010–01–M

federal register

Thursday
March 17, 1994

# Part VI

# Department of Commerce

## National Institute of Standards and Technology

## Manufacturing Extension Partnership Program; Notice

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

[Docket No. 940247–4047]

### Manufacturing Extension Partnership Program

**AGENCY:** National Institute of Standards and Technology (NIST), Technology Administration, Commerce.

**ACTION:** Notice of availability of funds.

**SUMMARY:** The National Institute of Standards and Technology invites proposals from qualified organizations for funding for projects that accomplish any one of the following objectives:

*Program Planning:* To support the creation of a program plan for a state-wide, coordinated technology extension system to enhance the competitiveness of small and medium-sized manufacturers through the application of technology.

*Program Implementation:* To support the initial implementation of a comprehensive state-wide industrial extension program or the pilot testing of new program and service concepts to help small and medium-sized manufacturers improve productivity and competitiveness.

*Regional Linkages:* To support inter-state or multi-state efforts to expand the scope and enhance the effectiveness of technical assistance services available regionally to small and medium-sized manufacturers.

Program Planning projects are open to all states, regardless of state size, industrial density/sparseness, or number of existing industrial assistance programs.

For Program Implementation and Regional Linkages projects, NIST plans to give priority consideration to projects having the best potential to benefit areas with relatively sparse distribution of industry, or low industry density areas that do not lend themselves to large extension centers as a method of service delivery.

**DATES:** Proposals will be accepted until 4 p.m. EDT on April 18, 1994. It is the responsibility of applicants to ensure that their proposals are received at the Manufacturing Extension Partnership office by the time and date stated. Proposals received after the closing time and date will be returned.

**ADDRESSES:** Applicants must submit one signed original plus two copies of the proposal along with Standard Form 424 and Form CD–511 to: Manufacturing Extension Partnership, Polymers Building (Bldg. 224), room B–115, National Institute of Standards and Technology, Gaithersburg, Maryland, 20899–0001.

**FOR FURTHER INFORMATION CONTACT:** For clarification of the content of this notice telephone: Roger Kilmer at (301) 975–3423. Copies of SF–424 (Rev 4–88) Form CD–511, and other required forms may be obtained from the NIST Grants Office (301) 975–6394.

**SUPPLEMENTARY INFORMATION:**

#### Catalog of Federal Domestic Assistance

The catalog number for the award of "State Technology Extension Program" funds in the Catalog of Federal Domestic Assistance is 11.613.

#### Program Description

In accordance with the provisions of the National Institute of Standards and Technology Act (15 U.S.C. 2781), as amended, NIST will provide assistance in fiscal year 1994 to help States develop manufacturing assistance programs aimed at small and medium-sized manufacturers and help bring those State programs to a level of performance where they can provide the full range of manufacturing extension services required by their manufacturers. Under the NIST Manufacturing Extension Partnership (MEP), which includes the State Technology Extension Program (STEP), NIST will make merit-based awards to States to help improve their planning, coordination, and implementation of their technology extension activities. This funding will also be available to multi-state partnerships which seek to expand the scope of technology assistance related services regionally available to small- and medium-sized manufacturers. MEP assumes a broad definition of manufacturing, and recognizes a wide range of technology and concepts, including durable goods production; chemical, biotechnology, and other materials processing; electronic component and system fabrication; and engineering services associated with manufacturing, as lying within the definition of manufacturing.

#### Funding Availability

Approximately, $2,500,000 will be available to support cooperative agreements on a matching funds basis under this program. Funding size will vary according to the project category and scope of work. For example, Program Planning projects have typically averaged less than $100,000 in past years. Program Planning projects that include pilot testing of the proposed extension plan or planning for multiple intrastate regions will be eligible for NIST funding up to $150,000. For Program Implementation projects and Regional Linkage projects, awards will also vary, but NIST funds may not exceed $250,000 per project. States will be able to submit proposals for each of the three project categories.

#### Award Period

The cooperative agreements entered into under this program will be available for one year. If an application is selected for funding, DOC has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of DOC.

#### Indirect Costs

The total dollar amount of the indirect costs proposed in an application under this program must not exceed the indirect cost rate negotiated and approved by a cognizant Federal agency prior to the proposed effective date of the award or 100 percent of the total proposed direct costs dollar amount in the application, whichever is less.

#### Proposal Format

The Basic Proposal must not exceed 25 typewritten pages in length. The applicant may submit a separately bound document of appendices, containing letters of support or other information in support of the Basic Proposal. Appendices and other supplemental information must not exceed 20 pages. Excess pages in either the Basic Proposal (over the 25 page limit) or the supplemental appendices (over the 20 page limit) will not be considered in the evaluation.

*Content of Basic Proposal*

The Basic Proposal must, at a minimum, include the following:

A. An executive summary of not more than five (5) pages, summarizing the planned project consistent with the Evaluation Criteria stated in this notice.

B. A description of the planned project sufficient to permit evaluation of the proposal in accordance with the proposal Evaluation Criteria stated in this notice.

C. A budget for the project which identifies all sources of funds.

D. A description of the qualifications of key personnel who will be assigned to work on the proposed project.

E. A statement of work that discusses the specific tasks to be carried out, including a schedule of measurable events and milestones.

F. For Program Planning and Program Implementation projects, letters from

the Governor's office (not considered part of the page count) indicating that the applicant is the lead organization for conducting the proposed activities. For Program Planning, the letter will also acknowledge that there is only one proposal from that state for Program Planning.

G. A Standard Form 424 (Rev 4–88) prescribed by OMB circular A–102, and Form CD–511, Certification Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying. SF–424 (Rev 4–88) and Form CD–511 will not be considered part of the page count of the Basic Proposal.

**Invitation for Proposals**

Qualified organizations are invited to submit proposals in one or more of the projects stated in this notice. Each proposal should address only one project.

**Program Planning Projects**

*Project objective*

The purpose of Program Planning projects will be to create plans for state-wide, coordinated, technology extension programs in order to enhance the competitiveness of small- and medium-sized manufacturers. These projects will plan for the development and coordination of existing and/or newly formed services, such as state industrial assistance programs; workforce training; university-based industrial assistance programs; and management assistance programs; into a unified state-wide program. Plans will include providing access to a wide range of technology and services, such as technology deployment, workers skills development, technology transfer and commercialization, or export and market development.

Applicants may conduct planning activities on multiple intrastate region basis, when regions are defined by the state. Regions should be clearly defined by the proposing organizations and it must be clear why the program is regionally oriented, versus state-wide, and how the multiple intrastate regions will be integrated into a state-wide plan or interact such that state-wide coverage is achieved.

Applicants may include pilot testing activities as part of their planning process. If pilot testing of the proposed extension plan is included in the project, it should include methods of evaluating the pilot test's success in implementing the proposed extension plan. Any proposed pilot activity must be consistent with the program plan developed for the state.

*Program Planning Projects Evaluation Criteria*

Proposals from applicants will be evaluated and rated on the basis of the following criteria by an impartial competitive review panel. Each proposal should address all five evaluation criteria and evaluation criteria 1–3 will be weighted more heavily than criteria 4–5. Selection will be based upon total evaluation score as well as geographic distribution.

1. *Target Population (25 points):* Potential applicants should specify a methodology for identifying a population of beneficiary companies (the target population) and their technology assistance-related needs. Factors that will be considered include:

(a) Methodology for defining the size and demographic characteristics of the target population to be served by the program plan.

(b) Methodology for determining the target population's assistance needs, eg. technology, training, information, quality improvement, management, etc.

(c) Methodology to ensure that the plan is appropriate for addressing identified industry needs.

2. *Resource Identification and Assessment (20 points):* Applicants should describe the methodology for collecting information about the number, size, technical sophistication, type, and relevance of industrial assistance activities that will be part of the coordination effort. Factors that will be considered include:

(a) Methodology for identifying relevant assistance programs and other sources of expertise outside applicant's organization.

(b) Methodology for assessing relevance and effectiveness of resources in addressing identified industry needs.

3. *Coordination with Existing Resources (25 points):* Applicants should set forth a plan for interacting or coordinating with appropriate existing and/or newly-formed state and local technology-industrial assistance services, potential industry partners, and appropriate federal services, to develop a coordinated state-wide delivery system. Factors that will be considered include:

(a) Methodology and adequacy of plans for forming effective linkages and partnerships necessary to plan for and provide a coordinated range of services to meet the needs of the target population.

(b) Safeguards to ensure that planned activity does not duplicate existing services or resources.

4. *Management (15 points):* Applicants should specify plans for proper organization, staffing, and management of the planning process. Factors that will be considered include:

(a) Appropriateness and authority of the governing or managing organization to conduct a state-wide (or regional) planning process.

(b) Qualifications of the project team and its leadership to conduct a state-wide (or regional) planning process.

(c) Appropriateness of the organizational approach for carrying out the planning activity.

(d) Evidence of significant involvement and support by the state and by private industry.

5. *Financial Plan (15 points):* Applicants should show the relevance and cost effectiveness of the financial plan for meeting the objectives of the project; the firmness and level of the applicant's total financial support for the project; and the plan to maintain the program after the cooperative agreement has expired. Factors that will be considered include:

(a) Cost effectiveness of the budget.

(b) Strength of commitment of proposer's cost share.

(c) Effectiveness of management plans for control of budget.

(d) Appropriateness of matching contribution.

(e) Plan for maintaining the program after the cooperative agreement has expired.

*Eligibility Criteria*

Eligible applicants for these projects are state technology extension programs operated by state governments, or on behalf of state governments by private or public non-profit organizations. All states will be eligible, regardless of state size, industrial density/sparseness, or number of existing industrial assistance programs. States that have received previous planning grants remain eligible for additional Program Planning projects. Applicants will be able to propose conducting the planning activities themselves or arranging for some or all of the planning activities to be carried out by a second party. One proposal for Program Planning will be accepted per state.

