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For information on a briefing in Washington, DC, see announcement on the inside cover of this issue.

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4. An introduction to the finding aids of the FR/CFR system.

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

WASHINGTON, DC

WHEN: July 28 at 9:00 am

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Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

FEDERAL RESERVE SYSTEM

12 CFR Parts 207, 220, 221, and 224

[Regulations G, T, U and X]

Securities Credit Transactions; List of Marginable OTC Stocks; List of Foreign Margin Stocks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; determination of applicability of regulations.

SUMMARY: The List of Marginable OTC Stocks (OTC List) is composed of stocks traded over-the-counter (OTC) in the United States that have been determined by the Board of Governors of the Federal Reserve System to be subject to the margin requirements under certain Federal Reserve regulations. The List of Foreign Margin Stocks (Foreign List) is composed of foreign equity securities that have met the Board's eligibility criteria under Regulation T. The OTC List and the Foreign List are published four times a year by the Board. This document sets forth additions to and deletions from the previous OTC List and an addition to the Foreign List.

EFFECTIVE DATE: August 8, 1994.

FOR FURTHER INFORMATION CONTACT: Peggy Wolffrum, Securities Regulation Analyst, Division of Banking Supervision and Regulation, (202) 452–2781, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. For the hearing impaired *only*, contact Dorothea Thompson, Telecommunications Device for the Deaf (TDD) at (202) 452–3544.

SUPPLEMENTARY INFORMATION: Listed below are additions to and deletions from the OTC List. This supersedes the last OTC List which was effective May 9, 1994. Additions and deletions to the OTC List were last published on May 5, 1994 (59 FR 23124). A copy of the complete OTC List is available from the Federal Reserve Banks.

The OTC List includes those stocks that meet the criteria in Regulations G, T and U (12 CFR Parts 207, 220 and 221, respectively). This determination also affects the applicability of Regulation X (12 CFR Part 224). These stocks have the degree of national investor interest, the depth and breadth of market, and the availability of information respecting the stock and its issuer to warrant regulation in the same fashion as exchange-traded securities. The OTC List also includes any OTC stock designated for trading in the national market system (NMS security) under a rule approved by the Securities and Exchange Commission (SEC). Additional OTC stocks may be designated as NMS securities in the interim between the Board's quarterly publications. They will become automatically marginable upon the effective date of their NMS designation. The names of these stocks are available at the SEC and at the National Association of Securities Dealers, Inc. and will be incorporated into the Board's next quarterly publication of the OTC List.

Also listed below is an addition to the Board's Foreign List, which was last published on May 5, 1994 (59 FR 23124), and became effective May 9, 1994. There are no deletions from the Foreign List. The Foreign List includes those foreign securities that meet the criteria in section 220.17 of Regulation T and are eligible for margin treatment at broker-dealers on the same basis as domestic margin securities. A copy of the complete Foreign List is available from the Federal Reserve Banks.

Public Comment and Deferred Effective Date

The requirements of 5 U.S.C. 553 with respect to notice and public participation were not followed in connection with the issuance of this amendment due to the objective character of the criteria for inclusion and continued inclusion on the Lists specified in 12 CFR 207.6 (a) and (b), 220.17 (a), (b), (c) and (d), and 221.7 (a) and (b). No additional useful information would be gained by public participation. The full requirements of 5 U.S.C. 553 with respect to deferred effective date have not been followed in connection with the issuance of this amendment because the Board finds that it is in the public interest to facilitate investment and credit decisions based in whole or in part upon the composition of these Lists as soon as possible. The Board has responded to a request by the public and allowed approximately a two-week delay before the Lists are effective.

List of Subjects

12 CFR Part 207

Banks, Banking, Credit, Margin, Margin requirements, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

12 CFR Part 220

Banks, Banking, Brokers, Credit, Margin, Margin requirements, Investments, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

12 CFR Part 221

Banks, Banking, Credit, Margin, Margin requirements, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

12 CFR Part 224

Banks, Banking, Borrowers, Credit, Margin, Margin requirements, Reporting and recordkeeping requirements, Securities.

Accordingly, pursuant to the authority of sections 7 and 23 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78g and 78w), and in accordance with 12 CFR 207.2(k) and 207.6 (Regulation G), 12 CFR 220.2(u) and 220.17 (Regulation T), and 12 CFR 221.2(j) and 221.7 (Regulation U), there is set forth below a listing of deletions from and additions to the OTC List and an addition to the Foreign List.

Deletions From the List of Marginable OTC Stocks

Stocks Removed for Failing Continued Listing Requirements

AMPEX CORPORATION
Class A, $.01 par common
BIOGEN, INC.
Warrants (expire 06–30–94)
CAMBRIDGE BIOTECH CORPORATION
$.01 par common
CAPX CORPORATION
Class A, warrants (07–30–95)
CHARIOT ENTERTAINMENT, INC.
No par common
CHEMDESIGN CORPORATION

$.01 par common
CHESTER HOLDINGS LIMITED
$.001 par common
COMMUNITY BANCSHARES, INC.
$1.00 par common
COMPTRONIX CORPORATION
$.01 par common, 6–3/4% convertible subordinated debentures
EXCEL TECHNOLOGY, INC.
Class A, warrants (expire 09–30–97)
FIBRONICS INTERNATIONAL, INC.
$.05 par common
GEONEX CORPORATION
$.01 par common
HEALTHWATCH, INC.
$.01 par common Class A, warrants (expire 10–31–94), Class B, warrants (expire 10–31–94)
INNOVO GROUP, INC.
$.01 par common
INTERPHARM LABORATORIES LTD.
Ordinary Shares, NIS .001 par value
LIDAK PHARMACEUTICALS
Class B, warrants (expire 05–08–95)
LUNN INDUSTRIES, INC.
$.01 par common
MEDICAL IMAGING CENTERS OF AMERICA, INC.
No par common
MUTUAL FEDERAL SAVINGS BANK
$1.00 par common
NEW ENGLAND REALTY ASSOCIATES LIMITED PARTNERSHIP
Depositary receipts evidencing units of limited partnership interest
QUADREX CORPORATION
$.01 par common
REGAL COMMUNICATIONS CORPORATION
$.001 par common
REGENT BANCSHARES CORPORATION
Series A, $.10 par convertible preferred
RELIABLE LIFE INSURANCE COMPANY
Class A, $1.00 par common
SANBORN, INC.
$.01 par common
SCIENCE DYNAMICS CORPORATION
$.01 par common
SHOPSMITH, INC.
No par common
SYM-TEK SYSTEMS, INC.
No par common
USA CLASSIC, INC.
$.01 par common
WETTERAU PROPERTIES INC.
$.01 par common
WILLIAMS INDUSTRIES, INC.
$.10 par common
XSIRIUS INC.
$.01 par common

Stocks Removed for Listing on a National Securities Exchange or Being Involved in an Acquisition

ADVANCED INTERVENTIONAL SYSTEMS, INC.
No par common
ALLIED CLINICAL LABORATORIES, INC.
$.01 par common
ALPINE MEADOWS OF TAHOE, INC.
$.25 par common
BANKWORCESTER CORPORATION (Massachusetts)
$.10 par common
CARL KARCHER ENTERPRISES, INC.
No par common
CENTEX TELEMANAGEMENT, INC.
$.01 par common
CITIZENS, INC.
Class A, $1.00 par common
CMS/DATA CORPORATION
$.01 par common
COOKER RESTAURANT CORPORATION
No par common
CRAGIN FINANCIAL CORPORATION
$.01 par common
CURAFLEX HEALTH SERVICES, INC.
$.001 par common
DIGITAL COMMUNICATIONS TECHNOLOGY CORPORATION
$.000025 par common
ELECTROMEDICS, INC.
$.05 par common
ENERGY VENTURES, INC.
$1.00 par common
ENVIROFIL, INC.
$.001 par common
FARM & HOME FINANCIAL CORP.
$.01 par common
FEDERAL SAVINGS BANK, THE (Connecticut)
$.01 par common
FIRST EASTERN CORPORATION
$10.00 par common
FORTUNE BANCORP, INC. (Florida)
$.01 par common, Series A, 8% par convertible preferred
FRANKLIN ELECTRONIC PUBLISHERS, INC.
No par common
GATEWAY FINANCIAL CORPORATION
$.01 par common
GENERAL CABLE CORPORATION
$1.00 par common
GLOBALINK, INC.
$.01 par common
GRAND CASINOS, INC.
$.01 par common
GRAND VALLEY GAS COMPANY
$.0125 par common
GWC CORPORATION
$.01 par common
HEALTHINFUSION, INC.
$.01 par common
HOME FEDERAL BANCORP OF MISSOURI INC.
$.01 par common
HOME NUTRITIONAL SERVICES, INC.
No par common
HS RESOURCES, INC.
$.001 par common
INDEPENDENCE BANCORP, INC. (Pennsylvania)
$2.50 par common
INTERSPEC, INC.
$.001 par common
JOHNSTOWN SAVINGS BANK (Pennsylvania)
$1.00 par common
KAYDON CORPORATION
$.10 par common
LAKE SHORE BANCORP, INC. (Illinois)
No par common
LGF BANCORP, INC. (Illinois)
$.01 par common
MARCUS CORPORATION, THE
$1.00 par common
MARK CONTROLS CORPORATION
$.01 par common
MEDISYS, INC.
$.01 par common
NEWORLD BANCORP, INC. (Massachusetts)
$1.00 par common
OMNI FILMS INTERNATIONAL, INC.
$.01 par common
ON THE BORDER CAFES, INC.
$.02 par common
PARK NATIONAL CORPORATION
$4.00 par common
PENNSYLVANIA ENTERPRISES, INC.
No par common
PEOPLES BANCORP OF WORCESTER, INC.
$.10 par common
PEOPLES WESTCHESTER SAVINGS BANK (New York)
$1.00 par common
PINPOINT RETAIL SOLUTIONS, INC.
No par common
RADIATION SYSTEMS, INC.
$1.00 par common
REPUBLIC PICTURES CORPORATION
$.01 par common
SECURITY SAVINGS BANK, FSB (Michigan)
$1.00 par common
SOFTIMAGE INC.
No par common
SOFTWARE TOOLWORKS, INC., THE
$.01 par common
STAR BANC CORPORATION (Ohio)
$5.00 par common
STEPHEN COMPANY, THE
$.01 par common
SUMMIT HEALTH LTD.
No par common
TAKECARE, INC.
$.10 par common
TERMIFLEX CORPORATION
$.10 par common
UNIFLEX, INC.
$.10 par common
UNITED WISCONSIN SERVICES, INC.
No par common
VALLEY BANCORPORATION (Wisconsin)
$.50 par common
VSB BANCORP, INC. (New Jersey)
$.01 par common
WASHINGTON BANCORP, INC. (New Jersey)

$.10 par common
WEST MASS BANKSHARES, INC. (Massachusetts)
$.10 par common

Additions to the List of Marginable OTC Stocks

ABC BANCORP (Georgia)
$1.00 par common
ABLE TELCOM HOLDING CORPORATION
$.001 par common
ABR INFORMATION SERVICES INC.
$.01 par common
ACRES GAMING INCORPORATED
$.01 par common
ACTIVISION, INC.
$.0001 par common
ALL AMERICAN COMMUNICATIONS, INC.
$.0001 par common
ALLEGIANCE BANC CORPORATION (Maryland)
$1.00 par common
ALTERNATIVE RESOURCES CORPORATION
$.01 par common
AMERICAN BUILDINGS COMPANY
$.01 par common
AMERICAN EAGLE OUTFITTERS, INC.
No par common
AMERICAN ELECTRONIC COMPONENTS, INC.
No par common
AMERICAN HOMESTAR CORPORATION
$.05 par common
AMERICAN NATIONAL SAVINGS BANK, F.S.B. (Maryland)
$1.00 par common
AMERICAN PUBLISHING COMPANY
Class A, $.01 par common
AMERICAN RESOURCE CORPORATION, INC.
$.01 par common
APOGEE, INC.
$.01 par common
APPLIED LASER SYSTEMS
Class A, no par common
ARIAD PHARMACEUTICALS, INC.
Units (expire 05–20–99)
ASCEND COMMUNICATIONS, INC.
$.001 par common
ATRIA SOFTWARE, INC.
$.01 par common
AURTEX, INC.
$.001 par common
AUTOMATED TELEPHONE MANAGEMENT SYSTEMS, INC.
Series A, $1.00 par cumulative convertible preferred
BANPONCE CORPORATION
Series A, no par 8.35% non-cumulative preferred
BCB FINANCIAL SERVICES CORPORATION
$2.50 par common
BELLWETHER EXPLORATION COMPANY
No par common
BETTIS CORPORATION
$.01 par common
BIO-PLEXUS, INC.
No par common
BOYD BROS. TRANSPORTATION INC.
$.001 par common
BRADLEY PHARMACEUTICALS, INC.
Class A, no par common;
Class A, warrants (expire 11–12–96),
Class B, warrants (expire 11–12–96),
Class D, warrants (expire 12–09–96)
BROOKLYN BANCORP, INC. (New York)
$.01 par common
BUCKHEAD AMERICA CORPORATION
$.01 par common
C–CUBE MICROSYSTEMS INC.
$.001 par common
CADIZ LAND COMPANY, INC.
$.01 par common
CAMBRIDGE SOUNDWORKS, INC.
No par common
CAREERSTAFF UNLIMITED, INC.
$.0001 par common
CARROLLTON BANCORP (Maryland)
$10.00 par common
CASCADE BANCORP (Oregon)
No par common
CDP TECHNOLOGIES, INC.
$.01 par common
CFW COMMUNICATIONS COMPANY
No par common
CHINATEK, INC.
$.001 par common
CINAR FILMS, INC.
No par common
CINERGI PICTURES ENTERTAINMENT INC.
$.01 par common
CNB FINANCIAL CORPORATION
$5.00 par common
COHERENT COMMUNICATIONS SYSTEMS CORPORATION
$.01 par common
COLE TAYLOR FINANCIAL GROUP, INC.
$.01 par common
COMMUNITY FIRST BANKSHARES, INC. (North Dakota)
Depositary shares
COMPUTALOG LTD.
No par common
CONSOLIDATED GRAPHICS, INC.
$.01 par common
CONSOLIDATED RAMROD GOLD CORPORATION
No par common
CONSOLIDATED TECHNOLOGY GROUP LTD.
$.01 par common
CONTINENTAL WASTE INDUSTRIES, INC.
$.001 par common
CREDIT DEPOT CORPORATION
$.001 par common
CROP GROWERS CORPORATION
$.01 par common
CROWN CASINO CORPORATION
$.01 par common
CYPROS PHARMACEUTICAL CORPORATION
Class A, warrants (expire 11–03–97)
DATA BROADCASTING CORPORATION
$.01 par common
DAW TECHNOLOGIES, INC.
$.01 par common
DEEPTECH INTERNATIONAL INC.
$.01 par common
DESIGNATRONICS INCORPORATED
$.04 par common
DEWOLFE COMPANIES INC., THE
$.01 par common
DIAMETRICS MEDICAL, INC.
$.01 par common
DIPLOMAT CORPORATION
$.0001 par common
DOUBLETREE CORPORATION
$.01 par common
DT INDUSTRIES, INC.
$.01 par common
EDUCATIONAL DEVELOPMENT CORPORATION
$.20 par common
EDUCATIONAL INSIGHTS, INC.
No par common
EMCO LIMITED
No par common
FAIRFAX BANK & TRUST COMPANY (Virginia)
$1.25 par common
FHP INTERNATIONAL CORPORATION
Series A, $.05 par cumulative convertible preferred
FINANCING FOR SCIENCE INTERNATIONAL INC.
$.01 par common,
Warrants (expire 05–19–99)
FIRST STATE CORPORATION
$1.00 par common
FLUOROSCAN IMAGING SYSTEMS, INC.
$.0001 par common,
Warrants (expire 07–11–99)
FNB CORP.
$2.50 par common
FOILMARK, INC.
$.01 par common
FORE SYSTEMS, INC.
$.01 par common
FRESH AMERICA CORPORATION
$.01 par common
FRONTIER NATURAL GAS CORPORATION
12% par convertible preferred
FUSION SYSTEMS CORPORATION
$.01 par common
GAMING WORLD INTERNATIONAL, INC.
$.01 par common,
Class A, redeemable purchase warants (expire 05–10–99)
GARDNER DENVER MACHINERY INC.
$.01 par common
GEERLINGS & WADE, INC.
$.01 par common
GENEMEDICINE INC.

$.001 par common
GEOWORKS
No par common
GFS BANCORP, INC. (Iowa)
$.01 par common
GOLF ENTERPRISES INC.
$.01 par common
GROUP TECHNOLOGIES CORPORATION
$.01 par common
GUILFORD PHARMACEUTICALS INC.
$.01 par common
HEARTLAND WIRELESS COMMUNICATIONS INC.
$.001 par common
HMG WORLDWIDE CORPORATION
$.01 par common
HMN FINANCIAL INC.
$.01 par common
HUMMINGBIRD COMMUNICATIONS LTD.
No par common
IMAX CORPORATION
No par common
INDIGO N.V.
NLG .04 par common
INHALE THERAPEUTIC SYSTEMS
No par common
INTEGRITY MUSIC, INC.
Class A, $.01 par common
INTERNATIONAL MICROCOMPUTER SOFTWARE, INC.
No par common
INTERNET COMMUNICATIONS CORPORATION
No par common
INTERSCIENCE COMPUTER CORPORATION
No par common,
Warrants (expire 11–15–96)
INVESTMENT TECHNOLOGY GROUP, INC.
$.01 par common
JEFFERSON SMURFIT CORPORATION
$.01 par common
JOS. A. BANK CLOTHIERS INC.
$.01 par common
KBK CAPITAL CORPORATION
$.01 par common
KELLEY OIL CORPORATION
$1.50 par convertible exchangeable preferred
KENETECH CORPORATION
Depositary Shares
LAJOLLA PHARMACEUTICAL COMPANY
$.01 par common,
Warrants (expire 06–03–99)
LAKE ARIEL BANCORP, INC. (Pennsylvania)
$.42 par common
LAZER–TRON CORPORATION
No par common
LEEDS FEDERAL SAVINGS BANK (Maryland)
$1.00 par common
LONG ISLAND BANCORP, INC. (New York)
$.01 par common
MacKENZIE FINANCIAL CORPORATION
No par common
MARISA CHRISTINA, INCORPORATED
$.01 par common
MARK SOLUTIONS, INC.
$.01 par common
MASTEC INC.
$.10 par common
MATEWAN BANCSHARES, INC. (West Virginia)
$1.00 par common
MAXWELL SHOE COMPANY INC.
Class A, $.01 par common
McMoRAN OIL & GAS COMPANY
$.01 par common
MEDICAL CONTROL, INC.
$.01 par common,
Warrants (expire 05–13–96)
MEDISENSE, INC.
$.01 par common
MEDMARCO, INC.
$.001 par common
MERIX CORPORATION
No par common
METROTRANS CORPORATION
$.01 par common
MICOM COMMUNICATIONS CORPORATION
$.0000001 par common
MICRO–INTEGRATION CORPORATION
$.01 par common
MICROELECTRONIC PACKAGING INC.
No par common
MID CONTINENT BANCSHARES, INC. (Kansas)
$.10 par common
MIDISOFT CORPORATION
No par common
MITY–LITE, INC.
$.01 par common
MK RAIL CORPORATION
$.01 par common
MLX CORPORATION
$.01 par common
MODEL IMPERIAL, INC.
$.01 par common
MONROC, INC.
$.01 par common
MOVIEFONE, INC.
Class A, $.01 par common
MOXHAM BANK CORPORATION (Pennsylvania)
$2.00 par common
MTL, INC.
$.01 par common
MULTICARE COMPANIES, INC.
$.01 par common
NAM TAI ELECTRONICS, INC.
Redeemable common share purchase warrants (expire 09–29–96)
NETWORK PERIPHERALS, INC.
$.001 par common
NEW WEST EYEWORKS, INC.
$.01 par common
NOBLE ROMAN'S, INC.
No par common
NORTH AMERICAN PALLADIUM LTD.
No par common
NORTHFIELD LABORATORIES INC.
$.01 par common
NORWALK SAVINGS SOCIETY (Connecticut)
$.01 par common
NPS PHARMACEUTICALS INC.
$.001 par common
NUMAR CORPORATION
$.01 par common
OCTAGON, INC.
$.01 par common,
Class A, warrants (expire 02–16–99)
ODWALLA, INC.
No par common
OXIGENE, INC.
$.01 par common
PACIFIC REHABILITATION & SPORTS MEDICINE INC.
$.01 par common
PACKAGING RESEARCH CORPORATION
$.01 par common
PARALLEL PETROLEUM CORPORATION
$.01 par common
PC DOCS GROUP INTERNATIONAL
No par common
PDS FINANCIAL CORPORATION
$.01 par common
PEDIATRIC SERVICES OF AMERICA, INC.
$.01 par common
PENN NATIONAL GAMING, INC.
$.01 par common
PETROMET RESOURCES LIMITED
No par common
PHARMACIA CORPORATION
American Depositary Receipts
PHYSICIAN SALES & SERVICE INC.
$.01 par common
PM AGRI–NUTRITION GROUP LIMITED
$.01 par common
POSITIVE RESPONSE TELEVISION, INC.
No par common
POTTERS SAVINGS & LOAN COMPANY, THE (Ohio)
$1.00 par common
PROJECT SOFTWARE & DEVELOPMENT INC.
$.01 par common
PROXYMED PHARMACY, INC.
$.001 par common
Q–STEAKS, INC.
$1.00 par common
QUINTILES TRANSNATIONAL CORPORATION
$.01 par common
QUIZNO'S FRANCHISE CORPORATION
$.001 par common
QUORUM HEALTH GROUP INC.
$.01 par common
RADICA GAMES LIMITED
$.01 par common
RAWLINGS SPORTING GOODS COMPANY INC.

$.01 par common
REDDI BRAKE SUPPLY CORPORATION
$.0001 par common
RICHEY ELECTRONICS, INC.
$.001 par common
ROCKY MOUNTAIN CHOCOLATE FACTORY, INC.
$.03 par common
ROYAL GOLD, INC.
$.01 par common
SABER SOFTWARE CORPORATION
$.01 par common
SAFETY COMPONENTS INTERNATIONAL INC.
$.01 par common
SBC TECHNOLOGIES, INC.
$.10 par common
SCOTT'S LIQUID GOLD, INC.
$.10 par common
SEVEN HILLS FINANCIAL CORPORATION
No par common
SHO–ME FINANCIAL CORPORATION
$.01 par common
SIGMA CIRCUITS, INC.
$.001 par common
SIMPSON MANUFACTURING CO., INC.
No par common
SOFTWARE PROFESSIONALS, INC.
No par common
SOUTHERN FINANCIAL FEDERAL SAVINGS BANK (Virginia)
$8.00 par common
SOUTHERN SECURITY LIFE INSURANCE COMPANY
Class A, $1.00 par common
STATEFED FINANCIAL CORPORATION
$.01 par common
STERLING FINANCIAL CORPORATION
Series A, $1.00 par cumulative convertible preferred
STRATOSPHERE CORPORATION
$.01 par common, Warrants (expire 02–22–99)
SUN INTERNATIONAL HOTELS LIMITED
Series A, no par common
SUNSTATES CORPORATION
$.33⅓ par common, $3.75 par cumulative preferred
SUPERTEL HOSPITALITY, INC.
$.01 par common
TARGETED GENETICS CORPORATION
$.01 par common
TELEPANEL SYSTEMS INC.
No par common
TELESCAN, INC.
$.01 par common
TF FINANCIAL CORPORATION
$.10 par common
THERATX, INCORPORATED
$.001 par common
THERMODYNE HOLDINGS CORPORATION
$.01 par common
TRANSACTION NETWORK SERVICES, INC.
$.01 par common
TRANSWORLD HOME HEALTHCARE, INC.
Warrants (expire 12–07–97)
TREND-LINES, INC.
$.01 par common
TRIPOS, INC.
$.01 par common
TROY HILL BANCORP, INC. (Pennsylvania)
$.01 par common
UNITED FEDERAL SAVINGS BANK (North Carolina)
$.01 par common
UNITED SERVICES ADVISORS, INC.
Non-voting, $.05 par preferred
VALUJET AIRLINES, INC.
$.01 par common
VARIFLEX, INC.
$.001 par common
VERMONT TEDDY BEAR CO., INC.
$.05 par common
VITAMIN SPECIALTIES CORPORATION
$.001 par common
WAVEFRONT TECHNOLOGIES, INC.
No par common
WEST COAST BANCORP (Oregon)
$2.00 par common
WESTAMERICA BANCORPORATION (California)
No par common
WFS BANCORP, INC. (Kansas)
$.01 par common
WINSTAR COMMUNICATIONS, INC.
$.01 par common
WINSTON HOTELS INC.
$.01 par common
WSB BANCORP, INC. (Missouri)
$.01 par common
XENOVA GROUP PLC
American Depositary Receipts (Units expire 07–08–95)

Addition to the List of Foreign Margin Stocks

SINO LAND CO., LTD.
HK$1.00 par ordinary shares

By order of the Board of Governors of the Federal Reserve System, acting by its Director of the Division of Banking Supervision and Regulation pursuant to delegated authority (12 CFR 265.7(f)(10)), July 15, 1994.

William W. Wiles,
Secretary of the Board.

[FR Doc. 94–17731 Filed 7–22–94; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–NM–07–AD; Amendment 39–8976; AD 94–15–05]

Airworthiness Directives; Boeing Model 747–400 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 747–400 series airplanes, that requires various inspections and functional tests of the thrust reverser control and indication system, and correction of any discrepancy found. This amendment is prompted by an investigation to determine the controllability of Model 747 series airplanes following an in-flight thrust reverser deployment, which has revealed that, in the event of thrust reverser deployment during high-speed climb or during cruise, these airplanes could experience control problems. The actions specified by this AD are intended to ensure the integrity of the fail safe features of the thrust reverser system by preventing possible failure modes in the thrust reverser control system that can result in inadvertent deployment of a thrust reverser during flight.

DATES: Effective August 24, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 24, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jon Regimbal, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (206) 227–2687; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to

include an airworthiness directive (AD) that is applicable to all Boeing Model 747–400 series airplanes was published in the **Federal Register** on March 4, 1994 (59 FR 10336). That action proposed to require various inspections and functional tests of the thrust reverser control and indication system, and correction of any discrepancy found.

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

One commenter supports the proposed rule.

The Air Transport Association (ATA) of America, on behalf of one of its members, requests that the proposed repetitive inspections and tests be withdrawn since those actions will be added to the revised Maintenance Planning Document. The ATA acknowledges that the proposed repetitive actions may not be incorporated uniformly into every operator's maintenance program unless an AD is issued. Therefore, the ATA asks that another provision be added to the proposal as follows: Within 3 months after the effective date of the AD, revise the FAA-approved maintenance inspection program to include a functional test of the thrust reverser control and indication system at an initial 15-month interval. Inspections for damage to the bullnose seal would be conducted at an initial 1,500 flight hour interval. The AD would no longer be applicable for operators that have acceptably revised the maintenance program. Operators complying with this paragraph could use an alternative recordkeeping method in lieu of that required by section 91.417 or 121.380 of the Federal Aviation Regulations (14 CFR 91.417 or 121.380). The FAA would be defined as the cognizant Principal Maintenance Inspector (PMI) for operators electing this alternative.

The ATA believes that its suggestion should be adopted because the proposed repetitive actions will likely continue for as long as Model 747–400 series airplanes are operated. The ATA acknowledges that, while numerous AD's that require repetitive inspections continue for the life of the aircraft, it has either been shown that a satisfactory terminating action has not been developed or that service experience has shown that control of the inspections cannot be administered safely through an operator's maintenance program. The ATA states that its proposal is intended to minimize the impact of the AD process on an operator's maintenance program and cites other AD's that contain provisions similar to its proposal.

The FAA recognizes the ATA's concerns regarding the requirement for repetitive inspections and tests of the thrust reverser control and indication systems. However, the FAA finds that this requirement is necessary in order to provide an adequate level of safety by addressing the specified unsafe condition. Further, the FAA determined the required repetitive intervals based on the service history of similar components and on an analysis of the system design to predict the reliability of the system during the service life of the aircraft. Lengthening these intervals would only be appropriate when a sufficient sample of systems is allowed to operate through an entire system overhaul cycle; adjustments made prior to that time may not account for the effects of age and wear.

The FAA finds that addressing inspections and tests of the thrust reverser control and indication systems in a document that is not FAA-approved, such as a Maintenance Planning Document, will not ensure an acceptable level of safety with regard to the thrust reverser system. The ATA's suggested provision for accomplishment of the inspections and tests would permit each operator to determine whether and how often these actions should be conducted. In light of the severity of the unsafe condition, however, the FAA has determined that allowing this degree of operator discretion is not appropriate at this time. Therefore, this AD is necessary to ensure that operators accomplish the repetitive actions in a common manner and at common intervals.

One commenter requests that the proposed compliance time for the initial inspections and functional tests of the thrust reverser control and indication systems be extended from 6 to 12 months. This commenter offers no justification for the request. A second commenter indicates a false impression that a 12-month compliance time was proposed for these inspections and functional tests, and requests that the compliance time be expressed in terms of maintenance checks (specifically, "C" checks) or 15 months to coincide with regularly scheduled maintenance. (The FAA notes that no 12-month compliance time is specified for any requirement contained in the proposal.) Another commenter requests that the compliance times be specified in terms of maintenance check intervals ("A" checks, "C" checks, etc.). The commenter provides no justification for this request.

The FAA concurs partially. Since only two comments were received in response to the proposed 6-month compliance time, the FAA assumes that most operators are able to accommodate that proposed compliance time. In light of safety considerations, the FAA finds that a short initial compliance time for the inspections and functional tests is warranted. However, upon reconsideration, the FAA considers that extending the proposed compliance time by 3 additional months will not adversely affect safety, and will allow the required actions to be performed at a base during regularly scheduled maintenance where special equipment and trained maintenance personnel will be available, if necessary. Paragraphs (a)(2), (b)(2), and (c) of the final rule have been revised to specify a compliance time of 9 months for the initial inspections and functional tests of the thrust reverser control and indication systems.

The FAA does not agree that the compliance times specified in the final rule should be expressed in terms of maintenance check intervals. Since maintenance schedules vary from operator to operator, there would be no assurance that the actions will be accomplished during those maximum intervals. The FAA has determined that the compliance times, as specified in the final rule, represent the maximum intervals of time allowable for the affected airplanes to continue to operate prior to accomplishing the required actions without compromising safety.

Several commenters request that the proposed compliance time for repetitive inspections and functional tests of the thrust reverser control and indication systems [specified in paragraphs (a)(2), (b)(2), and (c) of the proposal] be extended from the proposed 15-month intervals to accommodate current or future scheduled "C" check maintenance intervals. Two commenters propose extension of the compliance time to 18-month intervals. One commenter indicates that Boeing Alert Service Bulletin 747–78A2115, Revision 1, dated March 10, 1994, recommends inspection intervals of 15 months or 5,000 flight hours.

The FAA concurs partially. As discussed previously, the FAA does not agree that these compliance times should be expressed in terms of maintenance check intervals. However, the FAA does concur with the commenters' requests to extend the proposed compliance time to 18 months. Extending the compliance time by 3 additional months will not adversely affect safety, and will allow the inspections and tests to be

performed at a base during regularly scheduled maintenance where special equipment and trained maintenance personnel will be available, if necessary. Paragraphs (a)(2), (b)(2), and (c) of the final rule have been revised to specify a compliance time of 18 months for repetitive inspections and functional tests of the thrust reverser control and indication systems.

Several commenters request that paragraph (d) of the proposed rule be revised to allow dispatch with a thrust reverser inoperative in accordance with the FAA-approved Master Minimum Equipment List (MMEL) if any discrepancy is found during the required inspections and tests. Several commenters point out that allowing dispatch with a thrust reverser inoperative will provide operators time to obtain parts and perform any necessary corrective action. One commenter explains that, without this change, the dispatch capability of the airplane would be downgraded for problems such as proximity sensor adjustments or auto restow chafing, which are not related to the integrity of the stow lock feature. One commenter requests 14-day dispatch relief.

The FAA concurs partially. The FAA agrees that an option for dispatch relief may be allowed in accordance with an operator's FAA-approved Minimum Equipment List (MEL). However, the FAA does not concur with the commenter's request for 14-day dispatch relief, since the MMEL specifies 10-day dispatch relief. The FAA has revised paragraph (d) of the final rule to provide an alternative for an airplane to be operated in accordance with existing provisions and limitations specified in the MEL, provided that no more than one thrust reverser on the airplane is inoperative. Three commenters request that the proposed interval of 1,000 hours time-in-service for repetitive inspections of the bullnose seal and tests of the lock mechanism and of the position switch module and cone brake be extended to coincide with operators' scheduled maintenance intervals and to reduce the economic impact of the proposed actions. One commenter suggests a repetitive interval of 1,300 hours time-in-service. The second commenter proposes that the interval be extended to 1,500 hours time-in-service. The third commenter recommends that these actions be required every 15 months or during "C" checks.

The FAA does not concur. The FAA based the repetitive inspection interval on data obtained from a reliability analysis submitted by Boeing prior to the issuance of the proposed rule. The FAA based the proposed interval of 1,000 hours time-in-service on that analysis and on the fact that affected operators conduct "A" checks at intervals of approximately 450 hours time-in-service. The FAA's intent was that the proposed inspections and tests be conducted during every other regularly scheduled "A" check, when the airplanes would be located at a base where special equipment and trained personnel would be readily available, if necessary. Further, the FAA has received no supporting technical analysis to supplement or refute the manufacturer's original reliability analysis. The FAA has determined that the compliance time, as proposed, represents the maximum interval of time allowable for the affected airplanes to accomplish the required repetitive actions without compromising safety.

One commenter requests that a statement be added to the proposed rule to indicate that the AD is considered to be interim action. The FAA acknowledges that this AD is interim action, as specified in the preamble to the proposed rule. The manufacturer has advised that it currently is developing a modification that will positively address the unsafe condition addressed by this AD, and that the modification should be available within approximately 24 months. Once this modification is developed, approved, and available, the FAA may consider additional rulemaking.

One commenter requests that the proposal be revised to require that operators report results from all inspections and tests, rather than only initial inspections and tests, and that these results be used to justify adjustments of inspection intervals or cancellation of inspections. The commenter offers no justification for this request. The FAA does not concur. The FAA is interested in the initial inspection results for the purpose of determining the present state of thrust reverser systems throughout the fleet. Since the actions required by this AD are considered to be interim action and terminating action is imminent, the FAA finds that gathering information for the purpose of adjusting inspection intervals and cancelling inspections is not needed and would pose an unnecessary burden on operators.

One commenter requests that the FAA review the probability calculations made by Boeing in determining that an unsafe condition exists. The commenter states that if the probability of inadvertent thrust reverser deployment is lower than 1 in 10^9 flight hours, an AD would not be required. The commenter points out two factors that would reduce controllability: deployment of an outboard thrust reverser, and deployment of that reverser during climb. Neither of these factors was accounted for in the probability study that Boeing presented to the operators. In addition, for Model 747–400 series airplanes equipped with General Electric CF6–80C2 engines, deployment of a single thrust reverser sleeve half is possible, and deployment of a single sleeve half was assumed to have the same effect on airplane controllability as full (both halves) deployment of a thrust reverser.

The FAA does not concur. The analysis presented by Boeing to the FAA states clearly that the effect of deployment of an inboard thrust reverser, or the effect of deployment of a single outboard thrust reverser sleeve, had not yet been quantified. At that time, Boeing and the FAA recognized the need for further study. However, in light of the experience gained during investigation of the accident discussed in the preamble to the proposed rule, Boeing had identified design deficiencies that needed to be addressed as soon as practicable to ensure the safety of the Model 747 fleet. The FAA did not determine that an AD was warranted solely on the basis that a particular probability threshold of 1 in 10^9 flight hours had been exceeded. Rather, the FAA based its determination on the fact that design deficiencies exist that could lead to an unsafe condition (reduction in or loss of controllability of the airplane), which can be compensated for by periodic inspections and tests until a design change becomes available.

Since the issuance of the proposal, Boeing has issued Revision 1 of Boeing Alert Service Bulletins 747–78A2112, dated March 7, 1994; 747–78A2113, dated March 10, 1994; and 747–78A2115, dated March 4, 1994. (The original issues of these service bulletins were cited in the proposal as the appropriate sources of service information.) These alert service bulletin revisions reclassify the service bulletin type from standard to alert, recommend certain revised compliance times to coincide with operators' maintenance schedules, and revise certain test procedures. The FAA has reviewed and approved these alert service bulletins and has revised the final rule to reflect these latest revisions as additional sources of service information. In addition, the FAA has revised the final rule to specify the appropriate paragraphs of the Accomplishment Instructions of these alert service bulletins for performing the actions required by this AD.

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

This is considered to be interim action until final action is identified for these airplanes, at which time the FAA may consider further rulemaking.

There are approximately 286 Model 747–400 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 39 Model 747–400 series airplanes powered by Pratt & Whitney PW4000 series engines of U.S. registry will be affected by this AD, that it will take approximately 48 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators of Model 747–400 series airplanes powered by Pratt & Whitney PW4000 series engines is estimated to be $102,960, or $2,640 per airplane.

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

Currently, there are no Model 747–400 series airplanes powered by General Electric CF6–80C2 series engines on the U.S. Register. However, should one of these airplanes be imported and placed on the U.S. Register in the future, it will require approximately 60 work hours to accomplish the required actions, at an average labor charge of $55 per work hour. Based on these figures, the total cost impact of this AD is estimated to be $3,300 per airplane.

Additionally, there are no Model 747–400 series airplanes powered by Rolls-Royce RB211–524G/H series engines on the U.S. Register at this time. However, should one of these airplanes be imported and placed on the U.S. Register in the future, it will require approximately 30 hours to accomplish the required actions, at an average labor charge of $55 per work hour. Based on these figures, the total cost impact of this AD is estimated to be $1,650 per airplane.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) 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:

94–15–05 Boeing: Amendment 39–8976. Docket 94–NM–07–AD.

Applicability: All Model 747–400 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To ensure the integrity of the fail safe features of the thrust reverser system, accomplish the following:

(a) For Model 747–400 series airplanes powered by Pratt & Whitney PW4000 series engines: Accomplish paragraphs (a)(1) and (a)(2) of this AD.

(1) Within 90 days after the effective date of this AD, perform an inspection to detect damage to the bullnose seal on the translating sleeve of the thrust reverser, and perform a test of the lock mechanism of the center locking actuator, in accordance with paragraphs III.C. and III.E. of the Accomplishment Instructions of Boeing Service Bulletin 747–78–2112, dated November 11, 1993; or paragraphs III.E. and III.H. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–78A2112, Revision 1, dated March 7, 1994. Repeat this inspection and test thereafter at intervals not to exceed 1,000 hours time-in-service.

(2) Within 9 months after the effective date of this AD, perform inspections and functional tests of the thrust reverser control and indication systems in accordance with paragraphs III.A., III.B., III.D., and III.F. through III.M. of the Accomplishment Instructions of Boeing Service Bulletin 747–78–2112, dated November 11, 1993; or paragraphs III.C., III.D., III.F., III.G., and III.I. through III.P. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–78A2112, Revision 1, dated March 7, 1994. Repeat these inspections and functional tests thereafter at intervals not to exceed 18 months.

(b) For Model 747–400 series airplanes powered by General Electric CF6–80C2 series engines: Accomplish paragraphs (b)(1) and (b)(2) of this AD.

(1) Within 90 days after the effective date of this AD, perform an inspection to detect damage to the bullnose seal on the translating sleeve of the thrust reverser, and a continuity test of the position switch module of the center drive unit (CDU) and a cone brake test of the CDU, in accordance with paragraphs III.B. and III.C. of the Accomplishment Instructions of Boeing Service Bulletin 747–78–2113, dated November 11, 1993; or paragraphs III.E. through III.G. of Boeing Alert Service Bulletin 747–78A2113, Revision 1, dated March 10, 1994. Repeat the inspection and tests thereafter at intervals not to exceed 1,000 hours time-in-service.

(2) Within 9 months after the effective date of this AD, perform inspections and functional tests of the thrust reverser control and indication systems in accordance with paragraphs III.A., III.D., III.F., III.G., III.H., and III.J. through III.M. of the Accomplishment Instructions of Boeing Service Bulletin 747–78–2113, dated November 11, 1993; or paragraphs III.D. and III.H. through III.N. of Boeing Alert Service Bulletin 747–78A2113, Revision 1, dated March 10, 1994. Repeat these inspections and functional tests thereafter at intervals not to exceed 18 months.

(c) For Model 747–400 series airplanes powered by Rolls-Royce RB211–524G/H series engines: Within 9 months after the effective date of this AD, and thereafter at intervals not to exceed 18 months, perform inspections and functional tests of the thrust reverser control and indication systems in accordance with paragraphs III.D. through III.K. of the Accomplishment Instructions of Boeing Service Bulletin 747–78–2115, dated October 28, 1993; or paragraphs III.D. through III.L. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–78A2115, Revision 1, dated March 4, 1994.

(d) If any of the inspections and/or functional tests required by this AD cannot be successfully performed, or if any discrepancy is found during those inspections and/or functional tests, accomplish either paragraph (d)(1) or (d)(2) of this AD.

(1) Prior to further flight, correct the discrepancy found, in accordance with Boeing Service Bulletin 747–78–2112, dated November 11, 1993, or Boeing Alert Service Bulletin 747–78A2112, Revision 1, dated March 7, 1994 (for Model 747–400 series airplanes powered by Pratt & Whitney PW4000 series engines); Boeing Service Bulletin 747–78–2113, dated November 11, 1993, or Boeing Alert Service Bulletin 747–78A2113, Revision 1, dated March 10, 1994 (for Model 747–400 series airplanes powered by General Electric CF6–80C2 series engines); or Boeing Service Bulletin 747–78–2115, dated October 28, 1993, or Boeing Alert Service Bulletin 747–78A2115, Revision 1, dated March 4, 1994 (for Model 747–400 series airplanes powered by Rolls-Royce RB211–524G/H series engines); as applicable. Or

(2) The airplane may be operated in accordance with the provisions and limitations specified in an operator's FAA-approved Minimum Equipment List (MEL), provided that no more than one thrust reverser on the airplane is inoperative.

(e) Within 10 days after performing each initial inspection and test required by this AD, submit a report of the inspection and/or test results, both positive and negative, to the FAA, Seattle Aircraft Certification Office (ACO), ANM–100S, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; fax (206) 227–1181. 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, Seattle 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.

(g) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(h) The actions shall be done in accordance with Boeing Service Bulletin 747–78–2112, dated November 11, 1993; Boeing Alert Service Bulletin 747–78A2112, Revision 1, dated March 7, 1994; Boeing Service Bulletin 747–78–2113, dated November 11, 1993; Boeing Alert Service Bulletin 747–78A2113, Revision 1, dated March 10, 1994; Boeing Service Bulletin 747–78–2115, dated October 28, 1993; or Boeing Alert Service Bulletin 747–78A2115, Revision 1, dated March 4, 1994; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) This amendment becomes effective on August 24, 1994.

Issued in Renton, Washington, on July 13, 1994.

S.R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–17593 Filed 7–22–94; 8:45 am]

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14 CFR Part 39

[Docket No. 93–NM–183–AD; Amendment 39–8977; AD 94–15–06]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, that currently requires inspecting to detect cracking in certain lower lobe lap joints, and repair, if necessary; reporting any findings of discrepancies; replacing certain countersunk fasteners with protruding head fasteners; and verifying that the airplanes do not have certain countersunk fasteners. This amendment requires inspection of an expanded area, deletion of the reporting requirement, and expansion of the applicability to include additional airplanes. This amendment is prompted by reports of cracking of the fuselage skin in certain areas and findings of additional countersunk fasteners. The actions specified by this AD are intended to prevent reduced structural integrity of the fuselage.

DATES: Effective August 24, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 24, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Steven C. Fox, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (206) 227–2777; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 90–01–07, amendment 39–6440 (55 FR 255, January 4, 1990), which is applicable to certain Boeing Model 747 series airplanes, was published in the **Federal Register** on February 3, 1994 (59 FR 5139). The action proposed to require inspection of an expanded area, deletion of the reporting requirement, and expansion of the applicability.

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

One commenter supports the proposed rule.

Two commenters request that proposed paragraph (e) be revised to reduce the area of inspection to coincide with the area specified in the service bulletin (Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992) referenced in the proposal as the appropriate source of service information. The FAA does not concur. An FAA investigation has revealed that countersunk fasteners may be installed in areas other than those specified in the referenced service bulletin. Therefore, the FAA has determined that a one-time inspection along the entire lap joint of the skin panel must be accomplished to positively confirm the exact location of these countersunk fasteners.

One commenter requests an extension to the proposed compliance time of 11,000 total landings to conduct the high frequency eddy current (HFEC) inspection required by paragraph (g) of the proposal. The commenter states that the compliance time should coincide with the time recommended in the service bulletin (Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992) referenced in the proposal as the appropriate source of service information. The compliance time in the service bulletin specifies that, for airplanes on which only the minimum number of countersunk fasteners have been installed, the HFEC inspection should commence at 20,000 total flight cycles. The commenter notes that for airplanes on which only the minimum number of countersunk fasteners have been installed, the

potential for widespread multi-site damage is significantly lessened than for airplanes on which more than the minimum number of countersunk fasteners have been installed.

The FAA does not concur with the commenter's request to extend the compliance time. In developing an appropriate compliance time for this action, the FAA considered the safety implications of any cracking in this area. The FAA acknowledges that cracking in the upper row of countersunk fasteners in the lap splice in the area adjacent to the wing-to-body fairing intersection may not result in catastrophic consequences; however, the FAA finds that any cracking in this area has the potential for developing into an unsafe condition. This AD is issued to address that unsafe condition, which may result in reduced structural integrity of the fuselage of the airplane as a result of cracking in these areas. Further, since cracking has been found in this area on in-service airplanes that had accumulated less than 20,000 total flight cycles, the FAA has determined that 11,000 total landings represent the maximum interval of time allowable wherein the inspection can reasonably be accomplished and an acceptable level of safety can be maintained.

One commenter requests clarification of the proposed compliance time for reinspection of previously modified lap joints. The commenter requests that the HFEC inspections required by proposed paragraph (k) commence from the time the lap joint was modified in accordance with AD 90–01–07, rather than from the time the lap joint is modified in accordance with proposed paragraph (j). The FAA finds that clarification is warranted. Paragraph (k) of the final rule has been revised to state that HFEC inspections are to be performed prior to the accumulation of 10,000 total landings following modifications (of locations where countersunk fasteners were found) accomplished in accordance with Boeing Service Bulletin 747–53A2312, dated June 12, 1989, Revision 1, dated March 29, 1990, or Revision 2, dated October 8, 1992, which includes modifications accomplished in accordance with AD 90–01–07 or in accordance with paragraph (j) of this AD.

Two commenters question the necessity for the inspections following modification of the lap joints required by proposed paragraph (k). One of these commenters does not see adequate justification for requiring these inspections since AD 90–01–07 terminated the inspections after accomplishment of the modification. The other commenter states that, since other lap joints are not required to be inspected following modification, this lap joint should not be inspected following modification. From these comments, the FAA infers that these commenters are requesting that the requirement to inspect following modification be deleted. The FAA does not concur. An FAA evaluation of currently available inspection techniques reveals that current technology may not be able to adequately detect cracking beneath protruding head fasteners. Further, in-service experience has demonstrated that cracking has gone undetected beneath these protruding head fasteners. Therefore, the FAA's intent in requiring these inspections following the modification are to detect any cracking that may develop after accomplishment of the modification and to repair any cracking prior to it adversely affecting the structural integrity of the fuselage of the airplane.

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

There are approximately 723 Boeing Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 183 airplanes of U.S. registry will be affected by this AD.

The inspections that were previously required by AD 90–01–07, and retained in this AD, take approximately 14 work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Based on these figures, the total cost impact of these inspection requirements of this AD on U.S. operators is estimated to be $140,910, or $770 per airplane, per inspection cycle.

The additional new inspections that are required by this AD will take approximately 82 work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Based on these figures, the total cost impact of these inspection requirements of this AD on U.S. operators is estimated to be $825,330, or $4,510 per airplane, per inspection cycle.

The modification required by this AD will take approximately 124 work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Required parts will be nominal in cost. Based on these figures, the total cost impact of the modification requirements of this AD on U.S. operators is estimated to be $1,248,060, or $6,820 per airplane.

Based on the above figures, the total cost impact of the inspection and modification requirements of this AD on U.S. operators is estimated to be $2,214,300, or $11,407 per airplane.

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

The FAA recognizes that the modification will require a large number of work hours to accomplish. However, the 20,000-landings compliance time specified in paragraph (j) of this AD should allow ample time for the modification of all countersunk fasteners locations to be accomplished coincidentally with scheduled major airplane inspection and maintenance activities, thereby minimizing the costs associated with special airplane scheduling.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) 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 39–6440 (55 FR 255, January 4, 1990), and by adding a new airworthiness directive (AD), amendment 39– , to read as follows:

94–15–06 BOEING: Amendment 39–8977. Docket 93–NM–183–AD. Supersedes AD 90–01–07, Amendment 39–6440.

Applicability: Model 747 series airplanes, having line numbers 201 through 814 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the fuselage, accomplish the following:

Restatement of Requirements of AD 90–01–07, Amendment 39–6440

(a) For airplanes having line numbers 201 through 765: Conduct a high frequency eddy current (HFEC) inspection to detect cracking of the lower lobe lap joints in the vicinity of the wing-to-body fairing, in accordance with Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; or Revision 1, dated March 29, 1990; or Revision 2, dated October 8, 1992; at the time specified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4) of this AD, as applicable. Repeat this inspection thereafter at intervals not to exceed 4,000 landings until the inspection required by paragraph (e) of this AD is accomplished.

(1) For airplanes that have accumulated less than 11,200 total landings as of February 5, 1990 (the effective date of AD 90–01–07): Prior to the accumulation of 11,000 total landings or within the next 1,000 landings after February 5, 1990, whichever occurs later.

(2) For airplanes that have accumulated 11,200 or more total landings but less than 15,201 total landings as of February 5, 1990 (the effective date of AD 90–01–07):

Within the next 1,000 landings after February 5, 1990, or prior to the accumulation of 15,500 total landings, whichever occurs earlier.

(3) For airplanes that have accumulated 15,201 or more total landings but less than 18,200 total landings as of February 5, 1990: Within the next 300 landings after February 5, 1990, or prior to the accumulation of 18,250 total landings, whichever occurs earlier.

(4) For airplanes that have accumulated 18,200 or more landings as of February 5, 1990: Within the next 50 landings after February 5, 1990.

(b) For airplanes having line numbers 201 through 765: Accomplish the requirements of paragraphs (b)(1) and (b)(2) of this AD.

(1) If any cracking is detected during the inspections required by paragraph (a) of this AD, prior to further flight, repair in accordance with Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; or Revision 1, dated March 29, 1990; or Revision 2, dated October 8, 1992.

(2) Prior to the accumulation of 20,000 total landings or within the next 3,000 landings after February 5, 1990 (the effective date of AD 90–01–07), whichever occurs later, modify the airplane by replacing countersunk fasteners in the upper row of the lower lobe lap joints in the vicinity of the wing-to-body fairing with protruding head fasteners, in accordance with the procedures described in the Boeing Alert Service Bulletin 747–53A2312, dated June 12, 1989; or Revision 1, dated March 29, 1990; or Revision 2, dated October 8, 1992.

(c) For purposes of complying with paragraphs (a) and (b) of this AD, the number of landings may be determined to equal the number of pressurization cycles where the cabin pressure differential was greater than 2.0 p.s.i.

(d) For Model 747SR airplanes only: Based on continued mixed operation of lower cabin differentials, the inspection and modification compliance times specified paragraphs (a) and (b) of this AD may be multiplied by a 1.2 adjustment factor.

New Requirements of this AD

(e) Prior to the accumulation of 11,000 total landings, or within 1,000 landings after the effective date of this AD, whichever occurs later, unless previously accomplished within the last 3,000 landings prior to the effective date of this AD, conduct a visual inspection to determine if countersunk fasteners have been installed in the area defined in either paragraph (e)(1) or (e)(2), as applicable, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992. Accomplishment of this inspection terminates the inspection requirements of paragraph (a) of this AD.

(1) For Model 747–100, –200, –300, –400, and 747SR series airplanes: From body stations (BS) 741 to 1000 at Stringers (S–)34L, S–34R, S–39L, S–39R, S–44L, and S–44R, and from BS 1480 to 1741 at S–34L, S–34R, S–40L, and S–40R.

(2) For Model 747SP series airplanes: From BS 520 to 1000 at S–34L, S–34R, S–39L, S–39R, S–44L, and S–44R, and from BS 1480 to 1741 at S–34L, S–34R, S–40L, and S–40R.

(f) If no countersunk fastener is found in the upper row of the lap splice during the inspection required by paragraph (e) of this AD, no further action is required by this AD.

(g) If any countersunk fastener is found in the upper row of the lap splice during the inspection required by paragraph (e) of this AD, prior to further flight, perform an HFEC inspection to detect cracking at all locations where countersunk fasteners were found, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992.

(h) If no cracking is detected during any inspection required by paragraphs (g), (h), and (k) of this AD, at any location where a countersunk fastener was found, repeat the inspection thereafter at intervals not to exceed 4,000 landings, in accordance with the procedures described in the Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992.

(i) If cracking is detected during any inspection required by paragraphs (g), (h), (i), and (k) of this AD, at any location where a countersunk fastener was found, prior to further flight, repair and modify that lap joint in accordance with Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992.

(j) Prior to the accumulation of 20,000 total landings or within 1,000 landings after the effective date of this AD, whichever occurs later, modify all locations where countersunk fasteners were found, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992. For purposes of complying with the requirements of this paragraph, locations that were previously modified in accordance with paragraph (b) of this AD do not need to be modified again.

(k) Prior to the accumulation of 10,000 total landings following modification of the locations where countersunk fasteners were installed in accordance with Boeing Service Bulletin 747–53A2312, dated June 12, 1989, or Revision 1, dated March 29, 1990, or Revision 2, dated October 8, 1992, perform an HFEC inspection at all locations where countersunk fasteners were found, and repeat this inspection thereafter at intervals not to exceed 4,000 landings, in accordance with the procedures described in Boeing Service Bulletin 747–53A2312, Revision 2, dated October 8, 1992.

(l) 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.

(m) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(n) The actions shall be done in accordance with Boeing Service Bulletin 747–53A2312, including the "ADDENDUM," Revision 2, dated October 8, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(o) This amendment becomes effective on August 24, 1994.

Issued in Renton, Washington, on July 13, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–17592 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 93–SW–16–AD; Amendment 39–8979; AD 94–15–08]

Airworthiness Directives; Robinson Helicopter Company Model R22 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to Robinson Helicopter Company Model R22 helicopters. This action requires an initial inspection and repetitive checks and visual inspections for corrosion and cracks on certain main rotor blades. This amendment is prompted by reports of chordwise cracks found in the main rotor blades. The actions specified in this AD are intended to prevent abnormal in-flight vibrations, failure of the main rotor blade, and subsequent loss of control of the helicopter.

DATES: Effective August 9, 1994.

Comments for inclusion in the Rules Docket must be received on or before September 23, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Assistant Chief Counsel, Attention: Rules Docket No. 93–SW–16–AD, 2601 Meacham Boulevard, Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Ms. Lirio Liu, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3229 East Spring Street, Long Beach, California 90806–2425, telephone (310) 988–5229, fax (310) 988–5210.

SUPPLEMENTARY INFORMATION: This amendment adopts a new airworthiness directive that is applicable to Robinson Helicopter Company Model R22 helicopters equipped with main rotor blades, part number (P/N) A016–2, with serial numbers (S/N) up to and including 7569 (all suffixes), that have over 500 hours time-in-service (TIS) or more than 1 year TIS. The manufacturer reports finding two main rotor blades with cracks caused by corrosion on the main rotor blade skins. The cracks started at the trailing edge on both the upper and lower surfaces and extended several inches in the chordwise direction. The FAA has determined that corrosion or cracks in the main rotor blade skins create an unsafe condition. This condition, if not corrected, could result in abnormal in-flight vibrations, failure of the main rotor blade, and subsequent loss of control of the helicopter.

The FAA has reviewed Robinson Helicopter Company Service Bulletin (SB) #72, dated March 29, 1993, that describes procedures for a visual pilot check for corrosion or cracks in the skin of the main rotor blade, after the onset of any unusual vibrations, or within 25 hours TIS; and, thereafter at intervals of 4 months TIS. After reviewing the available data, the FAA has determined that repetitive visual inspections should be performed by a mechanic at intervals of 100 hours TIS, and the repetitive visual owner/operator (pilot) checks should be performed at intervals of 25 hours TIS.

Since an unsafe condition has been identified that is likely to exist or develop on other Robinson Helicopter Company Model R22 helicopters of the same type design, this AD is being issued to prevent abnormal in-flight vibrations, failure of the main rotor blade, and subsequent loss of control of the helicopter. This AD requires an initial visual inspection by a certificated mechanic, (1) for main rotor blades that have less than 500 hours TIS and have been installed for less than 1 year, upon or prior to the accumulation of 525 hours TIS or upon or prior to the main rotor blades having been installed for 1 year, whichever is earlier, or (2) for main rotor blades with 500 or more hours TIS or that have been installed for 1 year or more within the next 25 hours TIS. The inspection threshold is 1 year and 500 hours TIS. Thereafter, inspections for corrosion and cracks are required at intervals of not more than 100 hours TIS, or before further flight after the onset of abnormal vibrations. This AD also requires repetitive checks for corrosion and cracks in the main rotor blade at intervals not to exceed 25 hours TIS. These checks may be performed by an owner/operator holding at least a private pilot certificate but must be documented in the aircraft records showing compliance with this AD in accordance with sections 43.11 and 91.417(a)(2)(v) of the Federal Aviation Regulations. These checks do not require the use of tools, precision measuring equipment, training, pilot logbook endorsements, or the use of technical data not contained in the AD. These 25 hours TIS checks are additional measures to ensure that a crack that is visible without the aid of a magnifying glass has not developed during the time between maintenance inspections. However, this AD does not require visual checks at intervals of 4 months as specified by the SB, dated March 29, 1993. Due to the criticality of the main rotor blades and the short compliance times, this rule must be issued immediately to correct an unsafe condition in aircraft.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this AD 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–SW–16–AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the

national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from 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.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) 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:

AD 94-15-08 Robinson Helicopter Company: Amendment 39-8979. Docket Number 93-SW-16-AD.