*Matching Requirements*

A matching contribution from each applicant is required. NIST may provide financial support up to 50% of the total budget for the project, however, the federal share may not exceed $150,000. The applicant's share of the budget may include dollar contributions from state, county, industrial or other non-federal sources and in-kind contributions necessary and reasonable for proper accomplishment of project objectives.

*Required Letters*

A letter will be required from the Governor indicating that the eligible applicant is the lead organization in that state for Program Planning activities, and acknowledging that there is only one proposal from that state for a Program Planning project. Where more than one such otherwise qualified Program Planning proposal per state is submitted, all such proposals from that state may be disqualified.

**Program Implementation Projects**

*Project Objective*

The purpose of Program Implementation projects is to support the implementation of comprehensive, state-wide industrial extension programs and/or pilot testing of new program and service concepts, such as pilot outreach centers and other extention activities, to help small and medium-sized manufacturers improve productivity and competitiveness.

For projects that support the implementation of a comprehensive state-wide industrial extension system, activities must build upon existing services and be consistent with comprehensive state plans, if such plans exist. Extension programs should provide access to a range of services, including but not limited to: technical extension, training, manager assistance, and quality improvement.

Pilot testing of new services and activities will be permitted on a limited scale where there is an intent to replicate these services on a larger scale or to move toward full-scale implementation. Accordingly, pilot testingmust include evaluation, analysis and documentation, and may include some planning activities as necessary.

NIST plans to give priority consideration to projects having the best potential to benefit areas with relatively sparse distribution of industry, or low density industry areas that do not lend themselves to large extension centers as a method of service delivery.

*Program Implementation Projects Evaluation Criteria*

Proposals from applicants will be evaluated and rated on the basis of the following criteria by an impartial competitive review panel. Each proposal should address all six evaluation criteria and evaluation criteria 1–4 will be weighted more heavily than criteria 5–6. Selection will be based upon total evaluation score as well as geographic distribution.

1. *Target Population (20 points):* Potential applicants will be required to identify a population of beneficiary companies (the target population) and their technology-related assistance needs in the proposed service area. Factors that will be considered include:

(a) A clear definition of the target population, its size and demographic characteristics.

(b) Demonstrated understanding of the target population's assistance needs, e.g. technology, training, information, quality improvement, management, etc.

(c) Appropriateness of the size of the target population and the anticipated impact for the proposed expenditure.

2. *Delivery Mechanisms (20 points):* Applicants will need to specify the mechanism for delivery of services to the population of beneficiary companies (the target population). Factors that will be considered include:

(a) Appropriateness and effectiveness of proposed delivery mechanism for meeting the identified needs of the target population.

(b) Demonstration of capacity to form effective linkages and partnerships with other appropriate service providers.

(c) Technical quality of the proposed approach, including knowledge and use of best industrial modernization practices.

3. *Coordination with Existing Resources (20 points):* Applicants will need to describe how they will coordinate with existing or newly formed state or local technology/industrial assistance services, and federal services, to allow for increased economies of scale and to avoid duplication of services in providing assistance to small and medium-size manufacturers. For a comprehensive, state-wide industrial extension program, the applicant must show the degree to which activities integrate with and enhance existing or newly formed state, local, and appropriate federal technology assistance and industrial modernization activities to present a unified program of assistance. Factors that will be considered include:

(a) Demonstrated understanding of existing organizations and resources relevant for providing technology assistance related services to the target population.

(b) Adequate linkages and partnerships with existing organizations and clear definition of those organizations' roles in the proposed activities.

(c) Proposed activity does not duplicate existing services or resources.

(d) Consistency with comprehensive state plans if such plans exist.

4. Program Evaluation (20 points): The applicant should specify plans for evaluation of the effectiveness of the proposed program and for ensuring continuous improvement of program activities. Factors that will be considered include:

(a) Thoroughness of evaluation plans, including internal evaluation for management control, external evaluation for accessing outcomes of the activity, and "customer satisfaction" measures of performance.

(b) In the case of pilot projects, the proposer's plan must include documentation, analysis of the results, and must show how the results can be used in program development.

5. *Financial Plan (10 points):* Applicants should show the relevance and cost effectiveness of the financial plan for meeting the objectives of the project; the firmness and level of the applicant's total financial support for the project; and a plan to maintain the program after the cooperative agreement has expired. Factors that will be considered include:

(a) Reasonableness of the budget, both in income and expenses.

(b) Strength of commitment of the proposer's cost share.

(c) Effectiveness of management plans for control of budget.

(d) Appropriateness of matching contributions.

(e) Plan for maintaining the program after the cooperative agreement has expired.

6. *Management (10 points):* Applicants should specify plans for proper organization, staffing, and management of the implementation process. Factors that will be considered include:

(a) Appropriateness and authority of the governing or managing organization to conduct the proposed activities.

(b) Qualifications of the project team and its leadership to conduct the proposed activity.

(c) Soundness of staffing plans, including recruitment, selection, training, and continuing professional development.

(d) Appropriateness of the organizational approach for carrying out the proposed activity.

(e) Evidence of significant involvement and support by private industry.

*Eligibility Criteria*

Eligible applicants for these projects are state technology extension programs operated by state governments, or on behalf of state governments by private or public non-profit organizations. All states will be eligible, regardless of state size, industrial density/sparseness, or number of existing industrial assistance programs. States that have received previous program development or

implementation grants remain eligible for additional Program Implementation projects. Applicants will be able to propose providing services themselves or arranging for some or all of the proposed services to be provided by a second party. More than one proposal for Program Implementation may be accepted from each state.

*Matching Requirements*

A matching contribution for each applicant will be required. NIST may provide financial support up to 50% of the total budget for the project; however, the federal share may not exceed $250,000. One half of the applicant's required match (i.e. 25% of the total) must be cash. Cash may include dollar contributions from state, county, industrial or other non-federal sources. The applicant's share of the budget may include in-kind contributions necessary and reasonable for proper accomplishment of project objectives.

*Required Letters*

All proposals for Program Implementation projects must contain a letter from the Governor indicating that the applicant is the lead organization in that state for conducting the proposed activities.

Where linkages to other organizations are proposed, applicants are advised to include a letter of support and commitment from the linking organization.

**Regional Linkages Projects**

*Project Objective*

The purpose of Regional Linkage projects is to support inter-state or multi-state partnerships that will expand the scope and enhance the effectiveness of technical assistance services regionally available to small and medium-sized manufacturers. Projects may be assistance service-led, or industry-led partnerships to provide assistance services that cross institutional and political boundaries. Assistance service-led partnerships, for example, can include shared assistance services that cross state boundaries, or electronic networking. Industry-led partnerships can include linkage activities between original equipment manufacturers (OEMs) and suppliers, creating a multi-state network of suppliers, program planning for multi-state assistance delivery, or other activities that improve the interactions between manufacturers.

*Regional Projects Evaluation Criteria*

Proposals from applicants will be evaluated and rated on the basis of the following criteria by an impartial competitive review panel. Each proposal should address all six evaluation criteria and evaluation criteria 1–4 will be weighted more heavily than criteria 5–6. Selection will be based upon total evaluation score as well as geographic distribution.

1. *Target Population (20 points):* Potential applicants will be required to identify a population of beneficiary companies (the target population) and their technology-related assistance needs in the proposed service area. Factors that will be considered include:

(a) A clear definition of the target population, its size and demographic characteristics.

(b) Demonstrated understanding of the target population's assistance needs, eg. technology, training, information, quality improvement, management, etc.

(c) Appropriateness of the size of the target population and the anticipated impact for the proposed expenditure.

2. *Delivery Mechanisms (20 points):* Applicants will need to specify the mechanism for delivery of services to the population of beneficiary companies (the target population). Factors that will be considered include:

(a) Appropriateness and effectiveness of proposed delivery mechanism for meeting the identified needs of the target population.

(b) Demonstration of capacity to form effective linkages and partnerships with other appropriate service providers.

(c) Technical quality of the proposed approach, including knowledge and use of best industrial modernization practices.

3. *Coordination with Existing Resources (20 points):* Applicants will need to describe how they will coordinate with existing or newly-formed technology/industrial assistance services and resources that will allow for increased economies of scale and complementary capabilities, and will avoid duplication of efforts in providing assistance to small and medium-sized manufacturers. It will be important to show how the proposed approach can reach across political or institutional boundaries to provide access to services. Factors that will be considered include:

(a) Demonstrated understanding of existing organizations and resources relevant for providing technology assistance related services to the target population.

(b) Strength of plans to establish and maintain linkages and partnerships with existing organizations (particularly across state boundaries), and a clear definition of those organizations' roles in the proposed activities.

(c) Proposed activity does not duplicate existing services or resources.

(d) Consistency with comprehensive state plans if such plans exist.

4. *Program Evaluation (20 points):* The applicant should specify plans for evaluation of the effectiveness of the proposed program and for ensuring continuous improvement of program activities. Factors that will be considered include:

(a) Thoroughness of evaluation plans, including internal evaluation for management control, external evaluation for assessing outcomes of the activity, and "customer satisfaction" measures of performance.

(b) Plans for the documentation, analysis of the results, and how the results can be used in program development.

5. *Financial Plan (10 points):* Applicants should show the relevance and cost effectiveness of the financial plan for meeting the objectives of the project; the firmness and level of the applicant's total financial support for the project; and the plan to maintain the program after the cooperative agreement has expired. Factors that will be considered include:

(a) Reasonableness of the budget, both in income and expenses.

(b) Strength of commitment of the proposer's cost share.

(c) Effectiveness of management plans for control of the budget.

(d) Appropriateness of matching contributions.

(e) Plan for maintaining the program after the cooperative agreement has expired .

6. *Management (10 points):* Applicants should specify plans for proper organization, staffing, and management of the implementation process. Factors that will be considered include:

(a) Appropriateness and authority of the governing or managing organization to conduct the proposed interstate or multi-state activities.