Applicability: Model R22 helicopters, equipped with main rotor blades, part number (P/N) A016-2, with serial numbers (S/N) up to and including 7569 (including any suffixes), certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent abnormal in-flight vibrations, failure of a main rotor blade (blade), and subsequent loss of control of the helicopter, accomplish the following:

(a) For blades that have less than 500 hours time-in-service (TIS) and have been installed on a helicopter for less than 1 year, visually inspect the blades' top and bottom skins for corrosion or cracks using a 5-power or higher magnifying glass in accordance with the applicable maintenance manual. Conduct this visual inspection upon or prior to the accumulation of 525 hours TIS or upon or prior to the blades being installed for 1 year, whichever occurs first.

(b) For blades that have 500 or more hours TIS or have been installed on a helicopter for 1 year or more, within the next 25 hours TIS visually inspect the blades' top and bottom skins for corrosion or cracks using a 5-power or higher magnifying glass in accordance with the applicable maintenance manual.

(c) After the initial visual inspection required by paragraph (a) or (b), conduct the following inspections and checks:

(1) Visually inspect the blades' top and bottom skins for corrosion or cracks using a 5-power or higher magnifying glass at intervals not to exceed 100 hours TIS from the last inspection required by this AD.

(2) Visually check the blades' top and bottom skins for corrosion or cracks at intervals not to exceed 25 hours TIS from the last check or inspection required by this AD. The visual checks required by this AD may be performed by an owner/operator holding at least a private pilot certificate, and must be documented in the aircraft records showing compliance with this AD, in accordance with sections 43.11 and 91.417(a)(2)(v) of the Federal Aviation Regulations.

(d) Before further flight after the onset of abnormal vibrations of the main rotor system, visually inspect the blades' top and bottom skins for corrosion or cracks using a 5-power or higher magnifying glass.

(e) If a suspected crack is found in a blade during the inspections or checks required by this AD, conduct a dye penetrant or equivalent FAA-approved inspection for crack verification.

(f) If any crack is found in the blade skins, replace the blade with an airworthy blade before further flight.

(g) If any corrosion is found in the blade skins, repair or replace the blade with an airworthy blade in accordance with the provisions of the maintenance manual.

Note: Robinson Helicopter Company Service Bulletin #72, dated March 29, 1993, pertains to this AD.

(h) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Los Angeles Aircraft Certification Office.

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

(i) Special flight permits to comply with this AD will not be issued.

(j) This amendment becomes effective on August 9, 1994.

Issued in Fort Worth, Texas, on July 14, 1994.

James D. Erickson,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 94-17996 Filed 7-22-94; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Parts 71 and 91

[Airspace Docket No. 92-AWA-2]

Establishment of the Billings Logan International Airport Class C Airspace Area, MT, and Revocation of the Billings Class D Airspace Area, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a Class C airspace area and revokes the Class D airspace area at the Billings Logan International Airport, Billings, MT. The Billings Logan International Airport is a public-use facility at which a Terminal Radar Service Area (TRSA) is currently in effect. The establishment of this Class C airspace area will require pilots to establish two-way radio communications with the air traffic control (ATC) facility providing air traffic services prior to entering the airspace and thereafter maintain those communications while within the Class C airspace area. Implementation of the Billings Logan International Airport Class C airspace area will promote the efficient control of air traffic and reduce the risk of midair collision in the terminal area.

EFFECTIVE DATE: 0901 UTC, September 15, 1994.

FOR FURTHER INFORMATION CONTACT: Norman W. Thomas, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9230.

SUPPLEMENTARY INFORMATION:

History

On April 22, 1982, the National Airspace Review (NAR) plan was published in the **Federal Register** (47 FR 17448). The plan encompassed a review of airspace use and procedural aspects of the ATC system. Among the main objectives of the NAR was the improvement of the ATC system by increasing efficiency and reducing complexity. In its review of terminal airspace, NAR Task Group 1-2

concluded that TRSA's should be replaced. Four types of airspace configurations were considered as replacement candidates, and Model B, the Airport Radar Service Area (ARSA) configuration, was recommended by a consensus of the task group.

The FAA published NAR Recommendation 1–2.2.1, "Replace Terminal Radar Service Areas with Model B Airspace and Service" in Notice 83–9 (48 FR 34286; July 28, 1983) proposing the establishment of ARSA's at the Robert Mueller Municipal Airport, Austin, TX, and the Port of Columbus International Airport, Columbus, OH. ARSA's were designated at these airports on a temporary basis by Special Federal Aviation Regulation No. 45 (48 FR 50038; October 28, 1983) to provide an operational confirmation of the ARSA concept for potential application on a national basis.

Following a confirmation period of more than a year, the FAA adopted the NAR recommendation and, on February 27, 1985, issued a final rule (50 FR 9252; March 6, 1985) defining ARSA airspace and establishing air traffic rules for operation within such an area.

Concurrently, by separate rulemaking action, ARSA's were permanently established at the Austin, TX, Columbus, OH, and the Baltimore/Washington International Airports (50 FR 9250; March 6, 1985). The FAA stated that future notices would propose ARSA's for other airports at which TRSA procedures were in effect.

A number of problems with the TRSA program were identified by the NAR Task Group. The task group stated that because of the different levels of service offered in terminal areas, users are not always sure of what restrictions or privileges exist or how to cope with them. According to the NAR Task Group, there is a shared feeling among users that TRSA's are often poorly defined, are generally dissimilar in dimensions, and encompass more area than is necessary or desirable. There are other users who believe that the voluntary nature of the TRSA does not adequately address the problems associated with nonparticipating aircraft operating in relative proximity to the airport and associated approach and departure courses. The consensus among the user organizations is that within a given standard airspace designation, a terminal radar facility should provide all pilots the same level of service and in the same manner, to the extent feasible.

Additionally, the NAR Task Group recommended that the FAA develop quantitative criteria for establishing ARSA's at locations other than those which were included in the TRSA replacement program. The task group recommended that these criteria include, among other things, traffic mix, flow and density, airport configuration, geographical features, collision risk assessment, and ATC capabilities to provide service to users. These criteria have been developed and are being published via the FAA directives system (Order 7400.2D).

Airspace Reclassification, which became effective September 16, 1993, discontinued the use of the term "airport radar service area" and replaced it with the designation "Class C airspace area." This change in terminology is reflected in this rule.

The FAA has established Class C airspace areas at 121 locations under a paced implementation plan to replace TRSA's with Class C airspace areas.

This rule establishes a Class C airspace area at a location which was identified as a candidate for an ARSA (a Class C airspace area) in the preamble to Amendment No. 71–10 (50 FR 9252).

The Billings Logan International Airport is a public-use airport with an operating control tower served by a Level II TRACON, at which a TRSA is in effect. A TRSA consists of the airspace surrounding a designated airport where ATC provides radar vectoring, sequencing, and separation for all aircraft operating under instrument flight rules (IFR) and for participating aircraft operating under visual flight rules (VFR). TRSA airspace and operating rules are not established by regulation, and participation by pilots operating in the TRSA under VFR is voluntary, although pilots are urged to participate. This level of service is known as Stage III and is provided at all locations identified as TRSA's.

The Billings Logan International Airport is a major terminal hub that primarily serves the States of Montana, Wyoming, and the Dakotas. Airport operations at Billings Logan International Airport consist primarily of large air carriers (turbine-powered), air freighters, corporate jets, air taxis (multi-engine turboprop and piston-engine aircraft), and general aviation (GA) itinerant and training (multi-engine and single-engine) aircraft. An extensive lifeguard (helicopter and fixed-wing) operation is based at Billings Logan International Airport. The availability of instrument approach aids at Billings Logan International Airport attracts military (United States Air Force units) and civil (Rocky Mountain College aviation curriculum) entities alike.

The terminal air traffic environment is basically unencumbered by terrain and special use airspace restrictions. Aircraft operating under VFR that transit the Billings terminal area normally do so on random, flight-specific routes. There are no major "established" VFR routes to be considered.

On June 21, 1988, the FAA published a final rule, "Transponder with Automatic Altitude Reporting Capability Requirement (Mode C)" (Amendment No. 91–203; 53 FR 23356), which, among other amendments, revised Section 91.24 of the Federal Aviation Regulations (14 CFR part 91). In pertinent part, that rule added Section 91.24(b)(5)(ii), effective December 30, 1990, which required aircraft operating in the airspace from the surface to 10,000 feet MSL within a 10-mile radius of any airport listed in newly designated Appendix D of part 91 to be equipped with an operable transponder with Mode C except when operating in the airspace below 1,200 feet above ground level outside of the airport traffic area. Logan International Airport, Billings, MT, and Hector International Airport, Fargo, ND, were the only airports listed. Aircraft which were not originally certificated with an engine-driven electrical system or which had not subsequently been certified with such a system installed, balloons, and gliders were excluded from this requirement. The preamble to this rule indicated that an airport would be considered as a candidate for this Mode C requirement if its annual enplaned passenger count exceeded 200,000. The preamble further stated that several airports exceeded the 200,000 annual enplaned passenger requirement, which had not been designated as, or planned for, a Class C airspace area (formerly ARSA) (including Billings, MT). The FAA examined the operations at this location and determined that the Mode C requirement should be established at Billings, MT, because this airport had experienced a significantly high number of passenger enplanements, and typically generated over 50,000 instrument operations per year.

On December 17, 1993, the FAA proposed to designate a Class C airspace area at the Billings Logan International Airport, MT (58 FR 65950). Interested parties were invited to participate in this rulemaking proceeding by submitting comments on the proposal to the FAA. No comments were received.

The Rule

These amendments to parts 71 and 91 of the Federal Aviation Regulations (14 CFR parts 71 and 91) establish a Class C airspace area at the Billings Logan International Airport and revoke the

Class D airspace area at Billings, MT. This action will remove Billings Logan International Airport as the only remaining airport under Appendix D, Section 2 of part 91, "airports at which the requirements of section 91.215(b)(5)(ii) apply." This action will not remove Appendix D, Section 2 of part 91. Billings Logan International Airport is a public airport with an operating control tower served by a Level II TRACON, at which a TRSA is in effect. The establishment of this Class C airspace area will require pilots to establish two-way radio communications with the ATC facility providing air traffic services prior to entering the airspace and thereafter maintain those communications while within the Class C airspace area. Implementation of the Class C airspace area will promote the efficient control of air traffic and reduce the risk of midair collision in the terminal area. The Class D airspace area is being revoked because Class C airspace is more restrictive (i.e., carries higher operational requirements) than Class D airspace. Therefore, the FAA is revoking the Billings, MT, Class D airspace area.

This action supports a goal of airspace reclassification—to simplify the airspace by eliminating overlapping airspace designations. The coordinates in this document are based on North American Datum 83. Except for editorial changes and the revocation of the Class D airspace area in Billings, MT, this amendment is the same as that proposed in the notice. Class C and Class D airspace designations are published in paragraphs 4000 and 5000, respectively, of FAA Order 7400.9A dated June 17, 1993, and effective September 16, 1993, which is incorporated by reference in 14 CFR 71.1 (58 FR 36298; July 6, 1993). The Class C airspace area listed in this document will be published subsequently in the Order and the Class D airspace area listed in this document will be removed subsequently from the Order.

Regulatory Evaluation Summary

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. In conducting these analyses, the FAA has determined that the final rule will generate benefits that justify its costs and is not "a significant regulatory action" as defined in the Executive Order and the Department of Transportation Regulatory Policies and Procedures. The final rule will not have a significant impact on a substantial number of small entities and will not constitute a barrier to international trade. These analyses, available in the docket, are summarized below.

Costs

The FAA has determined that the establishment of the Billings, MT, Class C airspace area at Logan International Airport will impose a one-time FAA administrative cost of $550 (1993 dollars). For the aviation community (aircraft operators and fixed-based operators), the final rule will impose only negligible costs. The potential costs of the Class C airspace area are discussed below.

For the Billings, MT, Class C airspace area, the FAA does not expect to incur any additional costs for ATC-staffing, training, or facility equipment. The FAA is confident that it can accommodate any additional traffic that will participate in radar services at the Class C airspace area through more efficient use of personnel at current authorized staffing levels. The FAA has trained its controller force in Class C airspace procedures during regularly scheduled briefing sessions routinely held at Billings. Thus, no additional training costs or equipment requirements are anticipated.

Establishment of Class C airspace throughout the country has made it necessary to revise sectional charts by removing existing airspace depictions and incorporating the new Class C airspace boundaries. The FAA currently revises these sectional charts every 6 months to reflect changes to the airspace environment.

Changes required to depict Class C airspace are made routinely during these charting cycles. The periodic changes to these charts are considered as routine operating expenses of the FAA. Thus, the FAA does not expect to incur any additional charting costs as a result of the establishment of the Billings Class C airspace area.

The FAA holds an informal public meeting at each proposed Class C airspace location. These meetings provide pilots with the best opportunity to learn about Class C airspace operating procedures. The routine expenses associated with these public meetings are incurred regardless of whether Class C airspace is ultimately established. Before the Billings, MT, Class C airspace area becomes effective, the FAA will distribute a "Letter To Airmen" to all pilots residing within 50 miles of the Class C airspace site that will explain the operation and airspace configuration of the Class C airspace. The "Letter to Airmen" cost will be approximately $550. This one-time negligible cost will be incurred upon the establishment of the Class C airspace area.

The FAA anticipates that some pilots who currently transit the terminal area without establishing radio communications or participating in Stage III services may choose to circumnavigate the Billings Class C airspace area. However, the FAA contends that these operators can circumnavigate the Class C airspace area without significantly deviating from their regular flight paths. They could remain clear of the Class C airspace area by flying above the ceiling (7,700 feet mean sea level (MSL)), under the outer floor (4,900 feet MSL), or just beyond the lateral boundaries. The FAA estimates that this final rule will have a negligible, if any, cost impact on nonparticipating GA aircraft operations because of the small deviations from current flight paths imposed on these operators.

The FAA assumes that nearly all aircraft operating in the vicinity of the Billings Class C airspace area already have Mode C transponders and two-way radio communications capability. All aircraft (except those without an electrical system, balloons, and gliders) flying in the vicinity of the Billings Logan International Airport have been required (under 14 CFR Section 91.215(b)(5)(ii)) to have a Mode C transponder since December 30, 1990. Aircraft with Mode C transponders are usually equipped with two-way radio communications capability because radios are considered a more basic piece of avionics equipment. Since the cost of the Mode C requirement has already been addressed (Phase II of the Mode C Rule), it is not considered separately here in order to avoid double counting. This final rule will terminate the exemption from the Mode C requirement for gliders, balloons, and aircraft certified without engine-driven electrical systems. The overall economic impact will be very slight because there are not many of these aircraft, and ATC will have discretion to authorize deviations from the Mode C requirement for these aircraft on an individual basis.

The establishment of the Billings, MT, Class C airspace area is not expected to have any adverse impacts on the operations of the two small satellite airports (Laurel Municipal and Airpark

Oscars) located in the vicinity of Billings Logan International Airport. Pilots using these airports who do not have the required equipment can circumnavigate the Class C airspace area.

Benefits

The benefits of the Billings, MT, Class C airspace area will be enhanced aviation safety (lowered risk of midair collisions) and improved operational efficiency (higher air traffic controller productivity with existing resources). These potential benefits are difficult to quantify in monetary terms. Thus, such benefits have been analyzed in qualitative terms and are discussed below.

The NAR Task Group found that airspace users, especially GA users, encountered significant problems with terminal radar services. Different levels of radar service offered within terminal areas caused confusion about existing restrictions and privileges.

The standardization and simplification of operating procedures provided by Class C airspace is expected to alleviate many of these problems. All these benefits of the Class C airspace program, however, cannot be specifically attributed to individual airports. Rather, the benefits will result from overall improvements in terminal area ATC procedures realized as Class C airspace is implemented throughout the country. Establishment of the Billings, MT, Class C airspace area will contribute to these overall improvements.

The Billings, MT, Class C airspace area will lower the risk of midair collisions due to the increase of controlled airspace around Billings. Due to the proactive nature of the Class C airspace, the potential safety benefits are difficult to quantify in monetary terms. Traffic trends indicate an increased probability of a midair collision at Billings. The FAA is, therefore, establishing a Class C airspace area to prevent the development of a potential safety problem. These traffic trends consist of an increased volume of passenger enplanements and an increased complexity of aircraft operations. Complexity refers to air traffic conditions resulting from a mix of controlled and uncontrolled aircraft (pilots that are not in contact with ATC) that vary widely in speed and maneuverability. Enplanements at Billings, MT, for 1992 were 285,378 and are projected to be 397,000 by the year 2000. The number of aircraft operations at Billings is projected to increase from 112,000 in 1992 to 156,000 by the year 2000. The current volume of passenger enplanements and aircraft operations have made Billings, MT, eligible to become a Class C airspace area.

The FAA has conservatively estimated that the Class C airspace program will reduce the risk of midair collision by 50 percent at TRSA locations. This estimate is based on studies of near midair collision (NMAC) trends and radar tracking data from the original Columbus, OH, Class C airspace location and a review of the National Transportation Safety Board's (NTSB) midair collision accident records from January 1978 to October 1984. This 50 percent reduction translates into one midair collision prevented nationally every one to two years. The FAA currently values the prevention of a human fatality at $2.6 million and the prevention of a serious injury at $640,000. The quantifiable benefits of preventing a midair collision (based on the aforementioned reports) can range from less than $172,000 (1993 dollars), a minor non-fatal accident between two GA aircraft in which both aircraft need to be replaced, to $409 million (1993 dollars), the weighted average of a midair collision between an air carrier and a GA aircraft in which there are no survivors. The benefits of the Billings, MT, Class C airspace area and other designated airspace actions that require Mode C transponders cannot be separated from the benefits of the Mode C Rule and the Traffic Alert and Collision Avoidance System (TCAS) Rule. These airspace actions will share potential benefits totaling $4.4 billion (discounted 7 percent, 15 years, 1993 dollars).

International Trade Impact Assessment

This final rule will only affect U.S. terminal airspace operating procedures at and in the vicinity of Billings, MT. This final rule will not impose a competitive trade disadvantage on foreign firms in the sale of either foreign aviation products or services in the United States. In addition, domestic firms would not incur a competitive trade disadvantage in either the sale of United States aviation products or services in foreign countries.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Federal regulations. The RFA requires a Regulatory Flexibility Analysis if a final rule will have "a significant economic impact on a substantial number of small entities." FAA Order 2100.14A outlines the FAA's procedures and criteria for implementing the RFA. Small entities are independently owned and operated small businesses and small not for profit organizations. A substantial number of small entities is defined as a number that is 11 or more and which is more than one-third of the small entities subject to the final rule.

For the purpose of this evaluation, the small entities that will be potentially affected by this final rule are defined as fixed-base operators, airport operators, flight schools, agricultural operators, and other small aviation businesses operating in the vicinity of the Billings, MT, Class C airspace area. Sport aviation interests that may be affected include ballooning, parachuting, and gliding. Mandatory participation in the Class C airspace and special conditions around Billings could potentially impose certain costs (i.e., avionics equipment) on aircraft operators. The FAA will develop special procedures to accommodate these activities through local agreements between ATC and the affected organizations. For these reasons, the FAA does not expect any adverse impacts to occur as a result of the establishment of the Billings, MT, Class C airspace area.

The FAA has determined that this final rule will not result in a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required under the terms of the RFA.

Federalism Implications

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

The FAA has determined that this final rule to establish the Billings, MT, Class C airspace area will impose a negligible cost of $550 on the agency. When this cost estimate of $550 is added to the total cost of the Class C airspace program, the Class B airspace program, the Mode C Rule, and the TCAS Rule, the combined cost will still be less than their total potential safety benefits. This final rule will also generate benefits in the form of enhanced operational efficiency. The establishment of the Billings, MT, Class C airspace area will only impose negligible costs on the aviation

community. Thus, this final rule will be cost beneficial.

List of Subjects

14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

14 CFR Part 91

Aircraft, Air traffic control, Aviation safety.

Adoption of the Amendment

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

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9A, Airspace Designations and Reporting Points, dated June 17, 1993, and effective September 16, 1993, is amended as follows:

Paragraph 4000—Subpart C-Class C Airspace

* * * * *

ANM MT C Billings, MT [New]

Billings Logan International Airport
(Lat. 45°48′30″ N., long. 108°32′38″ W.)

That airspace extending upward from the surface to and including 7,700 feet MSL within a 5-mile radius of the Billings Logan International Airport; and that airspace extending upward from 4,900 feet MSL to and including 7,700 feet MSL within a 10-mile radius of the airport.

* * * * *

Paragraph 5000—Subpart D-Class D Airspace

* * * * *

ANM MT D Billings, MT [Removed]

* * * * *

PART 91—[AMENDED]

3. The authority citation for 14 CFR part 91 continues to read as follows:

Authority: 49 U.S.C. app. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970 Comp., p. 902; 49 U.S.C. 106(g).

4. Appendix D, Section 2 to part 91 is amended by removing the paragraph beginning "The requirements," and the entry for "Billings, MT (Logan International Airport)".

Issued in Washington, DC, on July 15, 1994.

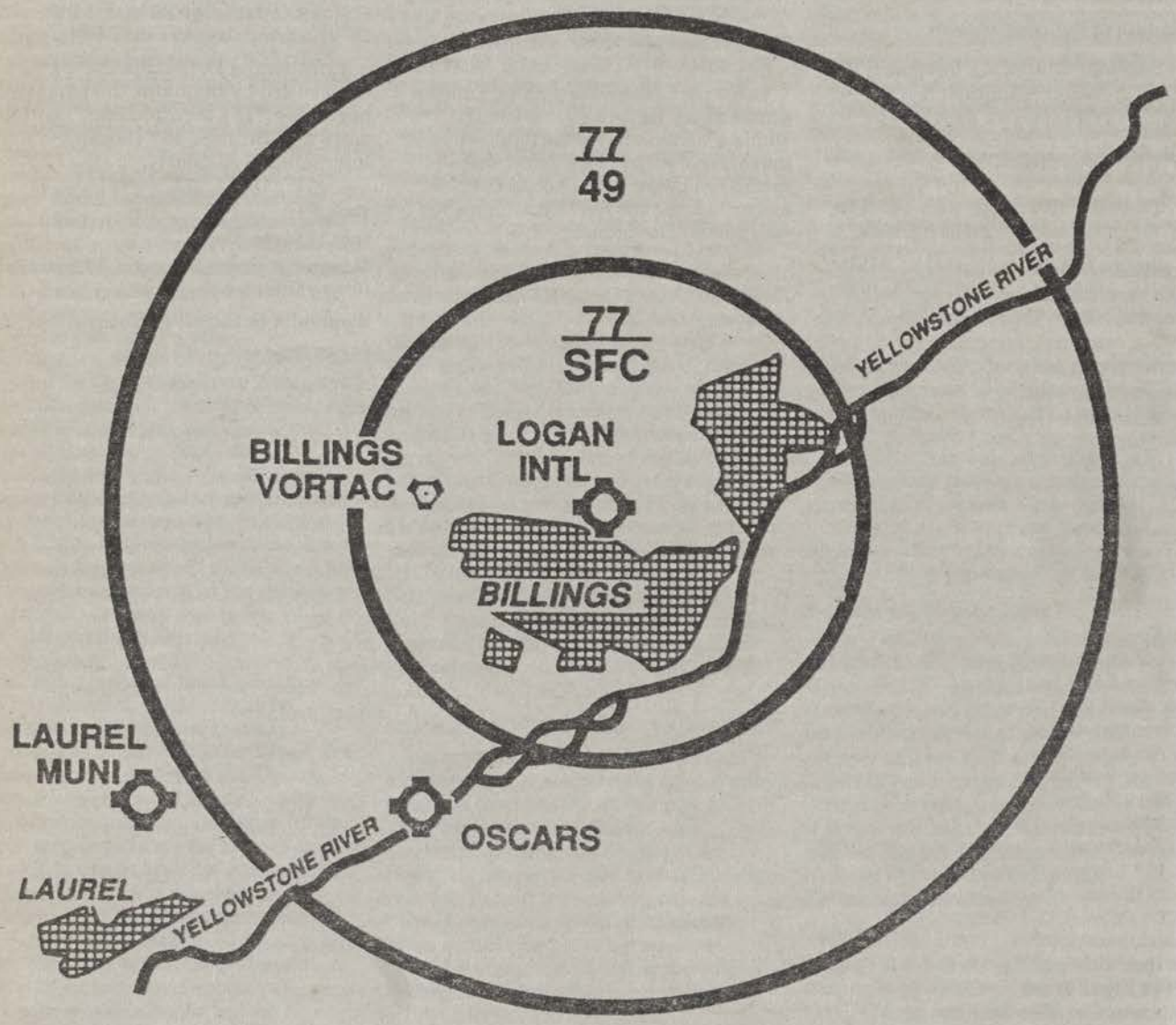
Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

Appendix to the Final Rule

BILLING CODE 4910–13–U

BILLINGS MONTANA
CLASS C AIRSPACE AREA
BILLINGS LOGAN INTERNATIONAL AIRPORT
AIRPORT ELEVATION 3649 FEET MSL
(NOT TO BE USED FOR NAVIGATION)



Prepared by the
FEDERAL AVIATION ADMINISTRATION
Cartographic Standards Branch
ATP-220

[FR Doc. 94–17998 Filed 7–22–94; 8:45 am]
BILLING CODE 4910–13–C

14 CFR Part 91

[Docket No. 26142; Amdt. No. 91-240]

RIN 2120-AD75

Temporary Restriction of Instrument Approaches and Certain Visual Flight Rules Operations in High Barometric Weather Conditions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: On April 12, 1994, the Federal Aviation Administration (FAA) issued a final rule amending the Federal Aviation Regulations (FAR) governing temporary flight restrictions (59 FR 17450; April 12, 1994). This action corrects an error concerning the intended placement within the FAR of the new section governing temporary restrictions of instrument approaches and certain visual flight rules operations in high barometric weather conditions by creating a new § 91.144 and deleting § 91.92.

EFFECTIVE DATE: May 12, 1994.

FOR FURTHER INFORMATION CONTACT: Larry Youngblut, Regulations Branch (AFS-240), Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, Telephone: (202) 267-3755.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 1994, the FAA issued a final rule amending the FAR governing temporary flight restrictions (59 FR 17450; April 12, 1994; Federal Register Document 94-8775) by adding § 91.92. The FAA intended to put the new section with other regulations governing temporary flight restrictions. However, §§ 91.27 through 91.99 are reserved. Other flight restrictions are contained in §§ 91.137 through 91.143. This action corrects the error by redesignating § 91.92 as new § 91.144.

This document corrects the preamble to the final rule published on April 12, 1994 (59 FR 174501) by replacing every reference to § 91.92 with the new § 91.144.

Accordingly, the Federal Register document FR Doc. 94-8775, which was published on April 12, 1994, at 59 FR 17450, is corrected as follows:

PART 91—[CORRECTED]

On page 17452 in the third column, in amendatory instruction 2, § 91.92 should be correctly designated as § 91.144, and the section heading is correctly added to read as follows:

2. Section 91.144 is added to read as follows: § 91.144 Temporary restriction on flight operations during abnormally high barometric pressure condition.

* * * * *

Issued in Washington, DC on July 19, 1994.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

[FR Doc. 94-17997 Filed 7-22-94; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8556]

RIN 1545-AP70

Computation and Characterization of Income and Earnings and Profits Under the Dollar Approximate Separate Transactions Method of Accounting (DASTM)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final Income Tax Regulations relating to the computation and characterization of income or earnings and profits under the dollar approximate separate transactions method of accounting (DASTM). These regulations are issued under section 985 of the Internal Revenue Code of 1986 (Code), which was added to the Code by the Tax Reform Act of 1986. These regulations provide guidance for taxpayers with a qualified business unit (QBU) operating in a hyperinflationary environment, i.e., a QBU that must use the dollar as its functional currency and determine income or earnings and profits under DASTM because its functional currency otherwise would be a hyperinflationary currency.

DATES: These regulations are effective July 25, 1994.

For dates of applicability, see the *Effective Dates* portion of the preamble under SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: Jacob Feldman or Teresa B. Hughes of the Office of Associate Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, Attention: CC:CORP:T:R (INTL-29-91) (202-622-3870, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulation has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1545-1051. The estimated annual burden per respondent varies from 45 minutes to 1¾ hours, depending on individual circumstances, with an estimated average of 1¼ hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer PC:FP, Washington, DC 20224, and to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Background

On July 17, 1991, proposed amendments to § 1.985-3 were published in the **Federal Register** at 56 FR 32525. In addition, conforming changes were proposed to §§ 1.904-4, 1.954-2T, 1.985-0, 1.985-1, and 1.985-2. A public hearing was held on September 13, 1991. A number of comments, which are discussed below, were received on issues raised by the proposed regulations. After consideration of these comments, the regulations are adopted as a Treasury decision with the modifications described below.

Explanation of Provisions

Under § 1.985-1(b)(2)(ii)(A), a QBU that would otherwise have a hyperinflationary currency as its functional currency must use the dollar as its functional currency and must compute income or earnings and profits using DASTM for taxable years beginning after August 24, 1994. Any change in a QBU's method of accounting which results from the QBU's adoption of DASTM under these final regulations shall be deemed to have been made with the consent of the Commissioner.

Some commentators objected to the requirement that use of the dollar and DASTM be made mandatory for a QBU operating in a hyperinflationary environment. The suggestion that use of the dollar and DASTM should continue to be elective was not adopted because the use of a hyperinflationary functional currency and the profit and loss method

of accounting (P&L method) does not clearly reflect income.

Under the P&L method, income or loss is computed in the hyperinflationary currency and translated into dollars at the appropriate exchange rate for the accounting period. The P&L method distorts income and loss of a QBU with substantial depreciable assets. As the hyperinflationary currency depreciates with respect to the dollar, sales revenues (as measured in the hyperinflationary currency) increase; but depreciation and amortization deductions, which are based on hyperinflationary currency cost bases, remain constant. This results in an overstatement of income. Another distortion occurs with respect to income and expense derived from hyperinflationary financial assets and liabilities. For example, a QBU that borrows in hyperinflationary currency will incur and deduct a very high level of nominal interest expense, reflecting the lender's expectation that payment of interest and repayment of principal will be in devalued currency. However, under the P&L method, the offsetting exchange gain (relative to the dollar) on a QBU's hyperinflationary currency liabilities is deferred, causing the income of net borrowers to be understated.

In light of these distortions, use of a hyperinflationary functional currency and the P&L method by QBUs operating in a hyperinflationary environment is not appropriate. The regulations, therefore, generally require that QBUs operating in a hyperinflationary environment use the dollar and DASTM for future taxable years. Under § 1.985–1(b)(2)(ii)(B)(*2*), however, a taxpayer is not required to use DASTM to compute the income or loss or earnings and profits of a foreign corporation that is not a controlled foreign corporation. This exception is provided because minority shareholders of a foreign corporation may be unable to obtain the information required to apply DASTM. However, where the necessary information can be obtained, § 1.985–1(b)(2)(ii)(B)(*2*) provides that DASTM may be elected by a noncontrolled section 902 corporation under the procedural rules of § 1.985–2(c)(3).

Section 1.985–1(b)(2)(ii)(B)(*1*) clarifies the rule for determining the functional currency of a QBU branch of a foreign corporation when the foreign corporation has a non-dollar functional currency that is not hyperinflationary. If the QBU branch otherwise would have a hyperinflationary currency as its functional currency, the branch's functional currency is the functional currency of the foreign corporation.

The definition of hyperinflationary currency, now found in § 1.985–1(b)(2)(ii)(D), has been revised to clarify that the cumulative inflation rate during the thirty-six month base period is based on compounded inflation rates for the base period, and not on the sum of annual inflation rates. This change conforms the definition of hyperinflationary currency more closely to that applicable under United States generally accepted accounting principles (GAAP).

Section 1.985–3(a) provides that, for all purposes of subtitle A, DASTM must be used to compute gross income, income or loss, or earnings and profits (or deficits in earnings and profits). This provision is intended to clarify that DASTM gain or loss is part of gross income for purposes of the *de minimis* and full inclusion rules of section 954(b)(3) (A) and (B), and that DASTM gain or loss must be taken into account in applying the related party interest rules of section 954(b)(5), among other computations.

Section 1.985–3(a) further provides that, for open taxable years beginning after December 31, 1986, but before the effective date of these regulations, the taxpayer has the option to elect DASTM for any open taxable year (and all subsequent taxable years). Taxpayers previously using the P&L method that wish to elect DASTM for prior open years may do so by amending their tax returns for the applicable years and complying with the applicable election procedures of § 1.985–2, including the conformity requirements of § 1.985–2(d)(3), if applicable. Taxpayers that have elected DASTM and applied the rules under prior § 1.985–3 may elect to apply the rules under this revised § 1.985–3 by amending their tax returns for the applicable years. In either case, the Commissioner is deemed to consent.

If a taxpayer elects for prior years to change the functional currency of a QBU operating in a hyperinflationary environment to the dollar, it must make the adjustments described in § 1.985–5 (or § 1.985–5T, if applicable) if the year of change begins after 1987, or the adjustments described in § 1.985–6 (or § 1.985–6T, if applicable) if the year of change begins in 1987. The adjustments described in § 1.985–5 (or § 1.985–5T, if applicable) must be included in income in the taxable year prior to the year of change unless that prior taxable year is closed. In that case, the adjustments must be included in income in the year of change.

Certain countries with hyperinflation require taxpayers to make adjustments to the balance sheet under a system of monetary correction with respect to fixed assets and capital, with corresponding adjustments to the profit and loss statement. Under U.S. GAAP, these adjustments are reversed. Section 1.985–3(b)(2) and § 1.985–3(d)(2)(ii) have been clarified to require reversal of monetary correction adjustments required by local accounting principles.

Taxpayers suggested that they should be permitted to translate certain financial assets and liabilities at the period-end exchange rate, rather than at the average exchange rate for the last translation period in order to conform the rules under § 1.985–3 to GAAP. To make it clear that the period-end exchange rate may be used, § 1.985–3(c)(6) has been amended to indicate that a spot exchange rate on the last day of the taxable period is a reasonable method, provided that it is consistently and used and conforms to the taxpayer's method of financial accounting.

Taxpayers requested guidance with respect to transactions described in section 988(c)(1) (B) and (C) denominated in a currency other than a QBU's hyperinflationary currency or the dollar (third currency transaction). In order to parallel the financial accounting rules for the administrative ease of taxpayers and the Service, § 1.985–3(c)(9) provides that taxpayers may use any reasonable method of accounting for third currency transactions so long as such method is consistent with their method of financial accounting.

Several commentators requested that the regulations provide a simpler method of allocating and apportioning DASTM gain or loss for small taxpayers. This suggestion has been adopted. Section 1.985–3(e)(2) provides that a taxpayer with a QBU having an adjusted basis in assets of $10 million or less (taking into account assets of related QBUs resident in the same country) may elect to allocate DASTM gain or loss ratably to all items of the QBU's gross income (determined prior to adjustment for DASTM gain or loss). Thus, for purposes of the foreign tax credit, DASTM gain or loss is allocated on the basis of the relative amounts of gross income in each separate category described in section 904(d). Similarly, for purposes of section 952, DASTM gain or loss is allocated to subpart F income in a separate category based on the ratio of gross subpart F income in the separate category to total gross income in that category. Commentators also requested a simpler method for taxpayers with one or two section 904(d) separate categories (or a *de minimis* amount in a second category).

This suggestion was not adopted because the allocation rules in § 1.985–3(e)(3) more accurately reflect the income of large taxpayers.

The prior final regulations under § 1.985–3 provided for the allocation of DASTM gains and losses to section 904(d) separate categories based on foreign source gross income in each category. There was no attempt to identify DASTM gain or loss with specific assets or liabilities. However, in the proposed regulations under § 1.985–3, DASTM gain or loss was identified with specific assets and was directly allocated to specific section 904(d) separate categories based on the income those assets would generate. With respect to liabilities, the proposed regulations provided that DASTM gain or loss should be allocated to the section 904(d) separate categories in the same manner as the allocation and apportionment of interest expense. The proposed regulations applied this method of allocation to all liabilities.

Some comments suggested that DASTM gain or loss on certain non-interest-bearing liabilities, particularly short-term non-interest-bearing trade payables, should be directly allocated to the same section 904(d) separate category as the income produced by the purchased good or service to which the payable relates. The suggested rationale for this approach is that in a hyperinflationary environment the purchase price for deferred payment of goods or services reflects a premium for inflation expected to occur prior to payment. This overstated purchase price is reflected in cost of goods sold, distorting the taxpayer's income in the pertinent section 904(d) separate category. Therefore, in order to compensate for this distortion, commentators recommended adjusting cost of goods sold by the DASTM gain on the trade payable.

In response to this suggestion, § 1.985–3(e) now provides different rules for allocating and apportioning DASTM gain or loss with respect to interest-bearing liabilities (under § 1.985–3(e)(3)(vii)) and non-interest-bearing liabilities (under § 1.985–3(e)(3)(viii)). Section 1.985–3(e)(3)(vii)(A) now provides that the amount of DASTM gain on interest-bearing liabilities reduces interest expense generated by such liabilities; any DASTM gain in excess of interest expense is sourced or otherwise classified in the same manner that interest expense is allocated and apportioned. Any DASTM loss on interest-bearing liabilities is allocated and apportioned in the same manner that interest expense is allocated and apportioned under § 1.861–9T (without regard to the exceptions to fungibility in § 1.861–10T).

Section 1.985–3(e)(3)(vii)(B) provides rules with respect to the allocation of DASTM gain or loss on debt that gives rise to related person interest expense under section 954(b)(5). Section 954(b)(5) requires that related person interest expense must first be allocated to foreign personal holding company income that is passive income to the extent thereof and therefore to the section 904(d)(1)(A) separate category for passive income for purposes of the foreign tax credit limitation. To prevent distortion, any DASTM gain or loss arising from such related person debt must also be allocated for purposes of sections 904 and 952 in the same manner that the related person interest expense of that debt is required to be allocated under the rules of section 954(b)(5).

One commentator suggested that, in applying the modified gross income method under § 1.861–9T(j) to allocate and apportion the interest expense of a controlled foreign corporation, the gross income in each section 904(d) separate category should first be adjusted by the amount of DASTM gain or loss allocated to assets under § 1.985–3(e)(3)(v). Section 1.985–3(e)(3)(vii)(C) of the final regulations adopts this suggestion and requires that, before applying the modified gross income method under § 1.861–9T(j), an adjustment to gross income must be made for DASTM gain or loss attributed to assets under § 1.985–3(e)(3)(v) and DASTM gain or loss on short-term, non-interest-bearing trade payables under § 1.985–3(e)(3)(viii)(A).

In accordance with comments described above, § 1.985–3(e)(3)(viii)(A) provides that DASTM gain or loss on short-term, non-interest-bearing trade payables is allocated to the same category or type of gross income as the cost or expense to which the trade payable relates. For this purpose, a short-term, non-interest-bearing trade payable is a non-interest-bearing liability with a term of 183 days or less that is incurred to purchase property or services to be used by the obligor in an active trade or business. Under § 1.985–3(e)(3)(viii)(B), a similar rule has been provided for excise tax payables.

Under § 1.985–3(e)(3)(viii)(C)(*1*), DASTM gain or loss on other non-interest-bearing liabilities is allocated under § 1.985–3(e)(3)(ix) (i.e., on a gross income basis). However, under § 1.985–3(e)(3)(viii)(C)(*2*), the taxpayer may demonstrate to the satisfaction of the district director, or the district director may determine, that application of the gross income allocation method would result in a substantial distortion of income. In that case, DASTM gain or loss on such liabilities may be attributed to the same section 904(d) separate category or subpart F category as the transaction to which the liability relates.

The temporary regulations under § 1.954–2T have been amended in this Treasury Decision and will be finalized as part of a separate regulation.

An accompanying proposed regulation provides rules that would require a taxpayer to change from DASTM to the P&L method when the currency which otherwise would be its functional currency ceases to be hyperinflationary.

Effective Date

These regulations are effective for taxable years beginning after August 24, 1994. However, a taxpayer may elect to apply § 1.985–3 to any open taxable year beginning after December 31, 1986 (whether or not DASTM has been previously elected for some or all of those years). In order to make this election, the taxpayer must apply § 1.985–3 to that year and all subsequent years. In addition, each person that is related (within the meaning of § 1.985–3(e)(2)(vi)) to the taxpayer on the last day of any taxable year for which the election is effective and that would have been eligible to elect DASTM must also apply § 1.985–3 to that year and all subsequent years.

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 also has 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, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Jacob Feldman and Teresa B. Hughes of the Office of Associate Chief Counsel (International) within the Office of Chief Counsel, IRS. 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.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. In § 1.904–4, paragraph (j) is revised to read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(j) *Special rule for DASTM gain or loss.* Any DASTM gain or loss computed under § 1.985–3(d) must be allocated among the categories of income under the rules of § 1.985–3 (e)(2)(iv) or (e)(3). The rules of § 1.985–3(e) apply before the rules of section 904(d)(2)(A)(iii)(III) (the exception from passive income for high-taxed income).

* * * * *

Par. 3. In § 1.954–2T, paragraph (g)(2)(i) is revised to read as follows:

§ 1.954–2T Foreign personal holding company income; taxable years beginning after December 31, 1986 (temporary).

* * * * *

(g) * * *

(2) * * * (i) *Qualified business units using the dollar approximate separate transactions method.* Any DASTM gain or loss computed under § 1.985–3(d) must be allocated under the rules of § 1.985–3 (e)(2)(iv) or (e)(3).

* * * * *

Par. 4. Section 1.985–0 is amended by revising the table of contents entry for § 1.985–3 to read as follows:

§ 1.985–0 Outline of regulation.

* * * * *

§ 1.985–3 United States dollar approximate separate transactions method.

(a) Scope and effective date.
(b) Statement of method.
(c) Translation into United States dollars.
(d) Computation of DASTM gain or loss.
(e) Effect of DASTM gain or loss on gross income, taxable income, or earnings and profits.

* * * * *

Par. 5. Section 1.985–1 is amended as follows:

1. Revise the fifth, seventh, and eighth sentences of paragraph (a)(1).
2. Revise paragraph (b).
3. Revise paragraph (c)(6).
4. Add a new sentence to the end of paragraph (d)(1)(ii) and remove the concluding text at the end of paragraph (d)(1).
5. The revisions and additions read as follows:

§ 1.985–1 Functional currency.

(a) * * * (1) * * * Section 1.985–3 sets forth the dollar approximate separate transactions method that certain QBUs must use to compute their income or loss or earnings and profits. * * * Section 1.985–5 provides adjustments that are required to be made upon a change in functional currency. Finally, § 1.985–6 provides transition rules for a QBU that uses the dollar approximate separate transactions method for its first taxable year beginning after December 31, 1986.

* * * * *

(b) *Dollar functional currency*—(1) *In general.* The dollar shall be the functional currency of a taxpayer or QBU described in paragraph (b)(1) (i) through (v) of this section regardless of the currency used in keeping its books and records (as defined in § 1.989(a)–1(d)). The dollar shall be the functional currency of—

(i) A taxpayer that is not a QBU (e.g., an individual);

(ii) A QBU that conducts its activities primarily in dollars. A QBU conducts its activities primarily in dollars if the currency of the economic environment in which the QBU conducts its activities is primarily the dollar. The facts and circumstances test set forth in paragraph (c)(2) of this section shall apply in making this determination;

(iii) Except as otherwise provided by ruling or administrative pronouncement, a QBU that has the United States, or any possession or territory of the United States where the dollar is the standard currency, as its residence (as defined in section 988(a)(3)(B));

(iv) A QBU that does not keep books and records in the currency of any economic environment in which a significant part of its activities is conducted. Whether a QBU keeps such books and records is determined in accordance with paragraph (c)(3) of this section; or

(v) A QBU that produces income or loss that is, or is treated as, effectively connected with the conduct of a trade or business within the United States.

(2) *QBUs operating in a hyperinflationary environment*—(i) *Taxable years beginning on or before August 24, 1994.* For taxable years beginning on or before August 24, 1994, see § 1.985–2 with respect to a QBU that elects to use, or is otherwise required to use, the dollar as its functional currency.

(ii) *Taxable years beginning after August 24, 1994.*—(A) *In general.* For taxable years beginning after August 24, 1994, except as otherwise provided in paragraph (b)(2)(ii)(B) of this section, any QBU that otherwise would be required to use a hyperinflationary currency as its functional currency must use the dollar as its functional currency and compute income or loss or earnings and profits under the rules of § 1.985–3.

(B) *Exceptions*—(*1*) *Certain QBU branches.* The functional currency of a QBU that otherwise would be required to use a hyperinflationary currency as its functional currency and that is a branch of a foreign corporation having a non-dollar functional currency that is not hyperinflationary shall be the functional currency of the foreign corporation. Such QBU's income or loss or earnings and profits shall be determined under § 1.985–3 by substituting the functional currency of the foreign corporation for the dollar.

(*2*) *Corporation that is not a controlled foreign corporation.* A foreign corporation (or its QBU branch) operating in a hyperinflationary environment is not required to use the dollar as its functional currency pursuant to paragraph (b)(2)(ii)(A) of this section if that foreign corporation is not a controlled foreign corporation as defined in section 957 or 953(c)(1)(B). However, a noncontrolled section 902 corporation, as defined in section 904(d)(2)(E), may elect to use the dollar (or, if appropriate, the currency specified in paragraph (b)(2)(ii)(B)(*1*) of this section) as its (or its QBU branch's) functional currency under the procedures set forth in § 1.985–2(c)(3).

(C) *Change in functional currency.* If a QBU is required to change its functional currency to the dollar under paragraph (b)(2)(ii)(A) of this section, or chooses or is required to change its functional currency to the dollar for any open taxable year (and all subsequent taxable years) under § 1.985–3(a)(2)(ii), the change is considered to be made with the consent of the Commissioner for purposes of § 1.985–4. A QBU changing functional currency must make the adjustments described in § 1.985–5 if the year of change (as defined in § 1.481–1(a)(1)) begins after 1987, or the adjustments described in

§ 1.985–6 if the year of change begins in 1987. The adjustments described in § 1.985–5 must be included in income in the taxable year prior to the year of change unless that prior taxable year is closed. In that case, the adjustments must be included in income in the year of change. No adjustments under section 481 are required solely because of a change in functional currency described in this paragraph (b)(2)(ii)(C).

(D) *Hyperinflationary currency.* For purposes of sections 985 through 989, the term hyperinflationary currency means the currency of a country in which there is cumulative inflation during the base period of at least 100 percent as determined by reference to the consumer price index of the country listed in the monthly issues of the "International Financial Statistics" or a successor publication of the International Monetary Fund. If a country's currency is not listed in the monthly issues of "International Financial Statistics," a QBU may use any other reasonable method consistently applied for determining the country's consumer price index. Base period means, with respect to any taxable year, the thirty-six calendar months immediately preceding the first day of the current calendar year. For this purpose, the cumulative inflation rate for the base period is based on compounded inflation rates. Thus, if for 1991, 1992, and 1993, a country's annual inflation rates are 29 percent, 25 percent, and 30 percent, respectively, the cumulative inflation rate for the three-year base period is 110 percent [$((1.29 \times 1.25 \times 1.3) - 1.0 \times 1.10) \times 100 = 110\%$] and the currency of the country for the QBU's 1994 year is considered hyperinflationary.

(c) * * *

(6) *Effect of changed circumstances.* Regardless of any change in circumstances, a QBU may change its functional currency determined under this paragraph (c) only if the QBU complies with § 1.985–4 or the Commissioner's consent is considered to have been granted under § 1.985–2(d)(4) or § 1.985–3(a)(2)(ii).

(d) * * *

(1) * * *

(ii) * * * For purposes of this paragraph (d)(1), if a QBU of a foreign corporation has the dollar as its functional currency under paragraph (b)(2) of this section, the QBU's activities shall be considered dollar activities of the corporation.

* * * * *

Par. 6. Section 1.985–2 is amended by revising paragraphs (a) and (b)(2) to read as follows:

§ 1.985–2 Election to use the United States dollar as the functional currency of a QBU.

(a) *Background and scope*—(1) *In general.* This section permits an eligible QBU to elect to use the dollar as its functional currency for taxable years beginning on or before August 24, 1994. An election to use a dollar functional currency is not permitted for a QBU other than an eligible QBU. Paragraph (b) of this section defines an eligible QBU. Paragraph (c) of this section describes the time and manner for making the dollar election and paragraph (d) of this section describes the effect of making the election. For the definition of a QBU, see section 989(a). See § 1.985–1(b)(2)(ii) for rules requiring a QBU to use the dollar as its functional currency in taxable years beginning after August 24, 1994.

(2) *Exception.* Pursuant to § 1.985–1(b)(2)(ii)(B)(*2*), the rules of paragraph (c)(3) of this section shall apply with respect to the procedure required to be followed by a noncontrolled section 902 corporation as defined in section 904(d)(2)(E) to elect the dollar as its (or its QBU branch's) functional currency and the application of § 1.985–3.

(b) * * *

(2) *Hyperinflationary currency.* See § 1.985–1(b)(2)(ii)(D) for the definition of hyperinflationary currency.

* * * * *

Par. 7. Section 1.985–3 is revised to read as follows:

§ 1.985–3 United States dollar approximate separate transactions method.

(a) *Scope and effective date*—(1) *Scope.* This section describes the United States dollar (dollar) approximate separate transactions method of accounting (DASTM). For all purposes of subtitle A, this method of accounting must be used to compute the gross income, taxable income or loss, or earnings and profits (or deficit in earnings and profits) of a QBU (as defined in section 989(a)) that has the dollar as its functional currency pursuant to § 1.985–1(b)(2).

(2) *Effective date*—(i) *In general.* This section is effective for taxable years beginning after August 24, 1994.

(ii) *DASTM prior-year election.* A taxpayer may elect to apply this section to any open taxable year beginning after December 31, 1986 (whether or not DASTM has been previously elected for some or all of those years). In order to make this election, the taxpayer must apply § 1.985–3 to that year and all subsequent years. In addition, each person that is related (within the meaning of § 1.985–3(e)(2)(vi)) to the taxpayer on the last day of any taxable year for which the election is effective and that would have been eligible to elect DASTM must also apply these rules to that year and all subsequent years. A taxpayer that has not previously elected to apply DASTM to its prior taxable years may make the DASTM election for the pertinent years by filing amended returns and complying with the applicable election procedures of § 1.985–2. Form 8819 shall be attached to the return for the first year for which the election is to be effective. A taxpayer that has elected DASTM for prior taxable years and applied the rules under § 1.985–3 (as contained in the April 1, 1994 edition of 26 CFR part 1 (1.908 to 1.1000)) may amend its returns to apply the rules of this § 1.985–3. In either case, the DASTM election for prior taxable years shall be deemed to be made with the consent of the Commissioner.

(b) *Statement of method.* Under DASTM, income or loss or earnings and profits (or a deficit in earnings and profits) of a QBU for its taxable year shall be determined in dollars by—

(1) Preparing an income or loss statement from the QBU's books and records (within the meaning of § 1.989(a)–1(d)) as recorded in the QBU's hyperinflationary currency (as defined in § 1.985–1(b)(2)(ii)(D));

(2) Making the adjustments necessary to conform such statement to United States generally accepted accounting principles and tax accounting principles (including reversing monetary correction adjustments required by local accounting principles);

(3) Translating the amounts of hyperinflationary currency as shown on such adjusted statement into dollars in accordance with paragraph (c) of this section; and

(4) Adjusting the resulting dollar income or loss or earnings and profits (or deficit in earnings and profits) and, where necessary, particular items of gross income, deductible expense or other amounts, in accordance with paragraph (e) of this section to reflect the amount of DASTM gain or loss as determined under paragraph (d) of this section.

(c) *Translation into United States dollars*—(1) *In general.* Except as otherwise provided in this paragraph (c), the amounts shown on the income or loss statement, as adjusted under paragraph (b)(2) of this section, shall be translated into dollars at the exchange rate (as defined in paragraph (c)(6) of this section) for the translation period (as defined in paragraph (c)(7) of this section) to which they relate. However, if the QBU previously changed its functional currency to the dollar, and the rules of § 1.985–5 (or, if applicable,

§ 1.985–5T, as contained in the April 1, 1993 edition of 26 CFR part 1 (1.908 to 1.1000)) applied in translating its balance sheet amounts into dollars, then the spot exchange rate applied under those rules shall be used to translate any amount that would otherwise be translated at a rate determined by reference to a translation period prior to the change in functional currency. For example, depreciation with respect to an asset acquired while the QBU had a nondollar functional currency shall be translated into dollars at the spot rate on the last day of the taxable year before the year of change to a dollar functional currency, rather than at the rate for the period in which the asset was acquired.

(2) *Cost of goods sold.* The dollar value of cost of goods sold shall equal the sum of the dollar values of beginning inventory and purchases less the dollar value of closing inventory as these amounts are determined under paragraph (c)(3) of this section.

(3) *Beginning inventory, purchases, and closing inventory*—(i) *Beginning inventory.* Amounts representing beginning inventory shall be translated so as to obtain the same amount of dollars which represented such items in the closing inventory balance for the preceding taxable year.

(ii) *Purchases.* Amounts representing items purchased or otherwise first included in inventory during the taxable year shall be translated at the exchange rate for the translation period in which the cost of such items was incurred.

(iii) *Closing inventory*—(A) *In general.* Amounts representing items included in the closing inventory balance shall be translated at the exchange rate for the translation period in which the cost of such items was incurred. However, if amounts representing items included in the closing inventory balance are either valued at market or written down to market value, they shall be translated at the exchange rate existing on the last day of the taxable year. For purposes of determining lower of cost or market, items of inventory included in the closing inventory balance shall be translated into dollars at the exchange rate for the translation period in which the cost of such items was incurred and compared with market as determined in the QBU's hyperinflationary currency translated into dollars at the exchange rate existing on the last day of the taxable year.

(B) *Determination of translation period.* The method used to determine the translation period of amounts representing items of closing inventory for purposes of paragraph (c)(3)(iii)(A) of this section may be based upon reasonable approximations and averages, including rates of turnover, provided that the method is used consistently from year to year.

(4) *Depreciation, depletion, and amortization.* Amounts representing allowances for depreciation, depletion, or amortization shall be translated at the exchange rate for the translation period in which the cost of the underlying asset was incurred, except as provided in paragraph (c)(1) of this section.

(5) *Prepaid expenses or income.* Amounts representing expense or income paid or received in a prior taxable year shall be translated at the exchange rate for the translation period during which they were paid or received.

(6) *Exchange rate.* The exchange rate for a translation period may be determined under any reasonable method, provided that the method is consistently applied to all translation periods and conforms to the taxpayer's method of financial accounting. Reasonable methods include the average of beginning and ending exchange rates for the translation period and the spot rate on the last day of the translation period. Once chosen, a method for determining an exchange rate can be changed only with the consent of the district director.

(7) *Translation period*—(i) *In general.* Except as provided in paragraphs (c)(3)(iii)(B) and (c)(7)(ii) of this section, a translation period shall be each month within a QBU's taxable year.

(ii) *Exception.* A taxpayer may divide its taxable year into translation periods of equal length (with not more than one short period annually) that are less than one month. Once such a translation period is established, it may not be changed without the consent of the district director.

(8) *Dollar transactions*—(i) *In general.* Except as provided in paragraph (c)(8)(ii) of this section, no DASTM gain or loss is realized with respect to dollar transactions since the dollar is the functional currency of the QBU. Thus, the amount of any payment or receipt of dollars shall be reflected in the income or loss statement by the amount of such dollars. Also, the income or loss attributable to any transaction in which the amount that a QBU is entitled to receive (or is required to pay) by reason of such transaction is denominated in terms of the dollar, or is determined by reference to the value of the dollar, must be computed transaction by transaction. For example, if a foreign corporation lends 20 LC when 20 LC=$20 and is entitled to receive the LC equivalent of $20 at maturity plus a market rate of interest in dollars (or its LC equivalent), the loan is a dollar transaction. Similarly, this paragraph applies to any transaction that is determined to be a dollar transaction under section 988.

(ii) *Non-dollar functional currency.* If pursuant to § 1.985–1(b)(2)(ii)(B)(*1*), a QBU is required to use a functional currency other than the dollar, then that currency shall be substituted for the dollar in applying paragraph (c)(8)(i) of this section.

(9) *Third currency transactions*—A taxpayer may use any reasonable method of accounting for transactions described in section 988(c)(1) (B) and (C) that are denominated in, or determined by reference to, a currency other than the QBU's hyperinflationary currency or the dollar (third currency transactions) so long as such method is consistent with its method of financial accounting.

(10) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples:

Example 1. S is an accrual basis QBU that is required to use the dollar as its functional currency for its first taxable year beginning in 1994. S's hyperinflationary currency is the "h." During 1994, S accrues 100 dollars attributable to dollar-denominated sales. Because this is a dollar transaction under paragraph (c)(8) of this section, S's income or loss for 1994 shall reflect the 100 dollars (not the hyperinflationary value of such dollars when accrued).

Example 2. (i) S is an accrual basis QBU that is required to use the dollar as its functional currency for its first taxable year beginning in 1994. S's hyperinflationary currency is the "h." During 1994, S's sales amounted to 240,000,000h, its currently deductible expenses were 26,000,000h, and its total inventory purchases amounted to 100,000,000h. During January and February of 1994, S purchased depreciable assets for 80,000,000h and was allowed depreciation of 4,000,000h. At the end of 1994, S's closing inventory was 23,000,000h. No election to use a translation period other than the month is made, S had no transactions described in paragraph (c)(8) or (c)(9) of this section, and S's closing inventory was computed on the first-in, first-out inventory method. S's adjusted income or loss statement for 1994 is translated into dollars as follows:

	Hyperinflationary currency	Exchange rate	United States dollars
Sales			
(Jan.–Feb.)	10,000,000h	[1] 20:1	$500,000
(Mar.–Apr.)	20,000,000	21:1	952,381
(May.–June.)	50,000,000	22:1	2,272,727
(July)	50,000,000	23:1	2,173,913
(August)	20,000,000	26:1	769,231
(Sept.)	20,000,000	28:1	714,286
(Oct.)	20,000,000	29:1	689,655
(Nov.)	20,000,000	30:1	666,667
(Dec.)	30,000,000	31:1	967,742
Total	240,000,000h		9,706,602
Cost of Goods Sold			
Opening Inventory Purchases:			
(Jan.–Feb.)	0		0
(Mar.–Apr.)	15,000,000h	20:1	750,000
(May–June)	10,000,000	21:1	476,190
(July)	30,000,000	22:1	1,363,636
(August)	20,000,000	23:1	869,565
(Sept.)	10,000,000	26:1	384,615
(Oct.)	5,000,000	28:1	178,571
(Nov.)	5,000,000	29:1	172,414
(Dec.)	2,500,000	30:1	83,333
Less Closing Inventory	2,500,000	31:1	80,645
	(23,000,000)	([2])	(822,655)
	77,000,000h		3,536,314

[1] Where multiple months are indicated, the exchange rate applies for all months.
[2] See paragraph (ii) of this *Example*.