(b) Qualifications of the project team and its leadership to conduct the proposed activity.

(c) Soundness of staffing plans, including recruitment, selection, training, and continuing professional development.

(d) Appropriateness of the organizational approach for carrying out the proposed activity.

(e) Evidence of significant involvement and support by private industry.

*Eligibility Criteria*

Eligible applicants for these projects will be state and local governments, representing either themselves or a consortium of states, and appropriate

private or public non-profit organizations, operating on behalf of a consortium of states or as a representative of states. Applicants will be able to propose providing services themselves or arranging for some or all of the proposed services to be provided by a second party. At least one state represented in the partnership or consortium must be characterized by relatively sparse distribution of industry or as having lower industrial densities.

*Matching Requirements*

A matching contribution from each applicant will be required. NIST may provide financial support up to 50% of the total budget for the project, however, the federal share may not exceed $250,000. The applicant's share of the budget may include dollar contributions from state, county, industrial or other non-federal sources and in-kind contributions necessary and reasonable for proper accomplishment of project objectives.

**Proposal Section Process**

The proposal evaluation and selection process with consist of three principal phases: Proposal qualification; Proposal review and selection of finalists; and Award determination.

*a. Proposal Qualification*

All proposals will be reviewed by NIST to assure compliance with the proposal content and other basic provisions of this notice. Proposals which satisfy these requirements will be designated qualified proposals; all others will be disqualified at this phase of the evaluation and selection process.

*b. Proposal Review and Selection of Finalists*

NIST will appoint an evaluation panel to review and evaluate all qualified proposals in accordance with the evaluation criteria and values set forth in this notice. From the qualified proposals a group of finalists will be selected based on this review.

*c. Award Determination*

The Director of NIST, or her designee, shall select awardees based on the rank order of total evaluation scores, geographic distribution, and the availability of funds. Upon the final award decision, a notification will be made to each of the proposing organizations.

**Additional Requirements**

*Federal Policies and Procedures*—Recipients and subrecipients are subject to all Federal laws and Federal and DOC policies, regulations, and procedures applicable to Federal financial assistance awards.

*Past Performance*—Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

*Preaward Activities*—If applicants incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any written or verbal assurance that may have been received, there is no obligation on the part of DOC to cover preaward costs.

*Delinquent Federal Debts*—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either:

1. The delinquent account is paid in full;
2. A negotiated repayment schedule is established and at least one payment is received; or
3. Other arrangements satisfactory to DOC are made.

*Name Check Review*—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's management honesty or financial integrity.

*Primary Applicant Certification*—All primary applicants must submit a completed Form CD–511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying," and the following explanations are hereby provided.

*1. Nonprocurement Debarment and Suspension.* Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies;

*2. Drug-Free Workplace.* Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies;

*3. Anti-Lobbying* Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000, and loans and loan guarantees for more than $150,000, or the single family maximum mortgage limit for affected programs, whichever is greater; and

*4. Anti-Lobbying Disclosures.* Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, appendix B.

*Lower Tier Certifications.* Recipients shall require applicants/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form SF–LLL, "Disclosure of Lobbying Activities." Form CD–512 is intended for the use of recipients and should be transmitted to DOC. SF–LLL submitted by an tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

*False Statements.* A false statement on an application is grounds for denial or termination of funds and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

*Requirement to Buy American-Made Equipment or Products.* Applicants are hereby notified that any equipment or products authorized to be purchased with funding provided under this program must be American-made to the maximum extent feasible in accordance with Public Law 103–121, section 606. (a) and (b). Adequate justifications will be required for any proposed purchases of equipment or products that are not American-made.

*Intergovernmental Review.* Applications under this program are subject to the requirements of Executive Order 12372, "Intergovernmental Review of Federal Programs."

*Classification:* The Manufacturing Extension Partnership is being carried out under the authority of the Omnibus Trade and Competitiveness Act of 1988, as amended 15 U.S.C. 2781. This notice relating to public property, loans, grants benefits, or contracts is exempt from all requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553(a)(2)) including notice and opportunity for comment. Therefore, a Regulatory Flexibility Analysis is not required and was not prepared for this notice for purposes of the Regulatory

Flexibility Act (5 U.S.C. 603 and 604). The program is not a major Federal action requiring an environmental assessment under the National Environmental Policy Act. This notice does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612. This notice contains collection of information requirements subject to the Paperwork Reduction Act which have been approved by the Office of Management and Budget (OMB Control Number 0693–0010). This document was not previously reviewed by OMB under Executive Order 12866.

Dated: March 10, 1994.

**Samuel Kramer,**

*Associate Director.*

[FR Doc. 94–6217 Filed 3–16–94; 8:45 am]

BILLING CODE 3510–13–M

federal register

Thursday
March 17, 1994

# Part VII

# Department of the Interior

## Fish and Wildlife Service

50 CFR Part 15

**Importation of Exotic Wild Birds to the United States; Proposed Rule Implementing the Wild Bird Conservation Act of 1992**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 15**

**RIN 1018–AC15**

## Importation of Exotic Wild Birds to the United States; Proposed Rule Implementing the Wild Bird Conservation Act of 1992

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** On October 23, 1992, the Wild Bird Conservation Act of 1992 (WBCA) was signed into law, the purposes of which include promoting the conservation of exotic birds by: ensuring that all imports into the United States of species of exotic birds are biologically sustainable and not detrimental to the species; ensuring that imported birds are not subject to inhumane treatment during capture and transport; and assisting wild bird conservation and management programs in countries of origin. This proposed rule would implement procedures for approval of foreign captive-breeding facilities and establishment of an approved list of species listed in the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora that can be imported.

**DATES:** The Fish and Wildlife Service (Service) will consider comments and information received by April 16,1994 in formulating a final rule, except for subpart D, § 15.32, for which the Service will consider comments and information received by June 15, 1994 in formulating a final rule.

**ADDRESSES:** Comments and information should be sent to: Director, U.S. Fish and Wildlife Service, 1849 C Street NW., 420 ARLSQ, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Susan S. Lieberman, Office of Management Authority, at the above address, telephone (703) 358–2093.

**SUPPLEMENTARY INFORMATION:** This rule proposes regulations implementing aspects of the WBCA, which was signed into law on October 23, 1992. This is the second of two notices of proposed rulemaking under the WBCA; the first was published in the **Federal Register** on August 12, 1993 (58 FR 42926). The first final rulemaking under the WBCA was published in the **Federal Register** on November 16, 1993 (58 FR 60524). The WBCA limits or prohibits imports of exotic bird species to ensure that their wild populations are not harmed by trade. It also encourages wild bird conservation programs in countries of origin by both ensuring that all trade in such species involving the United States is biologically sustainable and is not detrimental to the species, and by creating an Exotic Bird Conservation Fund to provide conservation assistance in countries of origin. The final rule of November 16, 1993, summarized the effects of the WBCA and proposed procedures for obtaining import permits authorized by exemptions in the WBCA.

An immediate moratorium, effective October 23, 1992, was established on the importation of ten species of wild birds of particular concern that are listed in appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, or Convention), two of which were moved to appendix I at the March 1992 CITES meeting. The prohibition on importation of those species was announced in the **Federal Register** of December 4, 1992 (57 FR 57510).

During the one-year delay period from October 23, 1992, to October 22, 1993, there was an import quota on CITES-listed bird species. That quota was announced in the **Federal Register** of December 4, 1992 (57 FR 57510). A notice published on March 30, 1993 (58 FR 16644), solicited public comments and announced a public meeting, held April 15–16, 1993, to receive input from the public in the development of regulations to implement some of the provisions of the WBCA. Useful input was received from a broad cross-section of interested members of the public who participated in the meeting and submitted comments in writing; that input has been utilized in developing this proposed rule. A notice published on April 16, 1993 (58 FR 19840) announced species for which the quota had been met and no further individual birds could be imported.

With the publication of the final rule of November 16, 1993, imports of all CITES-listed birds (as defined in the final rule) are prohibited, except for species included in an approved list, or for which an import permit has been issued. The approved list, which will include species (by country) and/or specific captive-breeding facilities, is proposed herein. The Service also has the emergency authority to suspend imports of any CITES-listed bird species at any time based on a series of criteria.

This notice of proposed rulemaking proposes regulations called for in the WBCA that will accomplish the following: (1) For wild-caught CITES-listed birds to be on an approved list, the Service must determine that: CITES is being effectively implemented for the species for each country of origin from which imports will be allowed; CITES-recommended measures are implemented; there is a scientifically based management plan for the species that provides for the conservation of the species and its habitat, includes incentives for conservation, ensures that the use of the species is biologically sustainable and maintained throughout its range at a level consistent with its role in its ecosystem, and addresses factors that include illegal trade, domestic trade, subsistence use, disease, and habitat loss; and that the methods of capture, transport, and maintenance of the species minimize the risk of injury or damage to health.

(2) For captive-bred birds to be imported from other countries, in order to be listed in an approved list, the Service is required to determine either that the species is regularly bred in captivity and no wild-caught birds of the species are in trade, or that the species is bred in a qualifying facility.

The Service is also required to review trade in all non-CITES avian species, and establish a moratorium on the import of any species, by country of origin, if any of a series of findings cannot be made. The procedures for such findings will be proposed in a future notice of proposed rulemaking.

### Section-by-Section Analysis

In the **Federal Register** notice of November 16, 1993, the Service included the regulations implementing the WBCA in 50 CFR part 15, subparts A–F. This proposed rulemaking proposes text for subparts D and E only, along with additional definitions for subpart A. A future notice of proposed rulemaking will propose regulations for subpart F.