(ii) Since S uses the first-in, first-out inventory method, the closing inventory is assumed to consist of purchases made during the most recent translation period as follows:

	Hyperinflationary currency	Exchange rate	United States dollars
December	2,500,000h	31:1	$80,645
November	2,500,000	30:1	83,333
October	5,000,000	29:1	172,414
September	5,000,000	28:1	178,571
August	8,000,000	26:1	307,692
Total	23,000,000h		822,655
Non-Capitalized Expenses			
(Jan.–Feb.)	4,000,000h	20:1	200,000
(Mar.–Apr.)	2,500,000	21:1	119,048
(May–June)	2,500,000	22:1	113,636
(July)	2,000,000	23:1	86,957
(August)	3,000,000	26:1	115,385
(Sept.)	3,000,000	28:1	107,143
(Oct.)	2,000,000	29:1	68,966
(Nov.)	3,000,000	30:1	100,000
(Dec.)	4,000,000	31:1	129,032
Total	26,000,000h		1,040,167
Depreciation	4,000,000h	20:1	200,000
Total Cost & Expenses	107,000,000h		4,776,481
Operating Profit	133,000,000h		4,930,121

(d) *Computation of DASTM gain or loss*—(1) *Rule.* DASTM gain or loss of a QBU equals—

(i) The net worth of the QBU (as determined under paragraph (d)(2) of this section) at the end of the taxable year minus the net worth of the QBU at the end of the preceding taxable year; plus

(ii) The dollar amount of the items described in paragraph (d)(3) of this section and minus the dollar amount of the items described in paragraph (d)(4) of this section; minus

(iii) The amount of dollar income or earnings and profits (or plus the amount of any dollar loss or deficit in earnings and profits) as determined for the

taxable year pursuant to paragraphs (b)(1) through (b)(3) of this section.

(2) *Net worth.* Net worth of a QBU at the end of any taxable year equals the aggregate dollar amount representing assets on the QBU's balance sheet at the end of the taxable year less the aggregate dollar amount representing liabilities on the balance sheet. Notwithstanding any other provision in this paragraph (d)(2), the district director may adjust the amount of any asset or liability if a purpose for acquiring (or disposing of) the asset or incurring (or discharging) the liability is to manipulate the composition of the balance sheet for any period during the taxable year in order to avoid tax. The taxpayer shall determine net worth by—

(i) Preparing a balance sheet as of the end of the taxable year from the QBU's books and records (within the meaning of § 1.989(a)–1(d)) as recorded in the QBU's hyperinflationary currency;

(ii) Making adjustments necessary to conform such balance sheet to United States generally accepted accounting principles and tax accounting principles (including reversing monetary correction adjustments required by local accounting principles); and

(iii) Translating the asset and liability amounts shown on the balance sheet into United States dollars in accordance with paragraph (d)(5) of this section.

(3) *Positive adjustments.* The items described in this paragraph (d)(3) are dividend distributions for the taxable year and any items that decrease net worth for the taxable year but that generally do not affect income or loss or earnings and profits (or a deficit in earnings and profits). Such items include a transfer to the home office of a QBU branch and a return of capital. Except as otherwise provided by ruling or administrative pronouncement, the amount of a transfer to the home office of a QBU branch, a dividend, or a distribution that is a return of capital shall be translated into dollars at the exchange rate on the date the amount is paid.

(4) *Negative adjustments.* The items described in this paragraph (d)(4) are items that increase net worth for the taxable year but that generally do not affect income or loss or earnings and profits (or a deficit in earnings and profits). Such items include a capital contribution or a transfer from a home office to a QBU branch. Except as otherwise provided by ruling or administrative pronouncement, if the contribution or transfer is not in dollars, the amount of a capital contribution or transfer shall be translated into dollars at the exchange rate on the date made.

(5) *Translation of balance sheet.* Asset and liability amounts shown on the balance sheet in hyperinflationary currency (adjusted pursuant to paragraph (d)(2)(ii) of this section) shall be translated into dollars as provided in this paragraph (d)(5). However, if the QBU previously changed its functional currency to the dollar and the rules of § 1.985–5 (or, if applicable, § 1.985–5T, as contained in the April 1, 1993 edition of 26 CFR part 1 (1.908 to 1.1000)) applied in translating its balance sheet amounts into dollars, then the spot exchange rate applied under those rules shall be used to translate any amount that would otherwise be translated at a rate determined by reference to a translation period prior to the change in functional currency. For example, the basis of real property acquired while the QBU had a nondollar functional currency shall be translated into dollars at the spot rate on the last day of the taxable year before the year of change to a dollar functional currency, rather than at the rate for the period in which the cost was incurred.

(i) *Closing inventory.* Amounts representing items of inventory included in the closing inventory balance shall be translated in accordance with paragraph (c)(3)(iii) of this section.

(ii) *Bad debt reserves.* Amounts representing bad debt reserves shall be translated at the exchange rate for the last translation period for the taxable year.

(iii) *Prepaid income or expense.* Amounts representing expenses or income paid or received in a prior taxable year shall be translated in accordance with paragraph (c)(5) of this section.

(iv) *Hyperinflationary currency.* Amounts of the hyperinflationary currency and hyperinflationary demand deposit balances shall be translated at the exchange rate for the last translation period of the taxable year.

(v) *Certain assets*—(A) *In general.* Amounts representing plant, real property, equipment, goodwill, and patents and other intangibles shall be translated at the exchange rate for the translation period in which the cost of the asset was incurred.

(B) *Adjustment to certain assets.* Amounts representing depreciation, depletion, and amortization reserves shall be translated in accordance with paragraph (c)(4) of this section.

(vi) *Hyperinflationary debt obligations.* Except as provided in paragraph (d)(5)(vii) of this section, amounts representing a hyperinflationary debt obligation (including accounts receivable and payable) shall be translated at the exchange rate for the last translation period for the taxable year.

(vii) *Accrued foreign income taxes.* Amounts representing an accrued but unpaid foreign income tax shall be translated at the exchange rate on the last day of the last translation period of the taxable year of accrual.

(viii) *Certain hyperinflationary financial instruments.* Amounts representing any item described in section 988(c)(1)(B)(iii) (relating to forward contracts, futures contracts, options, or similar financial instruments) denominated in or determined by reference to the hyperinflationary currency shall be translated at the exchange rate for the last translation period for the taxable year.

(ix) *Other assets and liabilities.* Amounts representing assets and liabilities, other than those described in paragraphs (d)(5)(i) through (viii) of this section, shall be translated at the exchange rate for the translation period in which the cost of the asset or the amount of the liability was incurred.

(6) *Dollar transactions.* Notwithstanding any other provisions of this paragraph (d), where the amount representing an item shown on the balance sheet reflects a dollar transaction (described in paragraph (c)(8) of this section), the transaction shall be taken into account in accordance with that paragraph.

(7) *Third currency transactions.* A taxpayer may use any reasonable method of accounting for transactions described in section 988(c)(1)(B) and (C) that are denominated in, or determined by reference to, a currency other than the QBU's hyperinflationary currency or the dollar (third currency transactions), so long as such method is consistent with its method of financial accounting.

(8) *Character.* The amount of DASTM gain or loss determined under paragraph (d)(1) of this section shall be ordinary income or loss.

(9) *Example.* The provisions of this paragraph (d) are illustrated by the following example:

Example. (i) S, an accrual method calendar year foreign corporation, uses DASTM. S's hyperinflationary currency is the "h." S's net worth at December 31, 1993 was $3,246,495. For 1994, S's operating profit is 81,340,000h, or $2,038,200. S made a 5,000,000h distribution in April and again in December of 1994. S's translation period is the month. None of S's assets or liabilities reflect a dollar or third currency transaction described in paragraph (c)(8) or (c)(9) of this section, respectively. The exchange rate for each month in 1994 is as follows:

January	32h:$1

Feb.–Mar.	33:1	Aug.–Sept.	37:1
April–May	34:1	Oct.	38:1
June	35:1	Nov.	39:1
July	36:1	Dec.	40:1

(ii) At the end of 1994, S's assets and liabilities, as adjusted and translated pursuant to paragraphs (d)(2) and (d)(5) of this section, are as follows:

	Hyperinflationary	Exchange rate	U.S. dollar
Hyperinflationary cash on hand	40,000h	40:1	$1,000
Checking account	400,000	40:1	10,000
Accounts Receivable- 30 Day Accounts	20,000,000	[1] 40:1	500,000
60 Day Accounts	25,000,000	40:1	625,000
Inventory	65,000,000	([2])	2,500,000
Fixed assets—Property	90,000,000	27:1	3,333,333
Plant	190,000,000	([3])	6,785,714
Accumulated Depreciation	(600,000)	([3])	(21,428)
Equipment	10,000,000	([4])	340,000
Accumulated Depreciation	(400,000)	([4])	(13,333)
Common Stock—Stock A	500,000	34:1	14,706
Stock B	400,000	26:1	15,385
Preferred Stock	1,000,000	32:1	31,250
C.D.s	5,000,000	40:1	125,000
Total Assets	406,340,000		14,246,627
Accounts Payable Long-term liabilities:	35,000,000	40:1	875,000
Liability A	150,000,000	40:1	3,750,000
Liability B	80,000,000	40:1	2,000,000
Liability C	30,000,000	40:1	750,000
Total Liabilities	295,000,000h		$7,375,000

[1] S ages its accounts receivable and groups them into two categories—those outstanding for 30 days and those outstanding for 60 days.
[2] Translated the same as closing inventory under paragraph (c)(3)(iii).
[3] The cost of S's plant was incurred in several translation periods. Therefore, the dollar cost and dollar depreciation reflect several translation rates.
[4] S has a variety of equipment. Therefore, S's dollar basis represents the sum of the hyperinflationary cost of each, translated according to the exchange rate for the translation period incurred.

(iii) The DASTM gain of S for 1994 is computed as follows:

Net worth—1994		$6,871,627
Less—Net worth—1993		$3,246,495
Plus—1994 Dividends;		
April	$149,254	
December	[1] 126,582	275,836
Less Operating Profit—1994		2,038,200
DASTM Gain		$1,862,768

[1] The exchange rates on the date of the April and December dividends were 33.5h:$1 and 39.5h:$1, respectively.

(iv) Thus, total profit = $2,038,200 + $1,862,768 = $3,900,968

(e) *Effect of DASTM gain or loss on gross income, taxable income, or earnings and profits*—(1) *In general.* For all purposes of subtitle A, the amount of DASTM gain or loss of a QBU determined under paragraph (d) of this section is taken into account by the QBU for purposes of determining the amount of its gross income, taxable income or loss, earnings and profits (or deficit in earnings and profits), and, where necessary, particular items of income, expense or other amounts. DASTM gain or loss is allocated under one of two methods. Certain small QBUs may elect the small QBU DASTM allocation described in paragraph (e)(2) of this section. All other QBUs must use the 9-step procedure described in paragraph (e)(3) of this section.

(2) *Small QBU DASTM allocation*—(i) *Election threshold.* A taxpayer may elect to use the small QBU DASTM allocation described in paragraph (e)(2)(iv) of this section with respect to a QBU that has an adjusted basis in assets (translated as provided in paragraph (d)(5) of this section) of $10 million or less at the end of any taxable year. In calculating the $10 million threshold, a QBU shall be treated as owning all of the assets of each related QBU (as defined in paragraph (e)(2)(vi) of this section) having its residence (as defined in section 988(a)(3)(B)) in the QBU's country of residence (related same-country QBU). For this purpose, appropriate adjustment shall be made to eliminate the double counting of assets created in transactions between related QBUs resident in the same country. For example, assume QBU–1, resident in country X, sells inventory to related QBU–2, also resident in country X, in exchange for an account receivable. For purposes of determining the assets of QBU–1 under this paragraph (e)(2)(i), the taxpayer shall take into account either the inventory shown on the books of QBU–2 or QBU–1's receivable from QBU–2 (but not both).

(ii) *Consent to election.* The election of the small QBU DASTM allocation or subsequent application of the rules of paragraph (e)(3) of this section due to an increase in the adjusted basis of the QBU's assets shall be deemed to have been made with the consent of the Commissioner. Once the election under paragraph (e)(2)(iii) of this section is

made, it shall apply for all years in which the adjusted basis of the assets of the QBU (and any related same-country QBU) is $10 million or less, unless revoked with the Commissioner's consent. If the adjusted basis of the assets of the QBU (and any related same- country QBU) exceeds $10 million at the end of any taxable year, the rules of paragraph (e)(3) of this section shall apply to that QBU (and any related same-country QBU) for such year and each subsequent year unless such QBU again qualifies, and applies for and obtains the Commissioner's consent, to use the small QBU DASTM allocation. However, if a QBU acquires assets with a principal purpose of avoiding the application of paragraph (e)(2)(iv) of this section, the Commissioner may disregard the acquisition of such assets.

(iii) *Manner of making election*—(A) *QBUs that are branches of United States persons.* For the first year in which this election is effective, in the case of a QBU branch of a United States person, a statement shall be attached to the United States person's timely filed Federal income tax return (taking extensions into account). The statement shall identify the QBU (or QBUs) for which the election is being made by describing its business and its country of residence, state the adjusted basis of the assets of the QBU (and any related same-country QBUs) to which the election applies, and include a statement that the election is being made pursuant to § 1.985–3(e)(2).

(B) *Other QBUs.* In the case of a QBU other than one described in paragraph (e)(2)(iii)(A) of this section, an election must be made in the manner prescribed in § 1.964–1. The statement filed with the Internal Revenue Service as required under § 1.964–1 must include the information required under paragraph (e)(2)(iii)(A) of this section.

(iv) *Effect of election.* If a taxpayer elects under this paragraph (e)(2) to use the small QBU DASTM allocation, DASTM gain or loss, as determined under paragraph (d) of this section, of a small QBU shall be allocated ratably to all items of the QBU's gross income (determined prior to adjustment for DASTM gain or loss). Therefore, for purposes of the foreign tax credit, DASTM gain or loss shall be allocated on the basis of the relative amounts of gross income in each separate category as defined in § 1.904–5(a)(1). In the case of a controlled foreign corporation (within the meaning of section 957 or 953(c)(1)(B)), for purposes of section 952, DASTM gain or loss shall be allocated to subpart F income in a separate category in the same ratio that the gross subpart F income in that category for the taxable year bears to its total gross income in that category for the taxable year.

(v) *Conformity.* If a person (or a QBU of such person) makes an election under this paragraph (e)(2) to use the small QBU DASTM allocation, then each QBU of any related person (as defined in paragraph (e)(2)(vi) of this section) that satisfies the threshold requirement of paragraph (e)(2)(i) of this section (after application of the aggregation rule of paragraph (e)(2)(i) of this section) shall be deemed to have made the election.

(vi) *Related person.* The term related person means any person with a relationship to the QBU (or to the United States or foreign person of which the electing QBU is a part) that is defined in section 267(b) or section 707(b).

(3) *DASTM 9-step procedure*—(i) *Step 1—prepare balance sheets.* The taxpayer shall prepare an opening and a closing balance sheet for the QBU for each balance sheet period during the taxable year. The balance sheet period is the most frequent period for which balance sheet data are reasonably available (but in no event less frequently than quarterly). The balance sheet period may not be changed without the consent of the district director. The balance sheets must be prepared under the principles of paragraph (d)(2) of this section.

(ii) *Step 2—identify certain assets and liabilities.* The taxpayer shall identify each item on the balance sheet that is described in section 988(c)(1)(B) or (C) and that would have been translated under paragraph (d)(5) of this section into dollars at the exchange rate for the last translation period for the taxable year (or the exchange rate on the last day of the last translation period of the taxable year in the case of an accrued foreign income tax liability).

(iii) *Step 3—characterize the assets.* The taxpayer shall characterize and group the assets identified in paragraph (e)(3)(ii) of this section (Step 2) according to the source and the type of income that they generate, have generated, or may reasonably be expected to generate by applying the principles of § 1.861–9T(g)(3) or its successor regulation (relating to characterization of assets for purposes of interest expense allocation). If a purpose for a taxpayer's business practices is to manipulate asset characterization or groupings, the district director may allocate or apportion DASTM gain or loss attributable to the assets. Thus, if a taxpayer that previously did not separately state interest on accounts receivable begins to impose an interest charge and a purpose for the change was to manipulate tax characterizations or groupings, then the district director may require that none of the DASTM gain or loss attributable to those receivables be allocated or apportioned to interest income.

(iv) *Step 4—determine DASTM gain or loss attributable to certain assets*—(A) *General rule.* The taxpayer shall determine the dollar amount of DASTM gain or loss attributable to assets in each group identified in paragraph (e)(3)(iii) of this section (Step 3) as follows:

$$[(bb+eb)\div 2]\times[er-br]$$

where

bb = the hyperinflationary currency adjusted basis of the assets in the group at the beginning of the balance sheet period.

eb = the hyperinflationary currency adjusted basis of the assets in the group at the end of the balance sheet period.

er = one dollar divided by the number of hyperinflationary currency units that equal one dollar at the end of the balance sheet period.

br = one dollar divided by the number of hyperinflationary currency units that equal one dollar at the beginning of the balance sheet period.

(B) *Weighting to prevent distortion.* If averaging the adjusted basis of assets in a group at the beginning and end of a balance sheet period results in an allocation of DASTM gain or loss that does not clearly reflect income, as might be the case in the event of a purchase or disposition of an asset that is not in the normal course of business, the taxpayer must use a weighting method that reflects the time the assets are held by the QBU during the translation period.

(C) *Example.* The provisions of this paragraph (e)(3)(iv) are illustrated by the following example:

Example. S is a foreign corporation that operates in the hyperinflationary currency "h" and computes its income or loss or earnings and profits under DASTM. S's adjusted basis in a group of assets described in section 988(c)(1)(B) or (C) that generate general limitation foreign source income (as characterized under paragraph (e)(3)(iii) of this section) at the beginning of the balance sheet period is 750,000h. S's basis in such assets at the end of the balance sheet period is 1,250,000h. The exchange rate at the beginning of the balance sheet period is $1 = 200h. The exchange rate at the end of the balance sheet period is $1 = 500h. The DASTM loss attributable to the assets described above is $3,000, determined as follows:

$$[(750{,}000h+1{,}250{,}000h)\div 2]\times[(\$1\div 500h)-(\$1\div 200h)]=(\$3000)$$

(v) *Step 5—adjust dollar gross income by DASTM gain or loss from assets.* The taxpayer shall adjust the dollar amount of the QBU's gross income (computed under paragraphs (b)(1) through (b)(3) of this section) generated by each group of assets characterized in paragraph (e)(3)(iii) of this section (Step 3) by the amount of DASTM gain or loss attributable to those assets computed under paragraph (e)(3)(iv) of this section (Step 4). Thus, if a group of assets, such as accounts receivable, generates both a category of income described in section 904(d)(1)(I) (relating to general limitation income) that is not foreign base company income as defined in section 954 and a DASTM loss under paragraph (e)(3)(iv) of this section (Step 4), the amount of the DASTM loss would reduce the amount of the QBU's gross income in that category. Similarly, if a group of assets, such as short-term bank deposits, generates both foreign personal holding company income that is passive income (described in sections 954(c)(1)(A) and 904(d)(1)(A)) and a DASTM loss under paragraph (e)(3)(iv) of this section (Step 4), the amount of the DASTM loss would reduce the amount of the QBU's foreign personal holding company income and passive income. See section 904(f) and the regulations thereunder in the case where that section would apply and DASTM loss attributable to a group of assets exceeds the income generated by such assets.

(vi) *Step 6—determine DASTM gain or loss attributable to liabilities*—(A) *General rule.* The taxpayer shall determine the dollar amount of DASTM gain or loss attributable to liabilities identified in paragraph (e)(3)(ii) of this section (Step 2), and described in paragraph (e)(3)(vi)(B) of this section as follows:

$$[(bl+el)\div 2]\times[br-er]$$

where

bl = the hyperinflationary currency amount of liabilities at the beginning of the balance sheet period.

el = the hyperinflationary currency amount of liabilities at the end of the balance sheet translation period.

br = one dollar divided by the number of hyperinflationary currency units that equal one dollar at the beginning of the balance sheet period.

er = one dollar divided by the number of hyperinflationary currency units that equal one dollar at the end of the balance sheet period.

(B) *Separate calculation.* The calculation shall be made separately for interest-bearing liabilities described in paragraph (e)(3)(vii) of this section (Step 7) and for each of the classes of non-interest-bearing liabilities described in paragraph (e)(3)(viii) of this section (Step 8).

(C) *Weighting to prevent distortion.* Where a distortion would result from averaging the amount of liabilities at the beginning and end of a balance sheet period, as might be the case where a taxpayer incurs or retires a substantial liability, the taxpayer must use a different method that more clearly reflects the average amount of liabilities weighted to reflect the time the liability was outstanding during the balance sheet period.

(vii) *Step 7—adjust dollar income and expense by DASTM gain or loss from interest-bearing liabilities*—(A) *In general.* The taxpayer shall apply the amount of DASTM gain on interest-bearing liabilities computed under paragraph (e)(3)(vi) of this section (Step 6) to reduce interest expense generated by such liabilities (*e.g.*, prior to the application of § 1.861–9T or its successor regulation). To the extent DASTM gain on such liabilities exceeds interest expense, it shall be sourced or otherwise classified in the same manner that interest expense is allocated and apportioned under § 1.861–9T or its successor regulation. The amount of DASTM loss on interest-bearing liabilities computed under paragraph (e)(3)(vi) of this section (Step 6) shall be allocated and apportioned in the same manner that interest expense is allocated and apportioned under § 1.861–9T or its successor regulation (without regard to the exceptions to fungibility in § 1.861–10T or its successor regulation). For purposes of this section, an interest-bearing liability is a liability that requires payment of periodic interest (whether fixed or variable), has original issue discount, or would have interest imputed under subtitle A.

(B) *Allocation of DASTM gain or loss from interest-bearing liabilities that generate related person interest expense.* DASTM gain or loss from interest-bearing liabilities that generate related person interest expense (as provided in section 954(b)(5)) shall be allocated for purposes of subtitle A (including sections 904 and 952) in the same manner that the related person interest expense of that debt is required to be allocated under the rules of section 954(b)(5) and § 1.904–5(c)(2).

(C) *Modified gross income method.* In applying the modified gross income method described in § 1.861–9T(j) or its successor regulation, gross income shall be adjusted for any DASTM gain or loss from assets as provided in paragraph (e)(3)(v) of this section (Step 5) and any DASTM gain or loss with respect to short-term, non-interest-bearing trade payables as provided in paragraph (e)(3)(viii)(A) of this section.

(viii) *Step 8—adjust dollar income and expense by DASTM gain or loss from non-interest bearing liabilities*—(A) *Short-term, non-interest-bearing trade payables.* The taxpayer shall allocate DASTM gain or loss on short-term non-interest-bearing trade payables for purposes of subtitle A (including sections 904 and 952) to the same category or type of gross income as the cost or expense to which the trade payable relates. For this purpose, a short-term, non-interest-bearing trade payable is a non-interest-bearing liability with a term of 183 days or less that is incurred to purchase property or services to be used by the obligor in an active trade or business.

(B) *Excise tax payables.* The taxpayer shall allocate DASTM gain or loss on excise tax payables for purposes of subtitle A (including sections 904 and 952) to the same category or type of gross income as would be derived from the activity to which the excise tax relates.

(C) *Other non-interest-bearing liabilities*—(*1*) *In general.* Except as provided in paragraphs (e)(3)(viii)(A), (e)(3)(viii)(B), and (e)(3)(viii)(C)(*2*) of this section, DASTM gain or loss on non-interest-bearing liabilities shall be allocated under paragraph (e)(3)(ix) of this section (Step 9).

(*2*) *Tracing if substantial distortion of income.* DASTM gains and losses on liabilities described in paragraph (e)(3)(viii)(C)(*1*) of this section may be attributed to the same section 904(d) separate category or subpart F category as the transaction to which the liability relates if the taxpayer demonstrates to the satisfaction of the district director, or it is determined by the district director, that application of paragraph (e)(3)(viii)(C)(*1*) of this section results in a substantial distortion of income.

(ix) *Step 9—allocate residual DASTM gain or loss.* If there is a difference between the net DASTM gain or loss determined under paragraphs (e)(3)(i) through (viii) of this section (Steps 1 through 8) and the DASTM gain or loss determined under paragraph (d) of this section, the amount of the difference must be allocated for purposes of subtitle A (including sections 904 and 952) to the QBU's gross income (computed under paragraphs (b)(1) through (3) of this section, as adjusted under paragraphs (e)(3)(i) through (viii) of this section (Steps 1 through 8)) on the basis of the relative amounts of each category or type of gross income.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. The authority citation for part 602 continues to read as follows:

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

Par. 9. Section 602.101(c) is amended by adding the following entries to the table in numerical order following to read as follows:

§ 602.101 OMB Control Numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control no.
* * *	*
1.985–3	1545–1051
* * *	*

Margaret Milner Richardson,
Commissioner of Internal Revenue.

Approved: June 28, 1994.

Leslie Samuels,
Assistant Secretary of the Treasury.

[FR Doc. 94–17570 Filed 7–22–94; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 80

Provision of Early Intervention Services to Eligible Infants and Toddlers With Disabilities and Their Families, and Special Education and Related Services to Children With Disabilities Within the Section 6 School Arrangements

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: Guidance is required for the Department of Defense (DoD) Section 6 School Arrangements and the Military Services pursuant to Section 6 of the Impact Aid Law of 1950, as amended (20 U.S.C. 241), as amended by Pub. L. 102–119, "Individuals with Disabilities Act (IDEA) Amendments of 1991." By statute, DoD must provide all substantive rights, protections and procedural safeguards, including due process procedures of IDEA, in the DoD Section 6 School Arrangements. This final rule provides guidance outlining the procedures for the provision of early intervention services for eligible children with disabilities ages birth to 2 (inclusive) and a free appropriate education and related services, for children with disabilities ages 3 to 21 (inclusive) enrolled in the DoD Section 6 School Arrangements.

EFFECTIVE DATE: July 25, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Hector O. Nevarez, Director, Section 6 Schools, on (703) 696–4373/4361.

SUPPLEMENTARY INFORMATION:

Background

On October 6, 1993, 58 FR 51996, the Office of the Secretary of Defense published an interim final rule (32 CFR part 80) that implemented the IDEA, as amended, in the Section 6 Schools and for eligible infants and toddlers. Today's final action, except for administrative amendments for clarity, does not differ from the interim final rule. This final rule reflects the change of the title of the Department of Defense organization formerly known as the Directorate for Industrial Security Clearance Review (DISCR). This organization is now named the Defense Office of Hearings and Appeals (DOHA).

Comments

Two comments were received from the public on the interim final rule.

1. *Comment:* State reason for release of records and set a time limit-usually six months from the date of signature that the release is signed.

Reply: The reason for release of records will be apparent in each case. Therefore, this recommendation has not been accepted. The final rule requires that the student activity for which the parental consent is being sought be specified. This necessarily involves stating the reason for parental consent. Because the final rule further provides that parental consent may be revoked at any time, a fixed time of expiration for that consent is unnecessary.

2. *Comment:* Why can't standardized test be used as part of the evaluation?

Reply: The final rule does not preclude the use of standardized tests. Under § 80.3(n), "basic tests" do not qualify as acceptable evaluative instruments. Standardized tests, however, are not included in the category of "basic tests."

Rulemaking Analyses

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR part 80 is not a significant regulation action. This final rule does not:

(1) Have an annual effect of the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Cause a serious inconsistency or other wise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Public Law 96–354, "Regulatory Flexibility Act"

It has been determined that this final rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it will not have a significant economic impact on a substantial number of small entities. The primary financial effect of the final rule will be a reduction in administrative costs and other burdens resulting from the simplification and clarification of policies.

Public Law 96–511, "Paperwork Reduction Act"

It has been determined that 32 CFR part 80 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520).

This final rule is issued to provide guidance, required by statute, with respect to (1) the implementation of the IDEA, as amended, in the DoD Section 6 Schools and (2) the provision of early intervention services to infants and toddlers who, but for their age, would be entitled to enroll in such Section 6 Schools. Section 6 School Arrangements are conducted by DoD pursuant to section 6 of Pub. L. 81–874, as amended, 20 U.S.C. 241, and Section 505(c) of Pub. L. 97–31, 20 U.S.C. 241 note.

List of Subjects in 32 CFR Part 80

Education of individuals with disabilities, Individuals with disabilities, Infants and children.

Accordingly, title 32, chapter I, subchapter C, is amended to revise part 80 to read as follows:

PART 80—PROVISION OF EARLY INTERVENTION SERVICES TO ELIGIBLE INFANTS AND TODDLERS WITH DISABILITIES AND THEIR FAMILIES, AND SPECIAL EDUCATION CHILDREN WITH DISABILITIES WITHIN THE SECTION 6 SCHOOL ARRANGEMENTS

Sec.
80.1 Purpose.
80.2 Applicability and scope
80.3 Definitions.
80.4 Policy.

80.5 Responsibilities.
80.6 Procedures.

Appendix A to Part 80—Procedures for the Provision of Early Intervention Services for Infants and Toddlers With Disabilities, Ages 0-2 (Inclusive), and Their Families

Appendix B to Part 80—Procedures for Special Educational Programs (Including Related Services) and for Preschool Children and Children With Disabilities (3-21 Years Inclusive)

Appendix C to Part 80—Hearing Procedures

Authority: 20 U.S.C. 1400 et seq.; 20 U.S.C. 241; 20 U.S.C. 241 note.

§ 80.1 Purpose.

This part:

(a) Establishes policies and procedures for the provision of early intervention services to infants and toddlers with disabilities (birth to age 2 inclusive) and their families, and special education and related services to children with disabilities (ages 3–21 inclusive) entitled to receive special educational instruction or early intervention services from the Department of Defense under Pub. L. 81–874, sec. 6, as amended; Pub. L. 97–35, sec. 505(c); the Individuals with Disabilities Education Act, Pub. L. 94–142, as amended; Pub. L. 102–119, sec. 23; and consistent with 32 CFR parts 285 and 310, and the Federal Rules of Civil Procedures (28 U.S.C.).