### Subpart D—Approved List of Species Listed in the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora

*Section 15.31 Criteria for Including Species in the Approved List for Captive-Bred Species*

Pursuant to Section 106 of the WBCA, the Secretary is required to publish a list of species of exotic birds that are listed in an appendix to the Convention and that are not subject to a prohibition or suspension of importation otherwise applicable under the WBCA. In order to list a species as exclusively captive-bred, the Service is required to determine that the species is regularly bred in captivity and no wild-caught birds of the species are in trade, legally

or illegally. These captive-bred species can be imported into the United States without meeting any additional requirements of the Wild Bird Conservation Act or this part 15; however, all of the existing requirements in parts 13 and 14, part 17 (species listed as endangered or threatened under the Endangered Species Act (ESA)), part 21 (Migratory Bird Treaty Act) and part 23 (species listed in the Appendices to the Convention, or CITES) must still be complied with.

This section establishes the criteria for the approval of the importation of captive-bred species. In the House of Representatives Committee Report for the WBCA, the Secretary was instructed "to use the standards adopted by the State of New York with respect to importation of captive-bred species, and include such species on the approved list under this section, as long as the Secretary believes that trade based on these standards will not result in harm to species in the wild." These standards direct the Secretary to include species of exotic birds in the approved list if the species is regularly bred in captivity and none are taken from the wild for the trade. In order to comply with such standards, the Service proposes the following criteria for the approval of the importation of foreign captive-bred species: (a) All specimens of the species known to be in trade (legal or illegal) must be captive-bred; (b) No specimens of the species can be known to be removed from the wild for the pet bird market; (c) Any importation of specimens of the species must not be detrimental to the survival of the species in the wild; and (d) Adequate enforcement controls must be in place in countries of export to ensure compliance with the aforementioned paragraphs.

If a species is bred in captivity in large numbers, but individual birds of that species are frequently, sometimes, or even rarely taken from the wild, or if there are enforcement concerns that illegal trade occurs in the species, that species cannot be included as a captive-bred species. Thus, that species would not be approved as a captive-bred species. However, individual captive-bred birds may still be imported into the United States under one of the following conditions: (1) The foreign breeding facility could be approved pursuant to subpart E of this part 15; or (2) a permit for an individual import could be obtained pursuant to subpart C, if the requirements of that subpart are met.

*15.32 Criteria for Including Species in the Approved List for Non-Captive-Bred Species*

Pursuant to Section 106 of the WBCA, the Secretary is required to publish a list of species of exotic birds that are listed in an Appendix to the Convention and that are not subject to a prohibition or suspension of importation otherwise applicable under the WBCA. For non-captive-bred (i.e., wild-caught) exotic birds to be imported from other countries, in order to be listed in an approved list, the Service is required by the WBCA to "use the best scientific information available, and to consider the adequacy of regulatory and enforcement mechanisms in all countries of origin for the species, including such mechanisms for control of illegal trade." In developing criteria on which to base approval of sustainable use management plans, the Service reviewed information available on the sustainable use of exotic birds subject to international trade. Beissinger and Bucher (1992) proposed a model for sustainable use of parrot species when biological data are incomplete (Bioscience Vol. 42, No 3, March, 1992: Can Parrots be Conserved through Sustainable Harvesting?); the Service drew upon this model in developing the approval criteria for non-captive-bred species.

The WBCA requires the Service to "find that the Convention is being effectively implemented with respect to that species". The Service believes that it is conceivable, although extremely unlikely, that a country which is not a CITES Party might be complying with all relevant CITES requirements. However, a country that is not a CITES Party can be considered for approval of its sustainable use management plan under this rule. The Service does not wish to discourage the development of effective sustainable use management plans. The Service welcomes comment and input on these qualification requirements, in order to ensure that the final rule promotes conservation objectives and expands opportunities to implement scientifically-based management strategies.

The WBCA requires the Service to make the finding that the Convention is being effectively implemented, by making each of the following findings specified in section 106, paragraph (c) of the WBCA, each of which the Service has included in § 15.32(b):

(1) That the country of origin has established a Scientific Authority.

(2) That the requirements of Article IV of the Convention are implemented with respect to that species.

In addition, since the WBCA requires that each country be effectively implementing the Convention, the proposed approval criteria also require that countries demonstrate implementation of Article VIII of the Convention regarding establishment of implementing legislation and submission to the Convention's Secretariat of required annual reports.

(3) That remedial measures recommended by the Parties to the Convention with respect to that species are implemented. The House of Representatives Committee Report for the WBCA states that "The Committee expects that the Secretary will weigh heavily the willingness and commitment of an exporting country to implement remedial measures in deciding whether to include a species on the list of approved species." This factor is included in the criteria for approval of country management plans.

(4) "That a scientifically-based management plan has been developed for the species which provides for the conservation of the species and its habitat and includes incentives for conservation" (Section 106, paragraph (c)(2)(A) of the WBCA). The proposed approval criteria incorporate this consideration in a number of ways, including requiring: (a) Information on species conservation status and distribution; (b) habitat conservation information, including habitat requirements, habitat distribution and protection status, and habitat status and trends; and (c) information on population dynamics, including population assessments, reproductive success, and evidence of how the sustainable use management plan promotes the value of the species and its habitats. In the case of habitat information, several pieces of information are required, including management plans for habitats important to the species. They are only required, however, if they are available or applicable. For a species that breeds in the country of export, the Service has proposed a requirement of a description of nest sites and/or plant communities that are most frequently used for placement of nests and, if applicable, nesting habits. Nesting habit information may include clutch size, ability to renest, nesting season, and known nest competitors/predators.

(5) "That a scientifically-based management plan has been developed for the species which ensures that the use of the species is biologically sustainable and maintained throughout the range of the species in the country to which the plan applies at a level that is consistent with the role of the species

in the ecosystem and is well above the level at which the species might become threatened with extinction" (Section 106, paragraph (c)(2)(B) of the WBCA). The proposed criteria, in fulfilling this statutory requirement, require the following: (a) Information on the population of the species; and (b) information on the species' role in its ecosystem, including nest requirements and diet. The proposed rule requires information on any species or plant community that is dependent on the occurrence of the exotic bird species, in order to make the required finding that the proposed capture and export are at levels that are consistent with the role of the species in its ecosystem. The proposed rule requires recent population data of the population of the species in the country of export, as derived from indices of relative abundance (such as catch per unit effort or call count surveys) or population estimates (if available), along with documentation for each estimate. These population data or estimates should be based on studies conducted for at least three separate years, or data for one year can be provided, with a description of survey plans for future years. Population assessments should have been conducted during the same season (breeding or non-breeding) of each year for which documentation is submitted.

For long-lived, more "K-selected" species of birds (as listed in the proposed rule in § 15.32) the Service is proposing to require that the management plan (for species that breed in the country of export) include information on nesting ecology, and reproductive rates or mortality rates. Those species are defined as those not in one of 19 specified families of birds. The Service is proposing more rigorous standards for the sustainable utilization of "K-selected" species, based on an awareness that their sustainable utilization is very difficult, and that they are extremely sensitive to population depletion.

For species included in one of the 19 families of birds specified in the proposed rule in § 15.32 (more "r-selected" species), the Service is proposing that, instead of detailed demographic information, the management plan (for species that breed in the country of export) need only include an estimation of recent reproductive success. Reproductive success may be estimated using pre-breeding and post-breeding counts, wherever that is appropriate. For all birds, when the species occurs in the country of export only during the nonbreeding season, the Service proposes to require documentation or a letter from the Convention Scientific Authority that the species does not breed there.

The Service has proposed, for the purposes of the WBCA, to define sustainable use as "the use of a species in a manner and at a level such that populations of the species are maintained at optimal levels for the long term and involves a determination of the productive capacity of the species and its ecosystem, in order to ensure that utilization does not exceed those capacities or the ability of the population to reproduce and maintain itself." In order to determine that the management plan utilization of the species is sustainable, the Service proposes to require evidence of how levels of sustainable use were determined, including either (1) adequate long-term trends in relative abundance and take levels, or (2) population estimates, reproductive success, and estimation of the number exported from the country during the past 2 years, and the number of birds removed directly from the wild for export, domestic trade, illegal trade, subsistence use, and other purposes. The information should include the estimated number of birds to be removed from the wild from each area or region of take each year for all purposes, including age-class information for "K-selected" species, and a description of future plans to monitor the species in each area of take and to determine whether the number of birds taken has been sustainable. Throughout the proposed rule, area or region of take refers to the area or region within the country of export where birds will be removed from the wild; the degree of specificity used will depend on the particular situation in the country of export. If the species is abundant throughout its range, the region of take could be the entire country; a species that is locally abundant but rare elsewhere might have a more restricted area of take.

The Service is aware that the criteria for approval of sustainable use management plans proposed herein may appear to be rigorous, and although desirable and scientifically valid, they may be difficult for many countries. The Service proposes to give particularly positive consideration to situations wherein very conservative capture and export quotas are implemented prior to being able to obtain all of the biological information necessary for a more large-scale management plan (in effect, a "preliminary" approval). Thus, the more tentative the biological information is, the more conservative the capture and export quotas are expected to be; the closer the capture quotas are to the reproductive capacity of the species, the biological information is expected to be more rigorous.

(6) "That a scientifically-based management plan has been developed for the species which addresses factors relevant to the conservation of the species, including illegal trade, domestic trade, subsistence use, disease, and habitat loss" (Section 106, paragraph (c)(2)(C) of the WBCA). The proposed criteria, in fulfilling this statutory requirement, require the following information: estimation of annual mortality or loss, including natural mortality and take for subsistence use, export trade, and domestic trade (in each area or region of take); and the estimated number of birds that will be removed from the wild from each area or region of take each year for all purposes (export trade, domestic trade, illegal trade, and subsistence use), including information on the regulation of these factors within the country. When applicable, information on age-classes removed from the wild should be included. As in the previous paragraph, the Service will give particularly positive consideration to situations wherein very conservative capture and export quotas are implemented prior to being able to obtain all of the biological information necessary for a more large-scale management plan (a sort of "preliminary" approval).

(7) That the management plan is implemented and enforced (Section 106, paragraph (c)(3) of the WBCA). The proposed criteria incorporate this finding in a number of ways, including requiring: (a) Certification from the country of export's Management Authority that the country has the legal means necessary to ensure enforcement of and compliance with the requirements of the management plan and to ensure that the number of birds removed from the wild or exported will be consistent with the management plan; (b) an explanation of infrastructure and law enforcement and monitoring mechanisms that will ensure compliance with methodology in the management plan; and (c) evidence of implementing legislation. The Service expects in this context not just a copy of a country's implementing legislation, but a summary of how that legislation and the management plan is or will be put into practice. Information provided could be varied, but might include how a country's wildlife department is organized, how the wildlife department will monitor implementation and enforcement of the management plan,

and evidence of prior enforcement actions.

(8) That the methods of capture, transport, and maintenance of the species minimize the risk of injury or damage to health, including inhumane treatment (Section 106, paragraph (c)(4) of the WBCA). The proposed criteria incorporate this required finding in a number of ways, including requiring: (a) a description of the process of removing birds from the wild, including locations, time of year of removal, capture methods, means of transport, and pre-export conditioning; and (b) a description of the shipping methods and enclosures proposed to be used to transport the exotic birds, including but not limited to feeding and care during transport, and shipping densities. Since there is evidence that for some species and, in some cases, consignment size may increase the risk of mortality in transport, the Service has also proposed that estimated consignment sizes be included with the management plan. Although the proposed rule does not establish a maximum consignment size, the Service will take this factor into consideration in making the required finding. Consignment size in this context refers to the number of birds in a single shipment exported from the country of export.

The WBCA also requires that the Service "consider the adequacy of regulatory and enforcement mechanisms in all countries of origin for the species, including such mechanisms for control of illegal trade" (WBCA § 106(a)(3)). Therefore, in the approval criteria, for species with a multi-national distribution, the Service proposes to make the following determinations (the information needed may need to come from sources other than the country requesting approval of its management plan): (a) whether populations of the species in other countries in which it occurs will be detrimentally affected by exports of the species from the country requesting approval (this information could be obtained from those governments and/or from other sources, and could include communication from the Scientific Authorities of other range states); (b) whether factors affecting conservation of the species, including export from other countries, illegal trade, domestic use, or subsistence use are regulated throughout the range of the species so that recruitment and/or breeding stocks of the species are not detrimentally affected by the proposed export; (c) whether the proposed take and export from the requesting country include enough demographic information to ensure they will not detrimentally affect breeding populations; and (d) whether the proposed take and export will not detrimentally affect any existing enhancement activities or conservation programs throughout the species' range.

The approved non-captive-bred (*i.e.*, wild-caught) species can be imported into the United States without meeting any additional requirements of the WBCA or this part 15; however, all of the existing requirements in parts 13 and 14, part 17, part 21, and part 23 must be complied with. Upon receipt of a completed sustainable use management plan for a country of export, the Director will publish a Notice in the **Federal Register** for public comment. Approval of species will be granted in accordance with the criteria proposed in § 15.32.

The Service proposes to consider only sustainable use management plans for appendix II species and appendix III species from the country for which they are listed, since trade for primarily commercial purposes is not permitted under the Convention for appendix I species. If specimens of an appendix I species are required for zoological, scientific, or breeding purposes, individuals desiring such import may apply for a permit under Subpart C of this Part 15.

*Section 15.33 Species Included in the Approved List*

(a) Captive-bred species. In order to establish a proposed list of approved captive-bred species, based on the criteria in proposed Section 15.31, the Service used the best information available, including import records of captive-bred species, law enforcement and intelligence data on the commercial trade in captive-bred species, and law enforcement and intelligence information on the illegal trade in exotic bird species. The proposed list of approved species includes 37 captive-bred exotic bird species that can be imported from any other country, with export permits required by CITES, other federal laws, and the exporting country. In addition, the Service has proposed to include in the approved list of captive-bred species several exotic bird species that are not listed in an appendix to the Convention but are regularly bred in captivity and are not taken from the wild. Although these species are not listed in an Appendix and thus are not presently prohibited under the WBCA, these species are included in the list for the convenience of the public. To ensure that there is no confusion, even if the species or higher taxon to which it belongs were subsequently listed in the Appendices to the Convention, the Service would still consider it to be an approved captive-bred species pursuant to this subpart D.

As established in the WBCA, the Service will periodically review the list of species that meet the approval criteria for the importation of captive-bred species. Any changes to this approved list will be proposed in the **Federal Register** for public comment. The Service is interested in receiving the comments, including documentation, of any interested individuals or organizations with information on the captive-bred status of any of the species in the list proposed in this subsection, or of any other exotic bird species that meet the criteria in § 15.31 for inclusion in this list.

(b) Non-captive-bred species. No species can be proposed for approval under this paragraph until the proposed regulations in Section 15.32 are finalized, and a completed sustainable use management plan for a country of export for that species has been received by the Director. Upon granting approval in accordance with the issuance criteria of this section, approved species and countries of export would be listed in this paragraph.

**Subpart E—Qualifying Foreign Facilities Breeding Exotic Birds in Captivity**

*Section 15.41 General Application Procedures*

Pursuant to Section 107 of the WBCA, any person may submit a petition to the Director to determine whether a foreign exotic bird breeding facility shall be designated as a qualifying facility. If a foreign facility is approved as a qualifying facility, species of exotic birds for which the facility is approved can be imported into the United States from that facility without import permits issued pursuant to subpart C of this part 15. In all cases, any additional requirements in 50 CFR parts 13, 14, 17, 21, and 23 must also be met. Applications for approval shall be submitted to the Service's Office of Management Authority. A separate application must be submitted for each species for which approval is requested.

Applications must contain information as required in paragraph (c) of this section, in order to make a series of findings required by the WBCA. The Service notes that the fundamental purposes of these findings is to ensure that the birds exported from these facilities are indeed bred in captivity, no illegal trade is involved, and wild populations are not harmed by either the breeding program or export from these facilities. The information required includes but is not limited to

the following: (1) Certification from the Management Authority of the country in which the facility is located that the facility is capable of breeding the species in the numbers to be traded, without detriment to the wild population of the species; (2) A summary of the legislation, and regulations where appropriate, implementing the Convention in the country in which the facility is located; (3) A detailed statement of the facility's capability of breeding the species in captivity in the numbers desired, including breeding methods, experience, and production levels; (4) A detailed statement demonstrating that the facility is operated in a manner not detrimental to the survival of the species, including details on the establishment of the parental stock; (5) A statement of any anticipated need for augmentation of breeding stock from other sources; (6) A detailed statement demonstrating that the facility is operated in a humane and healthful manner; (7) A description of the care and maintenance practices of the facility, including mortality and disease records and husbandry, veterinary, and hygienic practices; (8) A statement that all birds to be exported from the facility will be marked with closed leg bands or an electronic marking system; and (9) Details on the system of recordkeeping and tracking of birds and their progeny hatched at the facility would be required.

*Section 15.42 Approval Criteria and Conditions*

This section would establish the criteria for approval of foreign captive-breeding facilities by the Director, and approval conditions and duration. The approval conditions would include: (1) Whether the facility is located in a country that is Party to the Convention and is implementing the requirements of the Convention, including designation of functioning Scientific and Management Authorities, submission of annual reports, and establishment of implementing legislation; (2) Whether the facility is capable of producing captive-bred birds in the numbers to be exported; (3) Whether the parental breeding stock was acquired from legally obtained, exported, and/or imported birds; (4) Whether the facility is operated in a manner not detrimental to the survival of the species in the wild; (5) Whether adequate enforcement controls are in place; (6) Whether the breeding protocol of the facility is adequate; (7) Whether the facility is operated in a humane and healthful manner; (8) Whether the facility will provide for proper and healthful care and maintenance of the birds; and (9) Whether all birds are identifiable through closed leg bands or electronic marking. The Service welcomes comments on these criteria, including those related to the applicability of relevant international law.

The approval conditions established in this section require the submission of an annual report to the Service containing production and mortality records, including hatching records, numbers of birds exported, and their identification numbers. As established in the WBCA, approvals are to be effective for three years, provided that the facility continues to meet the requirements and approval conditions. Each application submitted for approval is proposed to be published in the **Federal Register** for public comment, and the Service will periodically publish in the **Federal Register** a list of all approved foreign breeding facilities and the effective dates of their approval.

**Public Comments Solicited**

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific or conservation communities, trade organizations, or any other interested party concerning any aspect of this proposal are hereby solicited.

**Effects of the Rule**

The Service has determined that this proposed rule is categorically excluded under Departmental procedures in complying with the National Environmental Policy Act (NEPA). See 516 DM [Departmental Manual] 2, appendix 1 Paragraph 1.10. The proposed regulations are procedural in nature, and the environmental effects while crafted to carry out the benign purposes of the WBCA, are judged to be minimal, speculative, and do not lend themselves to meaningful analysis. Future regulations implementing the WBCA may be subject to NEPA documentation requirements, on a case-by-case basis.

*Executive Orders 12866, 12612, and 12630 and the Regulatory Flexibility Act*

This rule has been reviewed under Executive Order 12866. This action is not expected to have significant taking implications for U.S. citizens, as per Executive Order No. 12630. It has also been certified that these revisions will not have a significant economic effect on a substantial number of small entities as described by the Regulatory Flexibility Act. Since the rule applies to importation of live wild birds into the United States, it does not contain any Federalism impacts as described in Executive Order 12612.

*Paperwork Reduction*

This proposed rule does not contain information collection requirements for persons subject to the jurisdiction of the United States that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

**Author**

The primary authors of this proposed rule are Dr. Susan S. Lieberman, Office of Management Authority, and Dr. Rosemarie Gnam, Division of Law Enforcement, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/358–2093).

**List of Subjects in 50 CFR Part 15**

Imports, Reporting and recordkeeping requirements, Transportation and Wildlife.