(b) Establishes policy, assigns responsibilities, and prescribes procedures for:

(1) Implementation of a comprehensive, multidisciplinary program of early intervention services for infants and toddlers ages birth through 2 years (inclusive) with disabilities and their families.

(2) Provision of a free, appropriate education including special education and related services for preschool children with disabilities and children with disabilities enrolled in the Department of Defense Section 6 School Arrangements.

(c) Establishes a Domestic Advisory Panel (DAP) on Early Intervention and Education for Infants, Toddlers, Preschool Children and Children with Disabilities, and a DoD Coordinating Committee on Domestic Early Intervention, Special Education and Related Services.

(d) Authorizes the publication of DoD Regulations and Manuals, consistent with DoD 5025.1–M,[1] and DoD forms consistent with DoD 5000.12–M[2] and DoD Directive 8910.1[3] to implement this part.

§ 80.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Agencies (hereafter referred to collectively as "the DoD Components").

(b) Encompasses infants, toddlers, preschool children, and children receiving or entitled to receive early intervention services or special educational instruction from the DoD on installations with Section 6 School Arrangements, and the parents of those individuals with disabilities.

(c) Applies only to schools operated by the Department of Defense within the Continental United States, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands.

§ 80.3 Definitions.

(a) *Assistive technology device.* Any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(b) *Assistive technology service.* Any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. This term includes:

(1) Evaluating the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment.

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities.

(3) Selecting designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices.

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing educational and rehabilitative plans and programs.

(5) Training or technical assistance for an individual with disabilities, or, where appropriate, the family of an individual with disabilities.

(6) Training or technical assistance for professionals (including individuals providing educational rehabilitative services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of an individual with a disability.

(c) *Attention deficit disorder (ADD).* As used to define students, encompasses attention-deficit hyperactivity disorder and attention deficit disorder without hyperactivity. The essential features of this disorder are developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.

(1) A diagnosis of ADD may be made only after the child is evaluated by appropriate medical personnel, and evaluation procedures set forth in this part (appendix B to this part) are followed.

(2) A diagnosis of ADD, in and of itself, does not mean that a child requires special education; it is possible that a child diagnosed with ADD, as the only finding, can have his or her educational needs met within the regular education setting.

(3) For a child with ADD to be eligible for special education, the Case Study Committee, with assistance from the medical personnel conducting the evaluation, must then make a determination that the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. Children with ADD who are eligible for special education and medically related services will qualify for services under "Other Health Impaired" as described in Criterion A, paragraph (h)(1) of this section.

(d) *Autism.* A developmental disability significantly affecting verbal and non-verbal communication and social interaction generally evident before age 3 that adversely affects educational performance. Characteristics of autism include irregularities and impairments in communication, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not include children with characteristics of the disability of serious emotional disturbance.

(e) *Case Study Committee (CSC).* A school-based committee that determines a child's eligibility for special education, develops and reviews a child's individualized education program (IEP), and determines appropriate placement in the least

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 80.1(c).

[3] See footnote 1 to § 80.1(c).

restrictive environment. A CSC is uniquely composed for each child. Participants on a CSC must include:

(1) The designated representative of the Section 6 School Arrangement, who is qualified to supervise the provision of special education. Such representative may not be the child's special education teacher.

(2) One, or more, of the child's regular education teachers, if appropriate.

(3) A special education teacher.

(4) One, or both, of the child's parents.

(5) The child, if appropriate.

(6) A member of the evaluation team or another person knowledgeable about the evaluation procedures used with the child.

(7) Other individuals, at the discretion of the parent or the Section 6 School Arrangement, who may have pertinent information.

(f) *Child-find.* The ongoing process used by the Military Services and a Section 6 School Arrangement to seek and identify children (from birth to 21 years of age) who show indications that they might be in need of early intervention services or special education and related services. Child-find activities include the dissemination of information to the public and identification, screening, and referral procedures.

(g) *Children with disabilities ages 5–21 (inclusive).* Those children ages 5–21 years (inclusive), evaluated in accordance with this part, who are in need of special education as determined by a CSC and who have not been graduated from a high school or who have not completed the requirements for a General Education Diploma. The terms "child" and "student" may also be used to refer to this population. The student must be determined eligible under one of the following four categories:

(1) *Criterion A.* The educational performance of the student is adversely affected, as determined by the CSC, by a physical impairment; visual impairment including blindness; hearing impairment including deafness; orthopedic impairment; or other health impairment, including ADD, when the condition is a chronic or acute health problem that results in limited alertness; autism; and traumatic brain injury requiring environmental and/or academic modifications.

(2) *Criterion B.* A student who manifests a psychoemotional condition that is the primary cause of educational difficulties; a student who exhibits maladaptive behavior to a marked degree and over a long period of time that interferes with skill attainment, classroom functioning or performance, social-emotional condition, and who as a result requires special education. The term does not usually include a student whose difficulties are primarily the result of:

(i) Intellectual deficit;

(ii) Sensory or physical impairment;

(iii) Attention deficit hyperactivity disorder;

(iv) Antisocial behavior;

(v) Parent-child or family problems;

(vi) Disruptive behavior disorders;

(vii) Adjustment disorders;

(viii) Interpersonal or life circumstance problems; or

(ix) Other problems that are not the result of a severe emotional disorder.

(3) *Criterion C.* The educational performance of the student is adversely affected, as determined by the CSC, by a speech and/or language impairment.

(4) *Criterion D.* The measured academic achievement of the student in math, reading, or language is determined by the CSC to be adversely affected by underlying disabilities (including mental retardation and specific learning disability) including either an intellectual deficit or an information processing deficit.

(5) *Criterion E.* A child, 0–5 inclusive, whose functioning level as determined by the CSC, is developmentally delayed and would qualify for special education and related services as determined by this regulation.

(h) *Consent.* This term means that:

(1) The parent of an infant, toddler, child, or preschool child with a disability has been fully informed, in his or her native language, or in another mode of communication, of all information relevant to the activity for which permission is sought.

(2) The parent understands and agrees in writing to the implementation of the activity for which his or her permission is sought. The writing must describe that activity, list the child's records that will be released and to whom, and acknowledge that the parent understands consent is voluntary and may be prospectively revoked at any time.

(3) The parent of an infant, toddler, preschool child or child must consent to the release of records. The request for permission must describe that activity, list each individual's records that will be released and to whom, and acknowledge that the parent understands that consent is voluntary and may be prospectively revoked at any time.

(4) The written consent of a parent of an infant or toddler with a disability is necessary for implementation of early intervention services described in the individualized family service plan (IFSP). If such parent does not provide consent with respect to a particular early intervention service, then the early intervention services for which consent is obtained shall be provided.

(i) *Deaf.* A hearing loss or deficit so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, to the extent that his or her educational performance is adversely affected.

(j) *Deaf-blind.* Concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(k) *Developmental delay.* A significant discrepancy in the actual functioning of an infant or toddler when compared with the functioning of a nondisabled infant or toddler of the same chronological age in any of the following areas of development: Physical development, cognitive development, communication development, social or emotional development, and adaptive development as measured using standardized evaluation instruments and confirmed by clinical observation and judgment. A significant discrepancy exists when the one area of development is delayed by 25 percent or 2 standard deviations or more below the mean or when two areas of development are each delayed by 20 percent or 1½ standard deviations or more below the mean. (Chronological age should be corrected for prematurity until 24 months of age.)

(l) *Early intervention service coordination services.* Case management services that include integration and oversight of the scheduling and accomplishment of evaluation and delivery of early intervention services to an infant or toddler with a disability and his or her family.

(m) *Early intervention services.* Developmental services that:

(1) Are provided under the supervision of a military medical department.

(2) Are provided using Military Health Service System and community resources.

(i) Evaluation IFSP development and revision, and service coordination services are provided at no cost to the infant's or toddler's parents.

(ii) Incidental fees (e.g., child care fees) that are normally charged to infants, toddlers, and children without

disabilities or their parents may be charged.

(3) Are designed to meet the developmental needs of an infant or toddler with a disability in any one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development.

(4) Meet the standards developed by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).

(5) Include the following services: Family training, counseling, and home visits; special instruction; speech pathology and audiology; occupational therapy; physical therapy; psychological services; early intervention program coordination services; medical services only for diagnostic or evaluation purposes; early identification, screening, and assessment services; vision services; and social work services. Also included are assistive technology devices and assistive technology services; health services necessary to enable the infant or toddler to benefit from the above early intervention services; and transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive early intervention services.

(6) Are provided by qualified personnel, including: Special educators; speech and language pathologists and audiologists; occupational therapists; physical therapists; psychologists; social workers; nurses' nutritionists; family therapists; orientation and mobility specialists; and pediatricians and other physicians.

(7) To the maximum extent appropriate, are provided in natural environments, including the home and community settings in which infants and toddlers without disabilities participate.

(8) Are provided in conformity with an IFSP.

(n) *Evaluation.* Procedures used to determine whether an individual (birth through 21 inclusive) has a disability under this part and the nature and extent of the early intervention services and special education and related services that the individual needs. These procedures must be used selectively with an individual and may not include basic tests administered to, or used with, all infants, toddlers, preschool children or children in a school, grade, class, program, or other grouping.

(o) *Family training, counseling, and home visits.* Services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of an infant or toddler eligible for early intervention services in understanding the special needs of the child and enhancing the infant or toddler's development.

(p) *Free appropriate public education.* Special education and related services for children ages 3–21 years (inclusive) that:

(1) Are provided at no cost (except as provided in paragraph (xx)(1) of this section, to parents or child with a disability and are under the general supervision and direction of a Section 6 School Arrangement.

(2) Are provided at an appropriate preschool, elementary, or secondary school.

(3) Are provided in conformity with an Individualized Education Program.

(4) Meet the requirements of this part.

(q) *Frequency and intensity.* The number of days or sessions that a service will be provided, the length of time that the service is provided during each session, whether the service is provided during each session, and whether the service is provided on an individual or group basis.

(r) *Health services.* Services necessary to enable an infant or toddler, to benefit from the other early intervention services under this part during the time that the infant or toddler is receiving the other early intervention services. The term includes:

(1) Such services as clean intermittent catheterization, tracheostomy care, tube feeding, the changing of dressings or osteotomy collection bags, and other health services.

(2) Consultation by physicians with other service providers on the special health care needs of infants and toddlers with disabilities that will need to be addressed in the course of providing other early intervention services.

(3) The term does not include the following:

(i) Services that are surgical in nature or purely medical in nature.

(ii) Devices necessary to control or treat a medical condition.

(iii) Medical or health services that are routinely recommended for all infants or toddlers.

(s) *Hearing impairment.* A hearing loss, whether permanent or fluctuating, that adversely affects an infant's, toddler's, preschool child's, or child's educational performance.

(t) *High probability for developmental delay.* An infant or toddler with a medical condition that places him or her at substantial risk of evidencing a developmental delay before the age of 5 years without the benefit of early intervention services.

(u) *Include; such as.* Not all the possible items are covered, whether like or unlike the ones named.

(v) *Independent evaluation.* An evaluation conducted by a qualified examiner who is not employed by the DoD Section 6 Schools.

(w) *Individualized education program (IEP).* A written statement for a preschool child or child with a disability (ages 3–21 years inclusive) developed and implemented in accordance with this part (appendix B to this part).

(x) *Individualized family service plan (IFSP).* A written statement for an infant or toddler with a disability and his or her family that is based on a multidisciplinary assessment of the unique needs of the infant or toddler and concerns and the priorities of the family, and an identification of the services appropriate to meet such needs, concerns, and priorities.

(y) *Individuals with disabilities.* Infants and toddlers with disabilities, preschool children with disabilities, and children with disabilities, collectively, ages birth to 21 years (inclusive) who are either entitled to enroll in a Section 6 School Arrangement or would, but for their age, be so entitled.

(z) *Infants and toddlers with disabilities.* Individuals from birth to age 2 years (inclusive), who need early intervention services because they:

(1) Are experiencing a developmental delay, as measured by appropriate diagnostic instruments and procedures, of 25 percent (or 2 standard deviations below the mean), in one or more areas, or 20 percent (or 1½ standard deviations below the mean), in two or more of the following areas of development: Cognitive, physical, communication, social or emotional, or adaptive development.

(2) Are at-risk for a developmental delay; i.e., have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay; e.g., chromosomal disorders and genetic syndromes.

(aa) *Intercomponent.* Cooperation among the DoD Components and programs so that coordination and integration of services to individuals with disabilities and their families occur.

(bb) *Medically related services.* (1) Medical services (as defined in paragraph (cc) of this section) and those services provided under professional medical supervision that are required by a CSC either to determine a student's eligibility for special education or, if the student is eligible, the special education and related services required by the

student under this part in accordance with 32 CFR part 345.

(2) Provision of either direct or indirect services listed on an IEP as necessary for the student to benefit from the educational curriculum. These services may include: Medical; social work; community health nursing; dietary; psychiatric diagnosis; evaluation, and follow up; occupational therapy; physical therapy; audiology; ophthalmology; and psychological testing and therapy.

(cc) *Medical services.* Those evaluative, diagnostic, and supervisory services provided by a licensed and credentialed physician to assist CSCs and to implement IEPs. Medical services include diagnosis, evaluation, and medical supervision of related services that by statute, regulation, or professional tradition are the responsibility of a licensed and credentialed physician.

(dd) *Mental retardation.* Significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a preschool child's or child's educational performance.

(ee) *Multidisciplinary.* The involvement of two or more disciplines or professions in the provision of integrated and coordinated services, including evaluation and assessment activities, and development of an IFSP or IEP.

(ff) *Native language.* When used with reference to an individual of limited English proficiency, the language normally used by such individuals, or in the case of an infant, toddler, preschool child or child, the language normally used by the parent of the infant, toddler, preschool child or child.

(gg) *Natural environments.* Settings that are natural or normal for the infant or toddler's same age peers who have no disability.

(hh) *Non-section 6 school arrangement or facility.* A public or private school or other institution not operated in accordance with 32 CFR part 345. This term includes Section 6 special contractual arrangements.

(ii) *Nutrition services.* These services include:

(1) Conducting individual assessments in nutritional history and dietary intake; anthropometric, biochemical and clinical variables; feeding skills and feeding problems; and food habits and food preferences.

(2) Developing and monitoring appropriate plans to address the nutritional needs of infants and toddlers eligible for early intervention services.

(3) Making referrals to appropriate community resources to carry out nutrition goals.

(jj) *Orthopedic impairment.* A severe physical impairment that adversely affects a child's educational performance. The term includes congenital impairments (such as club foot and absence of some member), impairments caused by disease (such as poliomyelitis and bone tuberculosis), and impairments from other causes such as cerebral palsy, amputations, and fractures or burns causing contracture.

(kk) *Other health impairment.* Having an autistic condition that is manifested by severe communication and other developmental and educational problems; or having limited strength, vitality, or alertness due to chronic or acute health problems that adversely affect a child's educational performance as determined by the CSC, such as: ADD, heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, and diabetes.

(ll) *Parent.* The biological father or mother of a child; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides, provided that such person stands in loco parentis to that child and contributes at least one-half of the child's support.

(mm) *Personally identifiable information.* Information that includes the name of the infant, toddler, preschool child, child, parent or other family member; the home address of the infant, toddler, preschool child, child, parent or other family member; another personal identifier, such as the infant's, toddler's, preschool child's, child's, parent's or other family member's social security number; or a list of personal characteristics or other information that would make it possible to identify the infant, toddler, preschool child, child, parent, or other family member with reasonable certainty.

(nn) *Preschool children with disabilities.* These are students, ages 3–5 years (inclusive), who need special education services because they:

(1) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: Cognitive development, physical development, communication development, social or emotional development, and adaptive development; and

(2) Who, by reason thereof, need special education and related services.

(oo) *Primary referral source.* The DoD Components, including child care centers, pediatric clinics, and parents that suspect an infant, toddler, preschool child or child has a disability and bring that infant, toddler, preschool child or child to the attention of the Early Intervention Program or school CSC.

(pp) *Public awareness program.* Activities focusing on early identification of infants and toddlers with disabilities, including the preparation and dissemination by the military medical department to all primary referral sources of information materials for parents on the availability of early intervention services. Also includes procedures for determining the extent to which primary referral sources within the Department of Defense, especially within DoD medical treatment facilities, and physicians disseminate information on the availability of early intervention services to parents of infants or toddlers with disabilities.

(qq) *Qualified.* With respect to instructional personnel, a person who holds at a minimum a current and applicable teaching certificate from any of the 50 States, Puerto Rico, or the District of Columbia, or has met other pertinent requirements in the areas in which he or she is providing special education or related services not of a medical nature to children with disabilities. Providers of early intervention services and medically related services must meet standards established by the ASD(HA).

(rr) *Related services.* This includes transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology; psychological services; physical and occupational therapy; recreation, including therapeutic recreation and social work services; and medical and counseling services), including rehabilitation counseling (except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in preschool children or children. The following list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as clean intermittent catheterization), if they are required to assist a child with a disability to benefit from special education, as determined by a CSC.

(1) *Audiology.* This term includes:

(i) Audiological, diagnostic, and prescriptive services provided by audiologists who have a Certificate of Clinical Competence—Audiology (CCC–A) and pediatric experience. Audiology shall not include speech therapy.

(ii) Identification of children with hearing loss.

(iii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention designed to ameliorate or correct that loss.

(iv) Provision of ameliorative and corrective activities, including language and auditory training, speech-reading (lip-reading), hearing evaluation, speech conservation, the recommendation of amplification devices, and other aural rehabilitation services.

(v) Counseling and guidance of children, parents, and service providers regarding hearing loss.

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services.* Services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel to help a preschool child or child with a disability to benefit from special education.

(3) *Early identification.* The implementation of a formal plan for identifying a disability as early as possible in the individual's life.

(4) *Medical services.* Those evaluative, diagnostic, and supervisory services provided by a licensed and credentialed physician to assist CSCs in determining whether a child has a medically related disability condition that results in the child's need for special education and related services and to implement IEPs. Medical services include diagnosis, evaluation, and medical supervision of related services that, by statute, regulation, or professional tradition, are the responsibility of a licensed and credentialed physician.

(5) *Occupational therapy.* Therapy that provides developmental evaluations and treatment programs using selected tasks to restore, reinforce, or enhance functional performance. It addresses the quality and level of functions in areas such as behavior, motor coordination, spatial orientation; visual motor and sensory integration; and general activities of daily living. This therapy, which is conducted or supervised by a qualified occupational therapist, provides training and guidance in using special equipment to improve the patient's functioning in skills of daily living, work, and study.

(6) *Parent counseling and training.* Assisting parents in understanding the special needs of their preschool child or child and providing parents with information about child development and special education.

(7) *Physical therapy.* Therapy that provides evaluations and treatment programs using exercise, modalities, and adaptive equipment to restore, reinforce, or enhance motor performance. It focuses on the quality of movement, reflex development, range of motion, muscle strength, gait, and gross motor development, seeking to decrease abnormal movement and posture while facilitating normal movement and equilibrium reactions. The therapy, which is conducted by a qualified physical therapist, provides for measurement and training in the use of adaptive equipment and prosthetic and orthotic appliances. Therapy may be conducted by a qualified physical therapist assistant under the clinical supervision of a qualified physical therapist.

(8) *Psychological services.* Services listed in paragraphs (rr) (8) (i) through (rr) (8) (iv) of this section that are provided by a qualified psychologist:

(i) Administering psychological and educational tests and other assessment procedures.

(ii) Interpreting test and assessment results.

(iii) Obtaining, integrating, and interpreting information about a preschool child's or child's behavior and conditions relating to his or her learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of preschool children and children, as indicated by psychological tests, interviews, and behavioral evaluations.

(v) Planning and managing a program of psychological services, including psychological counseling for preschool children, children, and parents. For the purpose of these activities, a qualified psychologist is a psychologist licensed in a State of the United States who has a degree in clinical or school psychology and additional pediatric training and/or experience.

(9) *Recreation.* This term includes:

(i) Assessment of leisure activities.

(ii) Therapeutic recreational activities.

(iii) Recreational programs in schools and community agencies.

(iv) Leisure education.

(10) *School health services.* Services provided, pursuant to an IEP, by a qualified school health nurse, or other qualified person, that are required for a preschool child or child with a disability to benefit from special education.

(11) *Social work counseling services in schools.* This term includes:

(i) Preparing a social and developmental history on a preschool child or child identified as having a disability.

(ii) Counseling the preschool child or child with a disability and his or her family on a group or individual basis, pursuant to an IEP.

(iii) Working with problems in a preschool child's or child's living situation (home, school, and community) that adversely affect his or her adjustment in school.

(iv) Using school and community resources to enable the preschool child or child to receive maximum benefit from his or her educational program.

(12) *Speech pathology.* This term includes the:

(i) Identification of preschool children and children with speech or language disorders.

(ii) Diagnosis and appraisal of specific speech or language disorders.

(iii) Referral for medical or other professional attention to correct or ameliorate speech or language disorders.

(iv) Provision of speech and language services for the correction, amelioration, and prevention of communicative disorders.

(v) Counseling and guidance of preschool children, children, parents, and teachers regarding speech and language disorders.

(13) *Transportation.* This term includes transporting the individual with a disability and, when necessary, an attendant or family member or reimbursing the cost of travel ((e.g., mileage, or travel by taxi, common carrier or other means) and related costs (e.g., tolls and parking expenses)) when such travel is necessary to enable a preschool child or child to receive special education (including related services) or an infant or toddler and the infant's or toddler's family to receive early intervention services. Transportation services include:

(i) Travel to and from school and between schools, including travel necessary to permit participation in educational and recreational activities and related services.

(ii) Travel from school to a medically related service site and return.

(iii) Travel in and around school buildings.

(iv) Travel to and from early intervention services.

(v) Specialized equipment (including special or adapted buses, lifts, and ramps) if required to provide special transportation for an individual with a disability.

(vi) If necessary, attendants assigned to vehicles transporting an individual with a disability when that individual requires assistance to be safely transported.

(ss) *Section 6 School Arrangement.* The schools (pre-kindergarten through grade 12) operated by the Department of Defense within the CONUS, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands. Section 6 School Arrangements are operated under DoD Directive 1342.21.[4]

(tt) *Separate facility.* A school or a portion of a school, regardless of whether it is used by the Section 6 School Arrangement, that is only attended by children with disabilities.

(uu) *Serious emotional disturbance.* The term includes:

(1) A condition that has been confirmed by clinical evaluation and diagnosis and that, over a long period of time and to a marked degree, adversely affects educational performance and that exhibits one or more of the following characteristics:

(i) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(iii) Inappropriate types of behavior under normal circumstances.

(iv) A tendency to develop physical symptoms or fears associated with personal or school problems.

(v) A general, pervasive mood of unhappiness or depression.

(2) Schizophrenia, but does not include children who are socially maladjusted, unless it is determined that they are otherwise seriously emotionally disturbed.

(vv) *Service provider.* Any individual who provides services listed in an IEP or an IFSP.

(ww) *Social work services.* This term includes:

(1) Preparing a social or developmental history on an infant, toddler, preschool child or child with a disability.

(2) Counseling with the infant, toddler, preschool child or child and family in a group or individual capacity.

(3) Working with individuals with disabilities (0–21 inclusive) in the home school, and/or community environment to ameliorate those conditions that adversely affect development or educational performance.

(4) Using school and community resources to enable the child to receive maximum benefit from his or her educational program or for the infant, toddler, and family to receive maximum benefit from early intervention services.

(xx) *Special education.* Specially designed instruction, at no cost to the parent, to meet the unique needs of a preschool child or child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. The term includes speech pathology or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a preschool child or child with a disability, and is considered "special education" rather than a "related service." The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

(1) *At no cost.* With regard to a preschool child or child eligible to attend Section 6 School Arrangements, specially designed instruction and related services are provided without charge, but incidental fees that are normally charged to nondisabled students, or their parents, as a part of the regular educational program may be imposed.

(2) *Physical education.* The development of:

(1) Physical and motor fitness.

(ii) Fundamental motor skills and patterns.

(iii) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(iv) A program that includes special physical education, adapted physical education, movement education, and motor development.

(3) *Vocational education.* This term means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(yy) *Special instruction.* This term includes:

(1) Designing learning environments and activities that promote the infant's, toddler's, preschool child's or child's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction.

(2) Planning curriculum, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the infant's, toddler's, preschool child's or child's IEP or IFSP.

(3) Providing families with information, skills, and support related to enhancing the skill development of the infant, toddler, or preschool child or child.

(4) Working with the infant, toddler, preschool child, or child to enhance the infant's, toddler's, preschool child's or child's development and cognitive processes.

(zz) *Specific learning disability.* A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include preschool children or children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural, or economic differences.

(aaa) *Speech and language impairments.* A communication disorder, such as stuttering, impaired articulation, voice impairment, or a disorder in the receptive or expressive areas of language that adversely affects a preschool child's or child's educational performance.

(bbb) *Superintendent.* The chief official of a Section 6 School Arrangement responsible for the implementation of this part on his or her installation.

(ccc) *Transition services.* A coordinated set of activities for a toddler that may be required to promote movement from early intervention, preschool, and other educational programs into different programs or educational settings. For a student 14 years of age and older, transition services are designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult

[4] See footnote 1 to § 80.1(c).

living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.

(ddd) *Traumatic brain injury.* An injury to the brain caused by an external physical force or by an internal occurrence, such as stroke or aneurysm, resulting in total or partial functional disability or psychosocial maladjustment that adversely affects educational performance. The term includes open or closed head injuries resulting in mild, moderate, or severe impairments in one or more areas, including cognition; language, memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory; perceptual and motor abilities; psychosocial behavior; physical function; and information processing and speech. The term does not include brain injuries that are congenital or degenerative or brain injuries that are induced by birth trauma.

(eee) *Vision services.* Services necessary to ameliorate the effects of sensory impairment resulting from a loss of vision.

(fff) *Visual impairment.* A sensory impairment including blindness that, even with correction, adversely affects a preschool child's or child's educational performance. The term includes both partially seeing and blind preschool children and children.

§ 80.4 Policy.

It is DoD policy that:

(a) All individuals with disabilities ages 3 to 21 years receiving or entitled to receive educational instruction from the Section 6 School Arrangements shall be provided a free, appropriate education under this part in accordance with the IDEA as amended, 20 U.S.C. Chapter 33; Pub. L. 102–119, Section 23; and DoD Directive 1342.21.

(b) All individuals with disabilities ages birth through 2 years (inclusive) and their families are entitled to receive early intervention services under this part, provided that such infants and toddlers would be eligible to enroll in a Section 6 School Arrangement but for their age.

§ 80.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

(1) Ensure that all infants and toddlers with disabilities (birth through 2 years inclusive) who but for their age would be eligible to attend the Section 6 Arrangement Schools, and their families are provided early intervention services in accordance with IDEA as amended, (20 U.S.C., Chapter 33, Subchapter VIII.) and in conformity with the procedures in appendix A to this part.

(2) Ensure that preschool children and children with disabilities ages 3–21 years (inclusive) receiving educational instruction from Section 6 School Arrangements are provided a free appropriate public education and that the educational needs of such preschool children and children with disabilities are met using the procedures established by this part.

(3) Ensure that educational facilities and services provided by Section 6 School Arrangements for preschool children and children with disabilities are comparable to educational facilities and services for non-disabled students.

(4) Maintain records on special education and related services provided to children with disabilities, consistent with 32 CFR part 310.

(5) Ensure the provision of all necessary diagnostic services and special education and related services listed on an IEP (including those supplied by or under the supervision of physicians) to preschool children and children with disabilities who are enrolled in Section 6 School Arrangements. In fulfilling this responsibility, (USD(P&R)), or designee, may use intercomponent arrangements, or act through contracts with private parties, when funds are authorized and appropriated.

(6) Develop and implement a comprehensive system of personnel development, in accordance with 20 U.S.C. 1413–(a)(3), for all professional staff employed by a Section 6 School Arrangement. This system shall include:

(i) Inservice training of general and special educational instructional and support personnel,

(ii) Implementing innovative strategies and activities for the recruitment and retention of medically related service providers,

(iii) Detailed procedures to assure that all personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, and

(iv) Effective procedures for acquiring and disseminating to teachers and administrators of programs for children with disabilities significant information derived from educational research, demonstration, and similar projects, and

(v) Adopting, where appropriate, promising practices, materials, and technology.

(7) Provide technical assistance to professionals in Section 6 School Arrangements involved in, or responsible for, the education of preschool children or children with disabilities.

(8) Ensure that child-find activities are coordinated with other relevant components and are conducted to locate and identify every individual with disabilities.

(9) Issue guidance implementing this part.

(10) Undertake evaluation activities to ensure compliance with this part through monitoring, technical assistance, and program evaluation.

(11) Chair the DoD Coordinating Committee on Domestic Early Intervention, Special Education, and Related Services, which shall be composed of representatives of the Secretaries of the Military Departments, the Assistant Secretary of Defense for Health Affairs (ASD(HA)), the General Counsel of the Department of Defense (GC, DoD), and the Director, Section 6 Schools.

(12) Through the DoD Coordinating Committee on Demestic Early Intervention, Special Education, and Related Services, monitor the provision of special education and related services and early intervention services furnished under this part, and ensure that related services, special education, and early intervention services are properly coordinated.

(13) Ensure that appropriate personnel are trained to provide mediation services in cases that otherwise might result in due process proceedings under this part.