**Proposed Regulation Promulgation**

## PART 15—[AMENDED] EXOTIC WILD BIRD CONSERVATION

Accordingly, 50 CFR part 15 is proposed to be amended as follows:

1. The authority citation for part 15 continues to read as follows:

**Authority:** Pub. L. 102–440, 16 U.S.C. 4901–4916.

2. Amend part 15 subpart A § 15.3 by adding the following definitions, in alphabetical order:

**§ 15.3 Definitions.**

* * * * *

*Documentation* means a description of how information was collected, including the methodologies used; names and institutions of individuals conducting the work; dates and locations of any study; and any published results or reports from the work.

* * * * *

*Life cycle* means the annual processes involved with breeding, migration, and all other non-breeding activities.

* * * * *

*Status* means a qualitative measure of the vulnerability to extinction or extirpation of a population at a given time (e.g., endangered, threatened, vulnerable, not threatened, non-threatened or insufficiently known).

*Sustainable use* means the use of a species in a manner and at a level such that populations of the species are maintained at optimal levels for the long term and involves a determination of

the productive capacity of the species and its ecosystem, in order to ensure that utilization does not exceed those capacities or the ability of the population to reproduce and maintain itself.

*Trend* means a long-term projection of any change in the size of a species' population or habitat over time (e.g., increasing, decreasing, equilibrium, insufficiently known).

* * * * *

3. Subpart D is revised to read as follows:

**Subpart D—Approved List of Species Listed in the Appendices to the Convention**

15.31 Criteria for including species in the approved list for captive-bred species
15.32 Criteria for including species in the approved list for non-captive-bred species.
15.33 Species included in the approved list.

**§ 15.31 Criteria for including species in the approved list for captive-bred species.**

The Director will periodically review the list of captive-bred exotic bird species in § 15.33(a), for which importation into the United States is approved. Any exotic bird species listed in paragraph 15.33(a) pursuant to this section must meet all of the following criteria:

(a) All specimens of the species known to be in trade (legal or illegal) are captive-bred;

(b) No specimens of the species are known to be removed from the wild for the pet bird market;

(c) Any importation of specimens of the species would not be detrimental to the survival of the species in the wild; and

(d) Adequate enforcement controls are in place in countries of export to ensure compliance with paragraphs (a) through (c) of this section.

**§ 15.32 Criteria for including species in the approved list for non-captive-bred species.**

Upon receipt of a completed sustainable use management plan for a country of export, the Director may approve a species listed in Appendices II or III of the Convention for importation from that country. Such approval shall be granted in accordance with the issuance criteria of this section. All approved species and countries of export will be listed in section 15.33.

(a) Requirements for scientifically-based sustainable use management plans. Sustainable use management plans developed by the country of export shall include the following information, and any other information that may be appropriate:

(1) Background information, including the following:

(i) The scientific and common name of the species;

(ii) Letters from the country of export's Management and Scientific Authorities transmitting the management plan of this species;

(iii) A summary of the country of export's legislation related to this species and legislation implementing the Convention, and, where appropriate, a summary of implementing regulations;

(iv) A summary, from the country of export's Management Authority, of the country's infrastructure and law enforcement and monitoring mechanisms designed to ensure both enforcement of and compliance with the requirements of the management plan, and that the number of birds removed from the wild or exported will be consistent with the management plan;

(v) Recent information on the distribution of the species within the country of export, including scientific references and maps, and historical information on distributions, if relevant; and

(vi) The species' status and its current population trend in the country of export, including scientific references.

(2) Habitat information, including:

(i) A general description of habitats used by the species for each portion of the life cycle completed within the country of export;

(ii) Recent information on the size and distribution of these habitats throughout the country of export and in each area or region of take, including scientific references and maps. The approximate location of any reserves that provide protection for this species should be indicated on the accompanying map(s);

(iii) Status and trends of the important habitats used by the species in the country of export as a whole and within each area or region of take, whenever available, including scientific references;

(iv) Factors, including management activities, favoring or threatening the species' habitat in the foreseeable future throughout the country of export and within each area or region of take, whenever available, including scientific references; and

(v) A list of management plans that have been or are being planned, developed, or implemented for the species' important habitats, if any.

(3) Information on the role of the species in its ecosystem, including:

(i) A description of the part(s) of the species' life cycle completed within the country of export;

(ii) For a species that breeds in the country of export, a description of nest sites and/or plant communities that are most frequently used for placement of nests and, if applicable, nesting habits;

(iii) A general description of the species' diet, where the species forages (aerial feeder, tree canopy, tree trunk, midstory, understory, open water or other), and seasonal changes in foraging habits, including, when available, scientific references; and

(iv) Information on any species or plant community which is dependent on the occurrence of the exotic bird species.

(4) Population dynamics of the species, including:

(i) Recent population data of the population of the species in the country of export, as derived from indices of relative abundance or population estimates, along with documentation for each estimate;

(ii) Within each area or region of take, documentation for recent population data or estimates, conducted for at least three separate years or one year with a description of survey plans for future years. These population assessments should have been conducted during the same season (breeding or non-breeding) of each year for which documentation is submitted;

(iii) If a species belongs to the avian families Columbidae, Fringillidae, Ploceidae, Estrildidae, Sturnidae, Tinamidae, Podicepedidae, Burhinidae, Scolopacidae, Tyrannidae, Pittidae, Emberizidae, Zosteropidae, Vireonidae, Atrichornithidae, Sylviidae, Oriolidae, Meliphagidae, or Icteridae, the management plan shall include the following information:

(A) For a species that does not breed in the country of export, documentation or a letter from the Convention Scientific Authority that the species occurs in the country of export only during the nonbreeding season; and

(B) For a species that breeds in the country of export, estimation (with documentation) of recent reproductive success. Where apppropriate, this assessment could include number of young produced per egg-laying female per year, or pre-breeding and post-breeding surveys conducted within the same annual cycle; and

(C) Estimation (with documentation) of annual mortality or loss including natural mortality and take for subsistence use, export trade, and domestic trade in each area of take; or

(D) In lieu of paragraphs (a)(4)(iii) (A) and (C) of this section, documentation of long-term population and offtake trends based on indices of relative abundance, and measures of offtake and description of any long-term changes in other mortality factors (including

subsistence use, domestic trade, and capture or transport mortalities).

(iv) If a species belongs to an avian family other than those listed in paragraph (a)(4)(iii) of this section, the management plan shall include the following information:

(A) For a species that does not breed in the country of export, certification by the Scientific Authority of that country that the species occurs in the country of export only during the nonbreeding season;

(B) For a species that breeds in the country of export, scientific assessment (with documentation) of the nesting ecology of the species. Such an assessment may include the availability of active nest sites and the number of females or pairs that successfully produce young per year in each area or region of take; and

(C) For a species that breeds in the country of export, estimation (with documentation) of recent reproductive rates (number of young produced per egg-laying female or pair per year) or mortality rates; and

(v) Estimation (with documentation) of annual mortality or loss, including natural mortality and take for subsistence use, export trade, and domestic trade in each area of take.

(5) Determination of biologically sustainable use:

(i) Estimation of the number exported from the country during the past 2 years, and the number of birds removed from the wild for export, domestic trade, illegal trade, subsistence use, and other purposes (specify) for the country of export during the past 2 years;

(ii) The estimated number of birds that will be removed from the wild from each area of take each year for all purposes (export trade, domestic trade, illegal trade, and subsistence use), including a description of age-classes (nestlings, fledglings, sub-adults, adults, all classes), when applicable;

(iii) For the projected take addressed in the management plan, a description of the removal process, including, but not limited to, locations, time of year, capture methods, means of transport, and pre-export conditioning;

(iv) Documentation of how each level of take was determined;

(v) Explanation of infrastructure and law enforcement and monitoring mechanisms that ensure compliance with the methodology in the management plan and that the species will be removed at a level that ensures sustainable use; and

(vi) Description of future plans to monitor the species in each area or region of take and to determine whether the number of birds taken has been sustainable.

(6) A description of incentives for conservation, including a description of how the sustainable use management plan promotes the value of the species and its habitats by means of environmental education, cooperative efforts or projects, development of cooperative management units, and/or activities involving local communities.

(7) Additional factors:

(i) Description of any captive-propagation programs (private and governmental) for the species carried out in the country of export;

(ii) Description of any existing enhancement activities developed for the species, including, but not limited to, annual banding programs, nest watching/guarding, and nest improvement; and

(iii) Description, including photographs or diagrams, of the shipping methods and enclosures proposed to be used to transport the exotic birds, including but not limited to feeding and care during transport, densities of birds in shipping enclosures, and estimated consignment sizes.

(b) Approval criteria. Upon receiving a sustainable use management plan in accordance with paragraph (a) of this section, the Director will decide whether or not an exotic bird species should be listed as an approved species for importation from the country of export, under § 15.33. In making this decision, the Director shall consider in addition to the general criteria in part 13 of this subchapter, all of the following factors for the species:

(1) Whether the country of export is effectively implementing the Convention, particularly with respect to:

(i) establishment of a functioning Scientific Authority;

(ii) the requirements of Article IV of the Convention;

(iii) remedial measures recommended by the Parties to the Convention with respect to the species, including recommendations of permanent committees of the Convention; and

(iv) Article VIII of the Convention, including but not limited to establishment of legislation and infrastructure necessary to enforce the Convention, and submission of annual reports to the Convention's Secretariat;

(2) Whether the country of export has developed a scientifically based management plan for the species that:

(i) provides for the conservation of the species and its habitat(s);

(ii) includes incentives for conservation;

(iii) is adequately implemented and enforced;

(iv) ensures that the use of the species is:

(A) sustainable;

(B) maintained throughout its range at a level that is consistent with the species' role in its ecosystem; and

(C) is well above the level at which the species might become threatened;

(v) addresses illegal trade, domestic trade, subsistence use, disease, and habitat loss; and

(vi) ensures that the methods of capture, transport, and maintenance of the species minimize the risk of injury, damage to health, or inhumane treatment; and

(3) If the species has a multi-national distribution:

(i) Whether populations of the species in other countries in which it occurs will not be detrimentally affected by exports of the species from the country requesting approval;

(ii) Whether factors affecting conservation of the species, including export from other countries, illegal trade, domestic use, or subsistence use are regulated throughout the range of the species so that recruitment and/or breeding stocks of the species will not be detrimentally affected by the proposed export;

(iii) If the species does not breed in the country of export, whether the projected take and export will not detrimentally affect breeding populations; and

(iv) Whether the projected take and export will not detrimentally affect existing enhancement activities, conservation programs, or enforcement efforts throughout the species' range.

(c) Publication in the **Federal Register**; The Director shall publish notice in the **Federal Register** of each complete sustainable use management plan under paragraph (a) of this section. Each notice shall invite the submission from interested parties of written data, views, or arguments with respect to the proposed approval.

(d) Duration of approval. A species and country of export listed in § 15.33 as approved shall be approved for three years, at which time renewal of approval shall be considered by the Service.

**§ 15.33 Species included in the approved list.**

(a) Captive-bred species. The list in this paragraph includes species of captive-bred exotic birds for which importation into the United States is not prohibited by § 15.11. The species are grouped taxonomically by order.

| Species | Common name |
|---|---|
| Order Columbiformes: | |
| Columba livia ..... | Rock dove. |
| Order Psittaciformes: | |
| Agapornis roseicollis. | Peach-faced lovebird. |
| Barnardius barnardi | Mallee Ringneck parrot. |
| Barnardius zonarius | Port Lincoln parrot. |
| Lathamus discolor. | Swift parrot. |
| Melopsittacus undulatus. | Budgerigar. |
| Neophema bourkii. | Bourke's parrot. |
| Neophema pulchella. | Turquoise parrot. |
| Neophema splendida. | Scarlet-chested parrot. |
| Nymphicus hollandicus. | Cockatiel. |
| Platycercus adelaide. | Adelaide rosella. |
| Platycercus adscitus. | Pale-headed rosella. |
| Platycercus caledonicus. | Green rosella. |
| Platycercus elegans | Crimson rosella. |
| Platycercus eximius | Eastern rosella. |
| Platycercus flaveolus. | Yellow rosella. |
| Polytelis alexandrae | Princess parrot. |
| Polytelis anthopeplus. | Regent parrot. |
| Polytelis swainsonii | Superb parrot. |
| Psephotus haematogaster. | Blue-bonnet parakeet. |
| Psephotus haematonotus. | Red-rumped parakeet. |
| Psephotus varius ... | Mulga parakeet. |
| Psittacula cyanocephala. | Plum-headed parakeet. |
| Purpureicephalus spurius. | Red-capped parrot. |
| Order Passeriformes:. | |
| Chloebia gouldiae .. | Gouldian finch. |
| Emblema picta ..... | Painted finch. |
| Lonchura castaneothorax. | Chestnut-breasted finch. |
| Lonchura domestica. | Society (=Bengalese) finch. |
| Lonchura pectoralis | Pictorella finch. |
| Neochmia ruficauda | Star finch. |
| Poephila acuticauda. | Long-tailed grassfinch. |
| Poephila bichenovii | Double-barred finch. |
| Poephila cincta ..... | Parson finch. |
| Poephila guttata .... | Zebra finch. |
| Poephila personata | Masked finch. |
| Serinus canaria ..... | Common Canary. |

(b) Non-captive-bred species. The list in this paragraph includes species of non-captive-bred exotic birds and countries for which importation into the United States is not prohibited by § 15.11. The species are grouped taxonomically by order, and may only be imported from the approved country, except as provided under a permit issued pursuant to subpart C of this part.

| Species | Common name | Country | Date approved |
|---|---|---|---|

(To be determined at a later date)

4. Subpart E is revised to read as follows:

15.41 General application procedures.
15.42 Approval criteria and conditions.

## Subpart E—Qualifying facilities breeding exotic birds in captivity

### § 15.41 General application procedures.

(a) Any person may petition the Director to determine whether a foreign exotic bird breeding facility may be designated as a qualifying facility. The Director may approve foreign breeding facilities to import exotic birds otherwise prohibited by § 15.11, in accordance with the approval criteria of this subpart. Approved species from qualifying facilities do not require permits issued under this part 15 and are not limited as to the number of birds that can be imported, for purposes of the WBCA.

(b) Applications for approval of foreign breeding facilities under this subpart shall be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Arlington, Virginia 22203. Each application must be submitted on an official application (Form 3–200) provided by the Service and must contain all of the information specified in this section. The sufficiency of the application shall be determined by the Director in accordance with the requirements of this part. A separate petition must be submitted for each species for which the approval is requested.

(c) Upon receipt of a complete application, the Director may approve foreign breeding facilities, which will allow individuals to import exotic bird species otherwise prohibited by section 15.11, if they are captive-bred in the facility. Each application shall provide the following information and any such other information that the Director may require:

(1) A description of the exotic bird species to be imported, including the common and scientific name of the species;

(2) The name and address of the foreign breeding facility, and a statement of the reasons supporting approval;

(3) Certification in writing from the Management Authority of the country in which the facility is located that the facility has the capability of breeding the species in captivity in the numbers to be traded without detriment to the wild population, and that the operator of the facility has not been convicted of any violations of the country's laws governing trade and export of avian species;

(4) A summary of the legislation implementing the Convention in the country in which the facility is located;

(5) A statement of the facility's capability of producing captive-bred birds of the species and in the numbers they wish to export to the United States, including:

(i) Relevant experience of persons involved in the operation of the facility;

(ii) Current stock of the facility, including total number, ages, sexes, and numbers of breeding pairs;

(iii) Production levels that have been achieved at the facility, at least for the past two complete calendar years, including numbers of eggs produced, chicks hatched, and chicks reared to independence;

(iv) Anticipated future production;

(v) A breeding protocol, including a genetic management plan and a description of breeding methods. Breeding methods shall include whether breeding is continuous or seasonal (including descriptions of photoperiod manipulations used to stimulate or control breeding, if any) and whether breeding birds are induced to produce multiple clutches by the removal of eggs for artificial incubation; and

(vi) Descriptions of incubation and rearing methods, as well as any other methods used to enhance production, including artificial insemination when applicable;

(6) A statement demonstrating that the facility is operated in a manner that is not detrimental to the survival of the species in the wild, including:

(i) The number and origin of original breeding stock (founders);

(ii) A statement from the Scientific Authority of the country in which the facility is located attesting that the parental stock was established in a manner that was not detrimental to the survival of the species in the wild;

(iii) If any parental breeding stock was wild-caught, a statement as to the country of origin, date of acquisition, and certification by the Management Authority in the country in which the facility is located that the parental breeding stock was legally acquired; and

(iv) Certification from the Management Authority in the country in which the facility is located that adequate controls, including inspections, are in place to prevent the use of the facility for the export of wild-caught stock;

(7) A statement of any anticipated need for augmentation of breeding stock with specimens from other sources; if augmentation is to be from the wild, an explanation as to why the removal of additional specimens from the wild shall be included. This explanation must address whether other captive-bred stock is available and describe breeding strategies employed at the facility to avoid deleterious inbreeding so that the need for augmentation from the wild is minimized;

(8) A statement describing the facility and demonstrating that it is operated in a humane and healthful manner, including:

(i) Diagrams or photographs of the facility;

(ii) Descriptions of enclosures, including dimensions, construction materials, substrates, availability of water, lighting, ventilation, the need for supplemental heat or cooling and how these are provided, and shading (for outdoor enclosures);

(iii) Densities of birds in enclosures;

(iv) Internal features of enclosures, including perches, nest boxes, and plantings; and

(v) A description of any facility features designed to satisfy unique requirements of the particular species;

(9) A description of the care and maintenance practices of the facility, including:

(i) Husbandry practices, feeding regimes (number of feedings per day), and diet;

(ii) Hygienic practices, including methods and frequency of cleaning and disinfection of equipment and facilities;

(iii) A statement as to the availability of routine professional veterinary care, including annual flock inspection or examination, and medication/vaccination schedules;

(iv) Records of mortality and disease outbreaks for both adults and chicks for at least the past two years. Episodes of high mortality or disease should be explained, and measures taken to prevent similar mortality or disease outbreaks in the future should be described; and

(v) Qualifications and experience of the personnel who will be responsible for the care of the exotic birds;

(10) A statement that all birds exported or to be exported from the facility are bred at the facility and are marked with closed leg bands or an electronic marking system;

(11) Details on the system of recordkeeping and tracking of birds and their progeny hatched at the facility, including:

(i) Documentation that the facility maintains records of hatch dates and band numbers of all birds produced at the facility;

(ii) Documentation that the facility maintains records of all birds traded from the facility, including both within the country in which the facility is located and internationally; and

(iii) Copies of these production and trade data shall be included with the application for the past two calendar years; and

(12) A statement documenting that adequate enforcement controls are in place in the country and at the facility to prevent the use of the facility for the export or re-export of wild-caught stock, including a statement on security at the facility and any prior losses due to theft.