(14) Ensure that transition services from early intervention services to regular or special education and from special education to the world of work are provided.

(15) Ensure that all DoD programs that provide services to infants and toddlers and their families (e.g., child care, medical care, recreation) are involved in a comprehensive intercomponent system for early intervention services.

(16) Ensure, whenever practicable, that planned construction not yet past the 35 percent design phase and new design begun after the date of this part of renovation of school or child care facilities includes consideration of the space required for the provision of medically related services and early intervention services.

(17) Shall establish the Domestic Advisory Panel that shall:

(i) Consist of members appointed by the USD (P&R) or Principal Deputy USD (P&R). Membership shall include at least one representative from each of the following groups:

(A) Individuals with disabilities.

(B) Parents, including minority parents of individuals with disabilities from various age groups.

(C) Section 6 School Arrangements special education teachers.

(D) Section 6 School Arrangements regular education teachers.

(E) Section 6 School Arrangements Superintendent office personnel.

(F) The Office of Director, Section 6 Schools.

(G) The Surgeons General of the Military Departments.

(H) The Family Support Programs of the Military Departments.

(I) Section 6 School Arrangements School Boards.

(J) Early Intervention service providers on installations with Section 6 School Arrangements.

(K) Other appropriate personnel.

(ii) Meet as often as necessary.

(iii) Perform the following duties:

(A) Review information and provide advice to ASD (P&R) regarding improvements in services provided to individuals with disabilities in Section 6 Schools and early intervention programs.

(B) Receive and consider the views of various parent, student, and professional groups, and individuals with disabilities.

(C) When necessary, establish committees for short-term purposes composed of representatives from parent, student, family and other professional groups, and individuals with disabilities.

(D) Review the findings of fact and decision of each impartial due process hearing conducted pursuant to this part.

(E) Assist in developing and reporting such information and evaluations as may aid Section 6 Schools and the Military Departments in the performance of duties under the part.

(F) Make recommendations, based on program and operational information, for changes in the budget, organization, and general management of the special education program, and in policy and procedure.

(G) Comment publicly on rules or standards regarding the education of individuals with disabilities.

(H) Assist in developing recommendations regarding the transition of toddlers with disabilities to preschool services.

(b) The Assistant Secretary of Defense for Health Affairs in consultation with the USD(P&R), the GC, DoD, and the Secretaries of the Military Departments, shall:

(1) Establish staffing and personnel standards for personnel who provide early intervention services and medically related services.

(2) Develop and implement a comprehensive system of personnel development in accordance with 20 U.S.C. 1413(a)(3), including the training of professionals, paraprofessionals and primary referral sources, regarding the basic components of early intervention services and medically related services. Such a system may include:

(i) Implementing innovative strategies and activities for the recruitment and retention of early intervention service providers.

(ii) Ensuring that early intervention service providers and medically related service providers are fully and appropriately qualified to provide early intervention services and medically related services, respectively.

(iii) Training personnel to work in the military environment.

(iv) Training personnel to coordinate transition services for infants and toddlers with disabilities from an early intervention program to a preschool program.

(3) Develop and implement a system for compiling data on the numbers of infants and toddlers with disabilities and their families in need of appropriate early intervention services, the numbers of such infants and toddlers and their families served, the types of services, and other information required to evaluate the implementation of early intervention programs.

(4) Resolve disputes among the DoD Components arising under appendix A of this part.

(c) *Secretaries of the Military Departments* shall:

(1) Provide quality assurance for medically related services in accordance with personnel standards and staffing standards under DoD Directive 6025.13 [5] developed by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).

(2) Plan, develop, and implement a comprehensive, coordinated, intercomponent, community-based system of early intervention services for infants and toddlers with disabilities (birth through 2 inclusive) and their families who are living on an installation with a Section 6 School Arrangement, or who but for their age, would be entitled to enroll in a Section 6 School Arrangement, using the procedures established by this part and guidelines from the ASD(HA) on staffing and personnel standards.

(3) Undertake activities to ensure compliance with this part through technical assistance, program evaluation, and monitoring.

(d) The *Director, Defense Office of Hearings and Appeals (DOHA)* shall ensure the provision of impartial due process hearings under appendix C of this part.

[5] See footnote 1 to § 80.1(c).

§ 80.6 Procedures.

(a) Procedures for the provision of early intervention services for infants and toddlers with disabilities and their families are in appendix A to this part. Provision of early intervention services includes establishing a system of coordinated, comprehensive, multidisciplinary, intercomponent services providing appropriate early intervention services to all eligible infants and toddlers with disabilities and their families.

(b) Procedures for special educational programs (including related services) for preschool children and children with disabilities (3–21 years inclusive) are in appendix B to this part.

(c) Procedures for adjudicative requirements required by Pub. L. 101–476, as amended, and Pub. L. 102–119 are in appendix C to this part. These procedures establish adjudicative requirements whereby the parents of an infant, toddler, preschool child or child with a disability and the military department concerned or Section 6 School System are afforded an impartial due process hearing on early intervention services or on the identification, evaluation, and educational placement of, and the free appropriate public education provided to, such infant, toddler, preschool child or child, as the case may be.

Appendix A to Part 80—Procedures For The Provision of Early Intervention Services for Infants And Toddlers With Disabilities, Ages 0–2 years (Inclusive), And Their Families

A. Requirements For A System of Early Intervention Services

1. A system of coordinated, comprehensive, multidisciplinary, and intercomponent programs providing appropriate early intervention services to all infants and toddlers with disabilities and their families shall include the following minimum components:

a. A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant and toddler with a disability and the priorities and concerns of the infant's or toddler's family to assist in the development of the infant or toddler with a disability.

b. A mechanism to develop, for each infant and toddler with a disability, an IFSP and early intervention services coordination, in accordance with such service plan.

c. A comprehensive child-find system, coordinated with the appropriate Section 6 School Arrangement, including a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources, such as the CDC and the pediatric clinic.

d. A public awareness program including information on early identification of infants and toddlers with disabilities and the

availability of resources in the community to address and remediate these disabilities.

e. A central directory that includes a description of the early intervention services and other relevant resources available in the community.

B. Each Military Medical Department Shall Develop and Implement a System to Provide for:

1. The administration and supervision of early intervention programs and services, including the identification and coordination of all available resources.

2. The development of procedures to ensure that services are provided to infants and toddlers with disabilities and their families in a timely manner.

3. The execution of agreements with other DoD components necessary for the implementation of this appendix. Such agreements must be coordinated with the ASD(HA) and the GC, DoD, in consultation with the USD(P&R).

4. The collection and reporting of data required by ASD(HA).

5. A multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs.

6. A family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of its infant or toddler with a disability.

C. Each Military Medical Department Shall Develop and Implement a Program to Ensure That an IFSP is Developed for Each Infant or Toddler With a Disability and the Infant's or Toddler's Family According to the Following Procedures:

1. The IFSP shall be evaluated once a year and the family shall be provided a review of the plan at 6-month intervals (or more often where appropriate), based on the needs of the infant or toddler and family.

2. Each initial meeting and each annual meeting to evaluate the IFSP must include the following participants:

a. The parent or parents of the infant or toddler.

b. Other family members, as requested by a parent, if feasible to do so.

c. An advocate, if his or her participation is requested by a parent.

d. The Early Intervention Program Services Coordinator who has been working with the family since the initial referral of the infant or toddler or who has been designated as responsible for the implementation of the IFSP.

e. A person or persons directly involved in conducting the evaluation and assessments.

f. Persons who will be providing services to the infant, toddler, or family, as appropriate.

g. If a person or persons listed in paragraph C.2 of this section is unable to attend a meeting, arrangements must be made for involvement through other means, including:

(1) Participating in a telephone call.

(2) Having a knowledgeable authorized representative attend the meeting.

(3) Making pertinent records available at the meeting.

3. The IFSP shall be developed within a reasonable time after the assessment. With the parent's consent, early intervention services may start before the completion of such an assessment under an IFSP.

4. The IFSP shall be in writing and contain:

a. A statement of the infant's or toddler's present levels of physical development, cognitive development, communication development, social or emotional development, and adaptive development, based on acceptable objective criteria.

b. A statement of the family's resources, priorities, and concerns for enhancing the development of the family's infant or toddler with a disability.

c. A statement of the major outcomes expected to be achieved for the infant or toddler and the family, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes is being made and whether modifications or revisions of the outcomes or services are necessary.

d. A statement of the specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and the method of delivering services.

e. A statement of the natural environments in which early intervention services shall be provided.

f. The projected dates for initiation of services and the anticipated duration of such services.

g. The name of the Early Intervention Program Service Coordinator.

h. The steps to be taken supporting the transition of the toddler with a disability to preschool services or other services to the extent such services are considered appropriate.

5. The contents of the IFSP shall be fully explained to the parents by the Early Intervention Program Service Coordinator, and informed written consent from such parents shall be obtained before the provision of early intervention services described in such plan. If the parents do not provide such consent with respect to a particular early intervention service, then the early intervention services to which such consent is obtained shall be provided.

D. Procedural Safeguards for the Early Intervention Program

1. The procedural safeguards include:

a. The timely administrative resolution of complaints by the parent(s), including hearing procedures (appendix C to this part).

b. The right to protection of personally identifiable information under 32 CFR part 310.

c. The right of the parent(s) to determine whether they, their infant or toddler, or other family members will accept or decline any early intervention service without jeopardizing the delivery of other early intervention services to which such consent is obtained.

d. The opportunity for the parent(s) to examine records on assessment, screening, eligibility determinations, and the development and implementation of the IFSP.

e. Written prior notice to the parent(s) of the infant or toddler with a disability whenever the Military Department concerned proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services to the infant and toddler with a disability.

f. Procedures designed to ensure that the notice required in paragraph D.1.e. of this appendix fully informs the parents in the parents' native language, unless it clearly is not feasible to do so.

g. During the pending of any proceeding under appendix C to this part, unless the Military Department concerned and the parent(s) otherwise agree, the infant or toddler shall continue to receive the early intervention services currently being provided, or, if applying for initial services, shall receive the services not in dispute.

Appendix B to Part 80—Procedures for Special Educational Programs (Including Related Services) for Preschool Children and Children with Disabilities (3–21 years Inclusive)

A. Identification and Screening

1. Each Section 6 School Arrangement shall locate, identify, and, with the consent of a parent of each preschool child or child, evaluate all preschool children or children who are receiving or are entitled to receive an education from Section 6 School Arrangements and who may need special education and/or related services.

2. Each Section 6 School Arrangement shall:

a. Provide screening, through the review of incoming records and the use of basic skills tests in reading, language arts, and mathematics, to determine whether a preschool child or child may be in need of special education and related services.

b. Analyze school health data for those preschool children and children who demonstrate possible disabling conditions. Such data shall include:

(1) Results of formal hearing, vision, speech, and language tests.

(2) Reports from medical practitioners.

(3) Reports from other appropriate professional health personnel as may be necessary, under this part, to aid in identifying possible disabling conditions.

c. Analyze other pertinent information, including suspensions, exclusions, other disciplinary actions, and withdrawals, compiled and maintained by Section 6 School Arrangements that may aid in identifying possible disabling conditions.

3. Each Section 6 School Arrangement, in cooperation with cognizant authorities at the installation on which the Section 6 School Arrangement is located, shall conduct ongoing child-find activities that are designed to identify all infants, toddlers, preschool children, and children with possible disabling conditions who reside on the installation or who otherwise either are entitled, or will be entitled, to receive services under this part.

a. If an element of the Section 6 School Arrangement, a qualified professional authorized to provide related services, a

parent, or other individual believes that an infant, toddler, preschool child or child has a possible disabling condition, that individual shall be referred to the appropriate CSC or early intervention coordinator.

b. A Section 6 School Arrangement CSC shall work in cooperation with the Military Departments in identifying infants, toddlers, preschool children and children with disabilities (birth to 21 years inclusive).

3B. Evaluation Procedures

1. Each CSC will provide a full and comprehensive diagnostic evaluation of special educational, and related service needs to any preschool child or child who is receiving, or entitled to receive, educational instruction from a Section 6 School Arrangement, operated by the Department of Defense under Directive 1342.21, and who is referred to a CSC for a possible disability. The evaluation will be conducted before any action is taken on the development of the IEP or placement in a special education program.

2. Assessment materials, evaluation procedures, and tests shall be:

a. Racially and culturally nondiscriminatory.

b. Administered in the native language or mode of communication of the preschool child or child unless it clearly is not feasible to do so.

c. Validated for the specific purpose for which they are used or intended to be used.

d. Administered by qualified personnel, such as a special educator, school psychologist, speech therapist, or a reading specialist, in conformity with the instructions provided by the producers of the testing device.

e. Administered in a manner so that no single procedure is the sole criterion for determining eligibility and an appropriate educational program for a disabled preschool child or child.

f. selected to assess specific areas of educational strengths and needs, not merely to provide a single general intelligence quotient.

3. The evaluation shall be conducted by a multidisciplinary team and shall include a teacher or other specialist with knowledge in the areas of the suspected disability.

4. The preschool child or child shall be evaluated in all areas related to the suspected disability. When necessary, the evaluation shall include:

a. The current level of academic functioning, to include general intelligence.

b. Visual and auditory acuity.

c. Social and emotional status, to include social functioning within the educational environment and within the family.

d. Current physical status, including perceptual and motor abilities.

e. Vocational transitional assessment (for children ages 14–21 years (inclusive)).

5. The appropriate CSC shall met as soon as possible after the preschool child's or child's formal evaluation to determine whether he or she is in need of special education and related services. The preschool child's or child's parents shall be invited to the meeting and afforded the opportunity to participate in such a meeting.

6. The school CSC shall issue a written report that contains:

a. A review of the formal and informal diagnostic evaluation findings of the multidisciplinary team.

b. A summary of information from the parents, the preschool child or child, or other persons having significant previous contact with the preschool child or child.

c. A description of the preschool child's or child's current academic progress, including a statement of his or her learning style.

d. A description of the nature and severity of the preschool child's or child's disability(ies).

7. A preschool child or child with a disability shall receive an individual comprehensive diagnostic evaluation every 3 years, or more frequently if conditions warrant, or if the preschool child's or child's parent, teacher, or related service provider requests an evaluation. The scope and nature of the reevaluation shall be determined individually, based upon the preschool child's or child's performance, behavior, and needs when the reevaluation is conducted, and be used to update or revise the IEP.

C. Individualized Education Program (IEP)

1. Section 6 School Arrangements shall ensure that an IEP is developed and implemented for each preschool child or child with a disability enrolled in a Section 6 School Arrangement or placed on another institution by a Section 6 School Arrangement CSC under this part.

2. Each IEP shall include:

a. A statement of the preschool child's or child's present levels of educational performance.

b. A statement of annual goals, including short-term instructional objectives.

c. A statement of the specific special educational services and related services to be provided to the preschool child or child (including the frequency, number of times per week/month and intensity, amount of times each day) and the extent to which the preschool child or child may be able to participate in regular educational programs.

d. The projected anticipated date for the initiation and the anticipated length of such activities and services.

e. Appropriate objective criteria and evaluation procedures and schedules for determining, on an annual basis, whether educational goals and objectives are being achieved.

f. A statement of the needed transition services for the child beginning no later than age 16 and annually thereafter (and when determined appropriate for the child, beginning at age 14 or younger) including, when appropriate, a statement of DoD Component responsibilities before the child leaves the school setting.

3. Each preschool child or child with a disability shall be provided the opportunity to participate, with adaptations when appropriate, in the regular physical education program available to students without disabilities unless:

a. The preschool child or child with a disability is enrolled full-time in a separate facility; or

b. The preschool child or child with a disability needs specially designed physical education, as prescribed in his or her IEP.

4. If specially designed physical education services are prescribed in the IEP of a preschool child or child with a disability, the Section 6 School Arrangement shall provide such education directly, or shall make arrangements for the services to be provided through a non-Section 6 School Arrangement or another facility.

5. Section 6 School Arrangements shall ensure that a preschool child or child with a disability, enrolled by a CSC in a separate facility, receives appropriate, physical education in compliance with this part.

6. The IEP for each preschool child or child with a disability shall be developed and reviewed at least annually in meetings that include the following participants:

a. The designated representative of the Section 6 School Arrangement, who is qualified to supervise the provision of special education. Such representative may not be the preschool child's or child's special education teacher.

b. One, or more, of the preschool child's or child's regular education teachers, if appropriate.

c. The preschool child's or child's special education teacher or teachers.

d. One, or both, of the preschool child's or child's parents.

e. The child, if appropriate.

f. For a preschool child or child with a disability who has been evaluated, a member of the evaluation team or another person knowledgeable about the evaluation procedures used with that student and familiar with the results of the evaluation.

g. Other individuals, at the reasonable discretion of the parent(s) or the school.

7. Section 6 School Arrangements shall:

2a. Ensure that an IEP meeting is held, normally within 10 working days, following a determination by the appropriate CSC that the preschool child or child is eligible to receive special education and/or related services.

b. Address the needs of a preschool child or child with a current IEP who transfers from a school operated by the DoD in accordance with 32 CFR part [1] or from a Section 6 School Arrangement to a Section 6 School Arrangement, by:

(1)Implementing the current IEP; or

(2) Revising the current IEP with the consent of a parent; or

(3) Initiating, with the consent of a parent, an evaluation of the preschool child or child, while continuing to provide appropriate services through a current IEP; or

(4) Initiating, with the consent of the parent, an evaluation of the preschool child or child without the provision of the services in the current IEP; or

(5) Initiating mediation, and if necessary, due process procedures.

c. Afford the preschool child's or child's parent(s) the opportunity to participate in every IEP or CSC meeting about their preschool child or child by:

[1] Copies of DoD Directive 1342.6 may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

(1) Providing the parent(s) adequate written notice of the purpose, time, and place of the meeting.

(2) Attempting to schedule the meeting at a mutually agreeable time and place.

8. If neither parent can attend the meeting, other methods to promote participation by a parent, such as telephone conservations and letters, shall be used.

9. A meeting may be conducted without a parent in attendance if the Section 6 School Arrangement is unable to secure the attendance of the parent. In this case, the Section 6 School Arrangement must have written records of its attempts to arrange a mutually acceptable time and place.

10. If the parent(s) attends the IEP meeting, the Section 6 School Arrangement shall take necessary action to ensure that at least one of the parents understands the proceedings at the meeting, including providing an interpreter for a parent who is deaf or whose native language is other than English.

11. The section 6 School Arrangement shall give a parent a copy of the preschool child's IEP.

12. Section 6 School Arrangements shall provide special education and related services, in accordance with an IEP, provided that the Department of Defense, its constituent elements, and its personnel, are not accountable if a preschool child or child does not achieve the growth projected in the IEP.

13. Section 6 School Arrangements shall ensure that an IEP is developed and implemented for each preschool child or child with a disability whom the CSC places in a non-Section 6 School or other facility.

D. Placement Procedures and Least Restrictive Environment

1. The placement of a preschool child or child in any special education program by the Section 6 School Arrangement shall be made only under an IEP and after a determination has been made that such student has a disability and needs special education and/or related services.

2. The Section 6 School Arrangement CSC shall identify the special education and related services to be provided under the IEP.

3. A placement decision may not be implemented without the consent of a parent of the preschool child or child, except as otherwise provided in accordance with this part.

4. The placement decision must be designed to educate a preschool child or child with a disability in the least restrictive environment so that such student is educated to the maximum extent appropriate with students who do not have disabilities. Special classes, separate schooling, or other removal of preschool children or children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability is such that the preschool child or child with disabilities cannot be educated satisfactorily in the regular classes with the use of supplementary aids and services, including related services.

5. Each educational placement for a preschool child or child with a disability shall be:

a. Determined at least annually by the appropriate CSC.

b. Based on the preschool child or child's IEP.

c. Located as close as possible to the residence of the parent who is sponsoring the preschool child or child for attendance in a Section 6 School Arrangement.

d. Designed to assign the preschool child or child to the school such student would attend if he or she were not a student with a disability, unless the IEP requires some other arrangement.

e. Predicated on the consideration of all factors affecting the preschool child's or child's well-being, including the effects of separation from parent(s).

f. To the maximum extent appropriate, designed so that the preschool child or child participates in school activities, including meals and recess periods, with students who do not have a disability.

E. Children With Disabilities Placed in Non-Section 6 School Arrangements

1. Before a Section 6 School Arrangement CSC, with the concurrence of the Section 6 School Arrangement Superintendent concerned, places a preschool child or child with a disability in a non-Section 6 School or facility, the Section 6 School CSC shall conduct a meeting in accordance with this part to initiate the development of an IEP for such student.

2. Preschool children and children with disabilities eligible to receive instruction in Section 6 School Arrangements who are referred to another school or facility by the Section 6 School CSC have all the rights of students with disabilities who are attending the Section 6 School Arrangement.

a. If a Section 6 School Arrangement CSC places a preschool child or child with a disability in a non-Section 6 School Arrangement or facility as a means of providing special education and related services, the program of that facility, including nonmedical care, room, and board, as set forth in the student's IEP, must be at no cost to the student or the student's parents.

b. A Section 6 School Arrangement CSC may place a preschool child or child with a disability in a non-Section 6 School Arrangement or facility only if required by an IEP. An IEP for a student placed in a non-Section 6 School is not valid until signed by the Section 6 School Arrangement Superintendent, or designee, who must have participated in the IEP meeting. The IEP shall include determinations that:

(1) The Section 6 School Arrangement does not currently have, and cannot reasonably create, an educational program appropriate to meet the needs of the student with a disability.

(2) The non-Section 6 School Arrangement or facility and its educational program conform to this part.

3. A Section 6 School Arrangement is not responsible for the cost of a non-Section 6 School Arrangement placement when placement is made unilaterally, without the approval of the cognizant CSC and the Superintendent, unless it is directed by a hearing officer under appendix C of this part or a court of competent jurisdiction.

F. Procedural Safeguards

1. Parents shall be given written notice before the Section 6 School Arrangement CSC proposes to initiate or change, or refuses to initiate or change, either the identification, evaluation, or educational placement of a preschool child or child receiving, or entitled to receive, special education and related services from a Section 6 School Arrangement, or the provision of a free appropriate public education by the Section 6 School Arrangement to the child. The notice shall fully inform a parent of the procedural rights conferred by this part and shall be given in the parent's native language, unless it clearly is not feasible to do so.

2. The consent of a parent of a preschool child or child with a disability or suspected of having a disability shall be obtained before any:

a. Initiation of formal evaluation procedures;

b. Initial special educational placement; or

c. Change in educational placement.

3. If a parent refuses consent to any formal evaluation or initial placement in a special education program, the Section 6 School Arrangement Superintendent may initiate an impartial due process hearing, as provided in appendix C of this part to show why an evaluation or placement in a special education program should occur without such consent. If the hearing officer sustains the Section 6 School Arrangement CSC position in the impartial due process hearing, the appropriate CSC may evaluate or provide special education and related services to the preschool child or child without the consent of a parent, subject to the parent's due process rights.

4. A parent is entitled to an independent evaluation of his or her preschool child or child at the Section 6 School Arrangement's expense, if the parent disagrees with the findings of an evaluation of the student conducted by the school and the parent successfully challenges the evaluation in an impartial due process hearing.

a. If an independent evaluation is provided at the expense of a Section 6 School Arrangement, it must meet the following criteria:

(1) Conform to the requirements of this part.

(2) Be conducted, when possible, within the area where the preschool child or child resides.

(3) Meet applicable DoD standards governing persons qualified to conduct an evaluation.

b. If the final decision rendered in an impartial due process hearing sustains the evaluation of the Section 6 School Arrangement CSC, the parent has the right to an independent evaluation, but not at the expense of the Department of Defense or any DoD Component.

5. The parents of a preschool child or child with a disability shall be afforded an opportunity to inspect and review all relevant educational records concerning the identification, evaluation, and educational placement of such student, and the provision of a free appropriate public education to him or her.

6. Upon complaint presented in a written petition, the parent of a preschool child or

child with a disability or the Section 6 School System shall have the opportunity for an impartial due process hearing provided by the Department of Defense as prescribed by appendix C of this part.

7. During the pendency of any impartial due process hearing or judicial proceeding on the identification, evaluation, or educational placement of a preschool child or child with a disability receiving an education from a Section 6 School Arrangement or the provision of a free appropriate public education to such a student, unless the Section 6 School Arrangement and a parent of the student agree otherwise, the student shall remain in his or her present educational placement, subject to the disciplinary procedures prescribed in this part.

8. If a preschool child or child with a disability, without a current IEP, who is entitled to receive educational instruction from a Section 6 School Arrangement is applying for initial admission to a Section 6 School Arrangement, that student shall enter that Arrangement on the same basis as a student without a disability.

9. The parent of a preschool child or child with a disability or a Section 6 School Arrangement employee may file a written communication with the Section 6 School Arrangement Superintendent about possible general violations of this part or Pub. L. 101–476, as amended. Such communications will not be treated as complaints under appendix C of this part.

G. Disciplinary Procedures

1. All regular disciplinary rules and procedures applicable to students receiving educational instruction in the Section 6 School Arrangements shall apply to preschool children and children with disabilities who violate school rules and regulations or disrupt regular classroom activities, subject to the provisions of this section.

2. The appropriate CSC shall determine whether the conduct of a preschool child or child with a disability is the result of that disability before the long-term suspension (10 consecutive or cumulative days during the school year) or the expulsion of that student.

3. If the CSC determines that the conduct of such a preschool child or child with a disability results in whole or part from his or her disability, that student may not be subject to any regular disciplinary rules and procedures; and

a. The student's parent shall be notified in accordance with this part of the right to have an IEP meeting before any change in the student's special education placement. (A termination of the student's education for more than 10 days, either cumulative or consecutive, constitutes a change of placement.)

b. The Section 6 School Arrangement CSC or another authorized school official shall ensure that an IEP meeting is held to determine the appropriate educational placement for the student in consideration of his or her conduct before the tenth cumulative day of the student's suspension or an expulsion.

4. A preschool child or child with a disability shall neither be suspended for more than 10 days nor expelled, and his or her educational placement shall not otherwise be changed for disciplinary reasons, unless in accordance with this section, except that:

a. This section shall be applicable only to preschool children and children determined to have a disability under this part.

b. Nothing contained herein shall prevent the emergency suspension of any preschool child or child with a disability who endangers or reasonable appears to endanger the health, welfare, or safety of himself or herself, or any other student, teacher, or school personnel, provided that:

(1) The appropriate Section 6 School Arrangement CSC shall immediately meet to determine whether the preschool child's or child's conduct results from his or her disability and what change in special education placement is appropriate for that student.

(2) The child's parent(s) shall be notified immediately of the student's suspension and of the time, purpose, and location of the CSC meeting and their right to attend the meeting.

(3) A component is included in the IEP that addresses the behavioral needs of the student.

(4) The suspension of the student is only effective for the duration of the emergency.

Appendix C to Part 80—Hearing Procedures

A. Purpose

This appendix establishes adjudicative requirements whereby the parents of infants, toddlers, preschool children, and children who are covered by this part and, as the case may be, the cognizant Military Department or Section 6 School System are afforded impartial due process hearings and administrative appeals on the early intervention services or identification, evaluation, and educational placement of, and the free appropriate public education provided to, such children by the Department of Defense, in accordance with Pub. L. 101–476, as amended, 20 U.S.C. sec. 1401 et seq.; Pub. L. 81–874, sec. 6, as amended, 20 U.S.C. sec. 241; Pub. L. 97–35, sec. 505(c), 20 U.S.C. sec. 241 note; and Pub. L. 102–119, sec. 23, 20 U.S.C. sec. 241(a).

B. Administration

1. The Directorate for the Defense Office of Hearings and Appeals (DOHA) shall have administrative responsibility for the proceedings authorized by this appendix.

2. This appendix shall be administered to ensure that the findings, judgments, and determinations made are prompt, fair, and impartial.

3. Impartial hearing officers, who shall be DOHA Administrative Judges, shall be appointed by the Director, DOHA, and shall be attorneys who are independent of the Section 6 School System or the Military Department concerned in proceedings conducted under this appendix. A parent shall have the right to be represented in such proceedings, at no cost to the government, by counsel and by persons with special knowledge or training with respect to the problems of individuals with disabilities. DOHA Department Counsel normally shall appear and represent the Section 6 School System in proceedings conducted under this appendix, when such proceedings involve a preschool child or child. When an infant or toddler is involved, the Military Department responsible under this part for delivering early intervention services shall either provide its own counsel or request counsel from DOHA.

C. Mediation

1. Mediation can be initiated by either a parent or, as appropriate, the Military Department concerned or the Section 6 School System to resolve informally a disagreement on the early intervention services for an infant or toddler or the identification, evaluation, educational placement of, or the free appropriate public education provided to, a preschool child or child. The cognizant Military Department, rather than the Section 6 School System, shall participate in mediation involving early intervention services. Mediation shall consist of, but not be limited to, an informal discussion of the differences between the parties in an effort to resolve those differences. The parents and the appropriate school or Military Department officials may attend mediation sessions.

2. Mediation must be conducted, attempted, or refused in writing by a parent of the infant, toddler, preschool child or child whose early intervention or special education services (including related services) are at issue before a request for, or initiation of, a hearing authorized by this appendix. Any request by the Section 6 School System or Military Department for a hearing under this appendix shall state how this requirement has been satisfied. No stigma may be attached to the refusal of a parent to mediate or to an unsuccessful attempt to mediate.