**§ 15.42 Approval criteria and conditions.**

(a) *Approval criteria.* Upon receiving an application completed in accordance with § 15.41 of this subpart, the Director will decide whether or not a breeding facility should be approved. In making this decision, the Director shall consider, in addition to the general criteria in part 13 of this subchapter, the following factors:

(1) The facility is located in a country that is:

(i) a Party to the Convention;

(ii) has domestic legislation that adequately implements the Convention;

(iii) has designated functioning Management and Scientific Authorities; and

(iv) is current in providing annual reports to the Convention Secretariat;

(2) The facility has demonstrated the capability of producing captive-bred birds of the species in the numbers to be imported into the United States from that facility;

(3) The facility is operated in a manner that is not detrimental to the survival of the species in the wild;

(4) The parental breeding stock was acquired from birds that were legally obtained, exported, and/or imported;

(5) Adequate enforcement controls are in place to prevent the use of the facility for the export or re-export of wild-caught stock;

(6) The breeding protocol of the facility is adequate to avoid deleterious inbreeding so that the need for augmentation from the wild is eliminated or minimized;

(7) The facility is operated in a humane and healthful manner;

(8) The facility has the expertise or other resources necessary for proper and healthful care and maintenance of the exotic birds, and the facility is operated according to professionally recognized standards; and

(9) All birds that are to be exported from the facility are bred at that facility, and are identifiable through either closed leg bands or electronic marking, and records kept are adequate to ensure identification, parentage, and disposition of individual birds.

(b) *Approval conditions.* In addition to the general conditions set forth in part 13 of this subchapter, qualifying facilities must submit a report to the Service within 12 months of approval, and annually thereafter. These reports shall contain production and mortality records of the facility, including hatching and banding records, and the numbers of birds exported to the United States during the reporting period and the numbers by which the birds were identified. All approvals shall be subject to other conditions as the Director may deem appropriate.

(c) *Duration of approval.* Approvals of foreign breeding facilities shall be effective for three years from the time a determination is made, provided that:

(1) The facility continues to meet the requirements of a qualifying facility for the entire time;

(2) The facility submits an annual report in order to remain designated as a qualifying facility; and

(3) If the Director finds that a facility no longer meets these requirements, its designation as a qualifying facility shall be terminated. A notice will be published in the **Federal Register** containing the date that the approval is terminated and the reason for the termination.

(d) *Publication in the* **Federal Register**. The Director shall publish a notice in the **Federal Register** of each application submitted for approval under this subpart. Each notice shall invite the submission of written data, views, or arguments with respect to the application from all interested parties. The Director shall publish notice periodically in the **Federal Register** listing the approved foreign breeding facilities and the effective dates of their approval.

Dated: October 19, 1993.

**Bruce Blanchard,**

*Director.*

[FR Doc. 94–6098 Filed 3–16- 94; 8.45 am]

BILLING CODE 4310–55–P

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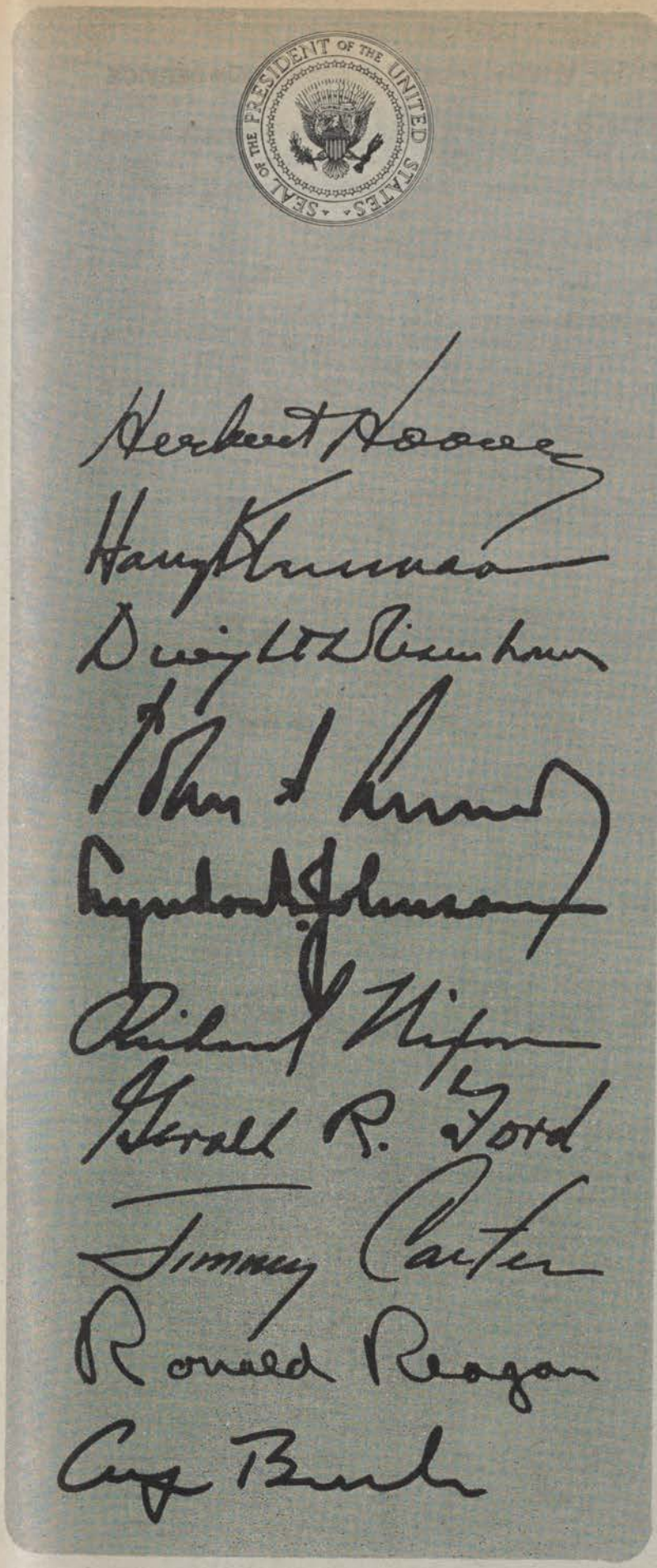


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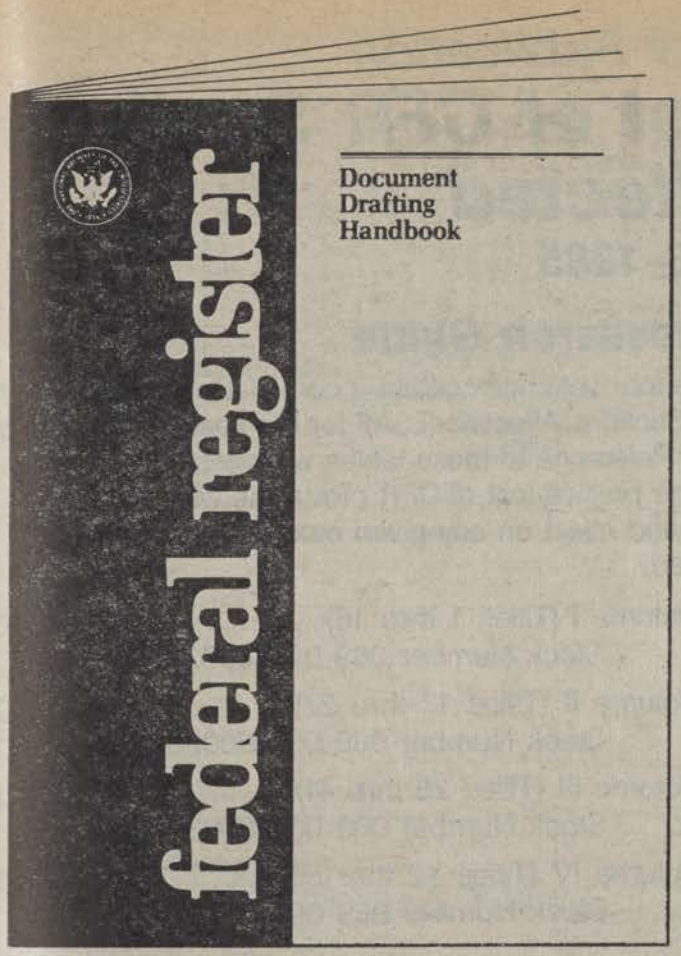


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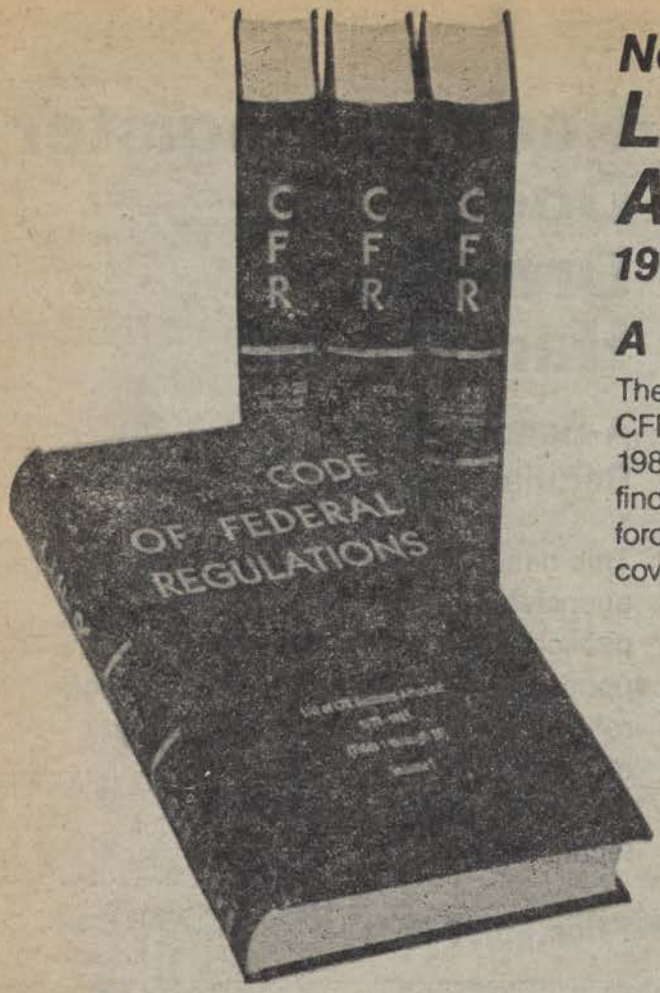


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