D. Practice and Procedure

1. Hearing

a. Should mediation be refused or otherwise fail to resolve the issues on the provision of early intervention services or a free, appropriate public education to a disabled infant, toddler, preschool child or child or the identification, evaluation, or educational placement of such an individual, the parent or either the school principal, on behalf of the Section 6 School System, or the military medical treatment facility commander, on behalf of the Military Department having jurisdiction over the infant or toddler, may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of an infant, toddler, preschool child or child and the Section 6 School System or Military Department concerned shall be the only parties to a hearing conducted under this appendix.

b. The party seeking the hearing shall submit a written request, in the form of a petition, setting forth the facts, issues, and proposed relief, to the Director, DOHA. The petitioner shall deliver a copy of the petition to the opposing party (that is, the parent or the school principal, on behalf of the Section 6 School System, or the military medical treatment facility commander, on behalf of

the Military Department), either in person or by first-class mail, postage prepaid. Delivery is complete upon mailing. When the Section 6 School System or Military Department petitions for a hearing, it shall inform the other parties of the deadline for filing an answer under paragraph D.1.c. of this appendix, and shall provide the other parties with a copy of this part.

c. An opposing party shall submit an answer to the petition to the Director, DOHA, with a copy to the petitioner, within 15 calendar days of receipt of the petition. The answer shall be as full and complete as possible, addressing the issues, facts, and proposed relief. The submission of the answer is complete upon mailing.

d. Within 10 calendar days after receiving the petition, the Director, DOHA, shall assign a hearing officer, who then shall have jurisdiction over the resulting proceedings. The Director, DOHA, shall forward all pleadings to the hearing officer.

e. The questions for adjudication shall be based on the petition and the answer, provided that a party may amend a pleading if the amendment is filed with the hearing officer and is received by the other parties at least 5 calendar days before the hearing.

f. The Director, DOHA, shall arrange for the time and place of the hearing, and shall provide administrative support. Such arrangements shall be reasonably convenient to the parties.

g. The purpose of a hearing is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case. Oral and documentary evidence that is relevant and material may be received. The technical rules of evidence shall be relaxed to permit the development of a full evidentiary record, with the Federal Rules of Evidence (28 U.S.C.) serving as a guide.

h. The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers shall include the authority to order an independent evaluation of the child at the expense of the Section 6 School System or Military Department concerned and to call and question witnesses.

i. Those normally authorized to attend a hearing shall be the parents of the individual with disabilities, the counsel and personal representative of the parents, the counsel and professional employees of the Section 6 School System or Military Department concerned, the hearing officer, and a person qualified to transcribe or record the proceedings. The hearing officer may permit other persons to attend the hearing, consistent with the privacy interests of the parents and the individual with disabilities, provided the parents have the right to an open hearing upon waiving in writing their privacy rights and those of the individual with disabilities.

j. A verbatim transcription of the hearing shall be made in written or electronic form and shall become a permanent part of the record. A copy of the written transcript or electronic record of the hearing shall be made available to a parent upon request and without cost. The hearing officer may allow corrections to the written transcript or electronic recording for the purpose of conforming it to actual testimony after adequate notice of such changes is given to all parties.

k. The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the written transcript or the electronic recording of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include in the record, provided that such matter is made available to all parties before the record is closed under paragraph D.1.m. of this appendix.

l. The hearing officer shall make a full and complete record of a case presented for adjudication.

m. The hearing officer shall decide when the record in a case is closed.

n. The hearing officer shall issue findings of fact and render a decision in a case not later than 50 calendar days after being assigned to the case, unless a discovery request under section D.2. of this appendix is pending.

2. Discovery

a. Full and complete discovery shall be available to parties to the proceeding, with the Federal Rules of Civil Procedure (28 U.S.C.) serving as a guide.

b. If voluntary discovery cannot be accomplished, a party seeking discovery may file a motion to accomplish discovery, provided such motion is founded on the relevance and materiality of the proposed discovery to the issues. An order granting discovery shall be enforceable as is an order compelling testimony or the production of evidence.

c. A copy of the written or electronic transcription of a deposition taken by the Section 6 School System or Military Department concerned shall be made available free of charge to a parent.

3. Witnesses; Production of Evidence

a. All witnesses testifying at the hearing shall be advised that it is a criminal offense knowingly and willfully to make a false statement or representation to a Department or Agency of the United States Government as to any matter within the jurisdiction of the Department or Agency. All witnesses shall be subject to cross-examination by the parties.

b. A party calling a witness shall bear the witness' travel and incidental expenses associated with testifying at the hearing. The Section 6 School System or Military Department concerned shall pay such expenses when a witness is called by the hearing officer.

c. The hearing officer may issue an order compelling the attendance of witnesses or the production of evidence upon the hearing officer's own motion or, if good cause be shown, upon motion of a party.

d. When the hearing officer determines that a person has failed to obey an order to testify or to produce evidence, and such failure is in knowing and willful disregard of the order, the hearing officer shall so certify.

e. The party or the hearing officer seeking to compel testimony or the production of evidence may, upon the certification provided for in paragraph D.3.d. of the section, file an appropriate action in a court of competent jurisdiction to compel compliance with the hearing officer's order.

4. Hearing Officer's Findings of Fact and Decision

a. The hearing officer shall make written findings of fact and shall issue a decision setting forth the questions presented, the resolution of those questions, and the rationale for the resolution. The hearing officer shall file the findings of fact and decision with the Director, DOHA, with a copy to the parties.

b. The Director, DOHA, shall forward to the Director, Section 6 Schools or the Military Department concerned and the Domestic Advisory Panel copies, with all personally identifiable information deleted, of the hearing officer's findings of fact and decision or, in cases that are administratively appealed, of the final decision of the DOHA Appeal Board.

c. The hearing officer shall have the authority to impose financial responsibility for early intervention services, educational placements, evaluations, and related services under his or her findings of fact and decision.

d. The findings of fact and decision of the hearing officer shall become final unless a notice of appeal is filed under section F.1. of this appendix. The Section 6 School System or Military Department concerned shall implement a decision as soon as practicable after it becomes final.

E. Determination Without Hearing

1. At the request of a parent of the infant, toddler, preschool child or child when early intervention or special educational (including related) services are at issue, the requirement for a hearing may be waived, and the case may be submitted to the hearing officer on written documents filed by the parties. The hearing officer shall make findings of fact and issue a decision within the period fixed by paragraph D.1.n. of this appendix.

2. The Section 6 School System or Military Department concerned may oppose a request to waive the hearing. In that event, the hearing officer shall rule on the request.

3. Documents submitted to the hearing officer in a case determined without a hearing shall comply with paragraph D.1.g. of this appendix. A party submitting such documents shall provide copies to all other parties.

F. Appeal

1. A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, within 5 calendar days of receipt of the findings of fact and decision. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete upon mailing.

2. Within 10 calendar days of the filing the notice of appeal, the appellant shall submit a written statement of issues and arguments to the Director, DOHA, with a copy to the other parties. The other parties shall submit a reply or replies to the Director, DOHA,

within 15 calendar days of receiving the statement, and shall deliver a copy of each reply to the appellant. Submission is complete upon mailing.

3. The Director, DOHA, shall refer the matter on appeal to the DOHA Appeal Board. It shall determine the matter, including the making of interlocutory rulings, within 60 calendar days of receiving timely submitted replies under section F.2. of this appendix. The DOHA Appeal Board may require oral argument at a time and place reasonable convenient to the parties.

4. The determination of the DOHA Appeal Board shall be a final administrative decision and shall be in written form. It shall address the issues presented and set forth a rationale for the decision reached. A determination denying the appeal of a parent in whole or in part shall state that the parent has the right under Pub. L. 101–476, as amended, to bring a civil action on the matters in dispute in a district court of the United States without regard to the amount in controversy.

5. No provision of this part or other DoD guidance may be construed as conferring a further right of administrative review. A party must exhaust all administrative remedies afforded by this appendix before seeking judicial review of a determination made under this appendix.

G. Publication and Indexing of Final Decisions

The Director, DOHA, shall ensure that final decisions in cases arising under this Appendix are published and indexed to protect the privacy rights of the parents who are parties in those cases and the children of such parents, in accordance with 32 CFR part 310.

Dated: July 19, 1994.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 94–17937 Filed 7–22–94; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 09–94–018]

Special Local Regulation; Venetian Festival Yacht Parade, Round Lake, Charlevoix, MI

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: A special local regulation is being adopted for the marine event, Venetian Festival Yacht Parade. This event will be held on Round Lake, Charlevoix, MI on July 23, 1994. The Venetian Festival Yacht Parade will have an estimated 25 power and sailboats, parading in a closed course on Round Lake which could pose hazards to navigation in the area. This regulation is needed to provide for the safety of life, limb, and property on navigable waters during the event.

EFFECTIVE DATE: This regulation is effective at 8 p.m. (EDST) until midnight (EDST), July 23, 1994.

FOR FURTHER INFORMATION CONTACT: William A. Thibodeau, Marine Science Technician Second Class, U.S. Coast Guard, Aids to Navigation & Waterways Management Branch, Ninth Coast Guard District, 1240 East 9th Street, Cleveland, Ohio 44199–2060, (216) 522–3990.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a Notice of Proposed Rulemaking has not been published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. The application to hold this event was not received by the Commander, Ninth Coast Guard District until June 3, 1994, and there was not sufficient time remaining to publish a proposed rule in advance of the event or to provide for a delayed effective date.

Drafting Information

The drafters of this regulation are Scott J. Smith, Lieutenant Junior Grade, U.S. Coast Guard, Project Officer, Aids to Navigation & Waterways Management Branch and Karen E. Lloyd, Lieutenant, U.S. Coast Guard, Project Attorney, Ninth Coast Guard District Legal Office.

Discussion of Regulation

The Venetian Festival Yacht Parade will be held on Round Lake, Charlevoix, MI, on July 23, 1994. This regulation restricts general navigation on Round Lake and the upper and lower portions of the Pine River. This event will have an estimated 25 power and sailboats, parading in a closed course on Round Lake which could pose hazards to navigation in the area. This regulation is necessary to ensure the protection of life, limb, and property during this event. Any vessel desiring to transit the regulated area may do so only with prior approval of the Patrol Commander (Officer in Charge, U.S. Coast Guard Station Charlevoix, MI).

This regulation is issued pursuant to 33 U.S.C. 1225 and 1231 as set out in the authority citation for all of Part 165.

Federalism

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

Environment

The Coast Guard has considered the environmental impact of this regulation and concluded that, under section 2.B.2.c of Coast Guard Commandant Instruction M16475.1B, it is categorically excluded from further environmental documentation.

Economic Assessment and Certification

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of the DOT is unnecessary

Collection of Information

This regulation will impose no collection of information requirements under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

Temporary Regulation

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

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

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

2. A temporary § 100.35–T09018 is added to read as follows:

§ 100.35–T09018 Venetian Festival Yacht Parade, Round Lake, Charlevoix, MI.

(a) *Regulated area.* That portion of the upper and lower section of the Pine River, to include Round Lake, from:

Latitude	*Longitude*
45° 19.3′ N	085° 15.9′ W,
(North Pierhead Light, LLNR 17920) thence to	
45° 18.9′ N	085° 14.7′ W,
(Pine River Light 3, LLNR 17945) thence to	
45° 18.8′ N	085° 14.7′ W,
(Pine River Channel Lighted Buoy 2, LLNR 17950) thence to	
45° 19′ N	085° 15.9′ W,
(South Pierhead Light, LLNR 17925) thence to	
45° 19.3′ N	085° 15.9′ W

(b) *Special local regulation.* This regulation restricts general navigation in the regulated area for the safety of spectators and participants. Any vessel desiring to transit the regulated area may do so only with prior approval of the Patrol Commander.

(c) *Patrol Commander.* (1) The Coast Guard will patrol the regulated area under the direction of a designated Coast Guard Patrol Commander (Officer in Charge, U.S. Coast Guard Station Charlevoix, MI). The Patrol Commander may be contacted on channel 16 (156.8 MHz) by the call sign "Coast Guard Patrol Commander."

(2) The Patrol Commander may direct the anchoring, mooring, or movement of any boat or vessel within the regulated area. A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the U.S. Coast Guard Patrol Commander shall serve as a signal to stop. Any vessel so signaled shall stop and shall comply with the orders of the Patrol Commander. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(3) The Patrol Commander may establish vessel size and speed limitations and operating conditions.

(4) The Patrol Commander may restrict vessel operation within the regulated area to vessels having particular operating characteristics.

(5) The Patrol Commander may terminate the marine event or the operation of any vessel at any time it is deemed necessary for the protection of life, limb, or property.

(6) All persons in the area shall comply with the orders of the Coast Guard Patrol Commander.

(d) *Effective date.* This section is effective from 8 p.m. (EDST) until midnight (EDST) on July 23, 1994, unless otherwise terminated by the Coast Guard Patrol Commander (Officer in Charge, U.S. Coast Guard Station Charlevoix, MI).

Dated: July 11, 1994.

Rudy K. Peschel,

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

[FR Doc. 94–17944 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AG83

Exclusions From Income (Tribal Trust Land Income)

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its adjudication regulations concerning income exclusions. The purpose of the rule is to implement recent legislation excluding from countable income under federal programs up to $2,000 per year of income received by an American Indian beneficiary from trust or restricted lands.

EFFECTIVE DATE: This amendment is effective January 1, 1994, the date specified in Pub. L. 103–66.

FOR FURTHER INFORMATION CONTACT: Paul Trowbridge, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 233–3005.

SUPPLEMENTARY INFORMATION: VA administers several income-based benefit programs under which a claimant's countable income determines the rate of VA benefits payable. 38 CFR 3.271 states that payments of any kind from any source shall be counted as income for purposes of the Improved Pension program unless specifically excluded under § 3.272. 38 CFR 3.261(a)(1) states that total income from business, investment, and rents is countable income for purposes of the Parents' Dependency and Indemnity Compensation program and prior pension programs.

In Precedent Opinion 76–90 dated July 18, 1990, the VA General Counsel held that although Indian trust lands were an excludable resource for purposes of net worth determinations, rental income from these lands received by beneficiaries of VA's income-based benefit programs is considered income for VA purposes.

Section 13736 of Public Law 103–66 amended 25 U.S.C. 1408 to provide that up to $2,000 per year of income received from trust or restricted lands shall be excluded from the income of individual Indians when determining eligibility for assistance from any Federal program.

25 CFR 151.2(d) defines "trust land" as land the title to which is held in trust by the United States for an individual Indian or a tribe. 25 CFR 151.2(e) defines "restricted land" as land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary of the Interior.

We are amending 38 CFR 3.261, 3.262, and 3.272 to show that up to $2,000 per year of income from trust or restricted lands is excludable from the countable income of an individual Indian. The purpose of this rule is to amend the regulations to be consistent with the provisions of Section 13736 of Public Law 103–66.

A notice of proposed rulemaking is unnecessary because this amendment simply corresponds to the provisions of section 13736 of Public Law 103–66. Since a notice of proposed rulemaking is unnecessary and will not be published, this amendment is not a "rule" as defined in and made subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(2). In any case, this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the RFA, 5 U.S.C. sections 601–612. This amendment will not directly affect any small entity.

The catalog of Federal Domestic Assistance program numbers are 64.104 and 64.105.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: July 12, 1994.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR Part 3 is amended to read as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.261, a new paragraph (a)(37) is added to read as follows:

§ 3.261 Character of income; exclusions and estates.

(a) *Income*

* * * * * * *					
(37) Income received by American Indian beneficiaries from Trust or Restricted lands (Pub. L. 103–66)	Excluded	Excluded	Excluded	Excluded	3.262(v)
* * * * * * *					

3. In § 3.262, paragraph (v) and its authority citation are added to read as follows:

§ 3.262 Evaluation of income.

* * * * *

(v) *Income received by American Indian beneficiaries from trust or restricted lands.* There shall be excluded from income computation payments of up to $2,000 per calendar year to an individual Indian from trust lands or restricted lands as defined in 25 CFR 151.2. (January 1, 1994) (Authority: Sec. 13736, Pub. L. 103–66; 107 Stat. 663)

4. In § 3.272, paragraph (r) and its authority citation are added to read as follows:

§ 3.272 Exclusions from income.

* * * * *

(r) *Income received by American Indian beneficiaries from trust or restricted lands.* Income of up to $2,000 per calendar year to an individual Indian from trust lands or restricted lands as defined in 25 CFR 151.2. (January 1, 1994) (Authority: Sec. 13736, Pub. L. 103–66; 107 Stat. 633)

[FR Doc. 94–18004 Filed 7–22–94; 8:45 am]
BILLING CODE 8320–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV 5–1–6307; FRL–4888–7]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia: Limited Approval and Disapproval of PM–10 Implementation Plan for the Follansbee Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking simultaneous limited approval and limited disapproval action on a State Implementation Plan (SIP) revision submitted by the State of West Virginia. West Virginia submitted the plan revisions in order to achieve the national ambient air quality standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM–10) and to fulfill other Clean Air Act (Act) requirements for the Follansbee, West Virginia area. The limited approval makes bilateral consent orders between the West Virginia Office of Air Quality and six companies federally enforceable and fulfills some of the requirements of the Act applicable to the Follansbee area. The limited disapproval disapproves West Virginia's submittal for the purpose of fulfilling its requirements under sections 172 and 189 of the Act to demonstrate that the SIP will provide for the attainment of the NAAQS. These actions are being taken under section 110 of the Act in light of EPA's authority pursuant to section 301(a) to adopt regulations necessary to further air quality improvement by strengthening the SIP

EFFECTIVE DATE: This rule will become effective on August 24, 1994.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460; and West Virginia Department of Environmental Protection, Office of Air Quality, 1558 Washington Street, East, Charleston, West Virginia, 25311.

FOR FURTHER INFORMATION CONTACT: Thomas A. Casey, (215) 597–2746.

SUPPLEMENTARY INFORMATION: The air quality planning requirements for PM–10 nonattainment areas, such as the Follansbee area, are set out in subparts 1 and 4 of Title I of the Act. Among other requirements, the Act requires that SIPs provide for reasonably available control measures (RACM) including reasonably available control technology (RACT), emissions inventories, and demonstrations (including air quality modeling) that the SIP will provide for attainment of the NAAQS by the statutory attainment date.

On January 7, 1994 (59 FR 988), EPA published a Notice of Proposed Rulemaking (NPR) that proposed limited approval and limited disapproval West Virginia's November 15, 1991 PM–10 SIP submittal for the Follansbee, West Virginia PM–10 nonattainment area. The submittal is not fully approvable because it does not demonstrate attainment of NAAQS, and, therefore, does not satisfy the requirements of section 189(a)(1)(B) of the Clean Air Act. Specifically, the modeling is unapprovable as a demonstration of attainment because of deficiencies in estimating emissions from coke oven batteries and other sources, the lack of an approvable analysis of intermediate terrain, and the nonguideline use of the Gaussian Plume Multiple Source Air Quality Algorithm (RAM) dispersion model in a meteorologically rural area.

While the submittal does not meet specific provisions of Part D, it does contain some provisions (enforceable consent orders) which advance the NAAQS-related air quality protection goals of the Act. Therefore, EPA is approving the submittal for the limited purpose of approving the consent agreements and making them part of the SIP. EPA has evaluated the consent agreements for consistency with the Act and EPA regulations and has found that they provide State and federally enforceable provisions to decrease PM–10 emissions in the nonattainment area.

While approving the consent orders for incorporation by reference into the SIP, EPA is taking no action at this time on the contingency measures contained therein with respect to the requirements of section 172(c)(9) of the Act. The General Preamble to Title I of the Clean Air Act Amendments established a November 15, 1993 deadline for state submittal of contingency plans (57 FR 13498).

In addition to the limited approval and limited disapproval, EPA proposed to determine that PM–10 precursors, such as sulfur dioxide, nitrogen oxides, and volatile organic compounds, do not contribute significantly to PM–10 concentrations in the Follansbee area. (See section 189(e).) EPA based this proposal an air quality data presented by West Virginia in its submittal.

The rationale for today's action is presented in more detail in the NPR and in the Technical Support Document

(TSD) which is available at the addresses indicated above.

Summary of Public Comments

EPA received two letters of comment; comments were submitted by the West Virginia Department of Environmental Protection and by the Wheeling-Pittsburgh Steel Corporation (WPS).

1. In correspondence dated February 4, 1994, West Virginia described its "planned action" to correct the deficiencies in its submittal. West Virginia stated its intent to correct PM–10 emission rates, perform an analysis of intermediate terrain, and replace RAM with an approvable technique for modeling certain area sources under rural meteorological conditions. Additionally, West Virginia also related its intent to alter the characterizations of certain buoyant volume sources.

EPA Response West Virginia did not comment on EPA's proposed action or its underlying rationale, so no response is necessary. EPA intends to provide technical guidance to West Virginia to assist in the submittal of a fully approvable SIP revision.

2. EPA received comments from WPS dated February 4, 1994. WPS commented on and disputed deficiencies identified by EPA in the NPR. WPS also provided its own air quality analysis. WPS's comments are summarized and responses are provided below.

a. Coke Oven Emissions

WPS Comment. WPS agrees that the coke oven emissions estimations are in error and provided revised estimates attributed to the West Virginia Office of Air Quality.

EPA Response. As described above, EPA intends to provide technical guidance to West Virginia to assist in the submittal of a fully approvable SIP revision.

b. Intermediate Terrain [1]

WPS Comment. WPS comments that at the time of the West Virginia SIP submittal, there was no single, EPA-approved model applicable to intermediate terrain; that its consultant had developed a post-processor to combine the results of simple and complex terrain models; and that EPA had approved the use of this post-processor in two permit applications in West Virginia in 1988. WPS continues to comment that its submittals to West Virginia and Ohio were consistent with EPA's intermediate terrain policy, including, in 1991, an analysis employing a model that integrates simple and complex terrain models. Finally, WPS comments that the deficiency relating to intermediate terrain is not identified in EPA's August 3, 1993 notice of proposed rulemaking for the Ohio PM–10 SIP (58 FR 41218).

EPA Response. West Virginia's attainment demonstration did not address intermediate terrain as required by the Guideline on Air Quality Models as revised in 1986 (EPA–450/2–78–027R) [2] and clarified in 1989.[3] WPS's comments do not dispute this fact. The consultant's post-processor and integrated model were two of several approaches available at the time to implement EPA's intermediate terrain policy. (See, for example, EPA's widely available post-processor, POSTIT). The development of these techniques by WPS or its consultant does not alter the fact that no such analysis was included in the West Virginia SIP submittal. Therefore, this comment does not affect today's action or its underlying rationale.

As matter of clarification, EPA's August 3, 1993 notice for Ohio affected the regulation of PM–10 emissions statewide.[4] Today's action applies only to the West Virginia SIP. Because of the broader scope of that notice, some issues that were presented in the NPR for the Follansbee, West Virginia nonattainment area were relegated to the technical support document [5] in EPA's rulemaking on the Ohio SIP. The NPR for the Ohio SIP clearly referred interested readers to the TSD for further information regarding EPA's underlying rationale for that notice, generally, and the deficiencies in Ohio's attainment demonstration, specifically. That TSD clearly articulated EPA's concern over Ohio's lack of an intermediate terrain analysis and other deficiencies in Ohio's November 4, 1991 and January 8, 1992 SIP submittals.

c. The Use of RAM

WPS Comment. WPS commented that the use of RAM was discussed with the Ohio Environmental Protection Agency (OEPA) before the West Virginia SIP was submitted. WPS also comments that this deficiency was not articulated in EPA's NPR for the Ohio PM–10 SIP referenced above (58 FR 41218).

EPA Response. Conversations between WPS and OEPA do not exempt or ameliorate the deficiencies in West Virginia submittal or invalidate today's action or its underlying rationale. As noted above, EPA's notice regarding the Ohio SIP addressed this deficiency through its technical support document.

d. WPS's Air Quality Analysis

WPS Comment. WPS supplied an alternative air quality analysis that concluded, "Controls resulting in the PM–10 emissions in Attachment 2 are shown to meet the NAAQS for PM–10 when naturally occurring buoyancy of several process fugitives is included in the dispersion modeling." Attachment 2 lists the PM–10 emissions rates for model input.

EPA Response. Setting aside the problem that this analysis was not submitted by the State of West Virginia and, therefore, does not satisfy the requirement of section 189(a)(2), this analysis is not approvable as an attainment demonstration for at least two reasons.

First, the emissions estimations used as model input are flawed. While an attempt was made to correct the unapprovable aspects of emissions from coke ovens, estimates of emissions from WPS's basic oxygen furnaces (BOF) in Mingo Junction, Ohio remain profoundly underestimated. Deficiencies in BOF emissions estimation were outlined in the TSD and described in more detail in EPA's notice and TSD regarding the Ohio SIP

Second, the buoyancy of emissions from certain large volume sources (coke oven battery fugitives, the BOF, and blast furnace cast houses) was only incorporated in the estimation of impacts at receptors (locations) where a more conventional methodology failed to show attainment. This approach is unapprovable because incorporation of buoyancy effects, by design, will disturb the spatial distribution of estimated PM–10 impacts. Therefore, it is necessary to model using a more extensive array of receptors than was employed in the WPS analysis.

For these reasons, WPS's air quality analysis does not effect today's action or its underlying rationale.

Final Action

EPA is approving West Virginia's submittal for the limited purpose of incorporating the enforceable provisions into the SIP and disapproving the submittal for the purpose of fulfilling the attainment demonstration requirements of Part D of Title I of the

[1] "Intermediate terrain" is a term used to describe terrain with an elevation between stack height and plume height. It is a subset of complex terrain and is defined separately for each stack.

[2] This document has subsequently been revised (Supplement B) and incorporated into federal regulations at 40 CFR part 51 appendix W.

[3] June 8, 1989 memorandum from Joseph Tikvart to Alan Cimorelli.

[4] West Virginia and Ohio collaborated on parts of the attainment demonstration, but each submittal stands alone.

[5] Memorandum from John Summerhays and Randall Robinson to "Files" dated November 17, 1992.

Act. EPA is also formally finding that PM–10 precursors do not contribute significantly to PM–10 concentrations exceeding the NAAQS in the Follansbee area (see section 189(e)).[6]

This limited disapproval constitutes a disapproval under section 179(a)(2) of the Act (see generally 57 FR 13566–67). As provided under section 179(a) of the Act, the State of West Virginia has up to 18 months after a final SIP disapproval to correct the deficiencies that are the subject of the disapproval before EPA is required to impose either the highway funding sanction or the requirement to provide two-to-one new source review offsets. If the State has not corrected its deficiency within 6 months thereafter, EPA must impose the second sanction. Any sanction EPA imposes must remain in place until EPA determines that the State has come into compliance. Note also that any final disapproval would trigger the requirement for EPA to impose a federal implementation plan within 24 months as provided under section 110(c)(1) of the Act.

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

This action has been classified as a Table 2 action for signature by the Acting Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of two years. The U.S. EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on U.S. EPA's request. This request continues in effect under Executive Order 12866, which superseded Executive Order 12291 on September 30, 1993.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 23, 1994. Filing a petition for reconsideration by the Administrator of the Follansbee, West Virginia PM–10 final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Editorial Note: This document was received by the Office of the Federal Register on July 19, 1994.

Dated: March 30, 1994.

Stanley L. Laskowski,

Acting Regional Administrator, EPA Region III.

40 CFR part 52, subpart XX of chapter I, title 40 is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart XX—West Virginia

2. Section 52.2520 is amended by adding paragraph (c)(26) to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(c) * * *

(26) Bilateral consent orders between the West Virginia Air Pollution Control Commission and six companies to limit emissions of particulate matter. The effective date of the consent order with Koppers is November 15, 1991; the effective date of the five other orders cited in paragraph (i)(B), below, is November 14, 1991.

(i) Incorporation by reference.

(A) Letter dated November 12, 1991 from the West Virginia Department of Commerce, Labor, and Environmental Resources transmitting six consent orders.

(B) Consent orders with the following companies (West Virginia order number and effective date in parentheses): Follansbee Steel Corporation (CO-SIP–91–31, November 14, 1991); International Mill Service, Incorporated (CO-SIP–91–33, November 14, 1991); Koppers Industries, Incorporated (CO-SIP–91–32, November 15, 1991); Standard Lafarge (CO-SIP–91–29, November 14, 1991); Starvaggi Industries, Incorporated (CO-SIP–91–34, November 14, 1991); and Wheeling-Pittsburgh Steel Corporation (CO-SIP–91–29, November 14, 1991).

3. Section 52.2522 of chapter I, title 40 is amended by adding paragraph (f) to read as follows as follows:

§ 52.2522 Approval Status.

* * * * *

(f) The Administrator approves West Virginia's November 15, 1991 SIP submittal for fulfilling all PM–10-specific requirements of part D of the Clean Air Act applicable to the Follansbee, West Virginia PM–10 nonattainment area, except for the section 189(a)(1)(B) requirement for a demonstration that the plan is sufficient to attain the PM–10 NAAQS, which the Administrator is disapproving, and the section 172(c)(9) requirement for contingency measures, which the Administrator has yet to act upon.

[FR Doc. 94–17935 Filed 7–22–94; 8:45 am]

BILLING CODE 6560–50–P

[6] Note that while EPA is making a general finding for this area, today's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area. EPA intends to issue future guidance addressing such potential differences in the significance of precursor emissions in PM–10 nonattainment areas.

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40 CFR Part 52

[CO33–1–6406; and CO5–1–6686; FRL–5003–7]

Clean Air Act Approval and Promulgation of PM_{10} Implementation Plan and Oxygenated Gasoline Program for Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA is finalizing two separate proposed actions: EPA is finalizing the limited approval of the control measures which were contained in the State Implementation Plan (SIP) revisions submitted by the State of Colorado to achieve attainment of the national ambient air quality standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). EPA is approving these control measures for the limited purpose of strengthening the federally approved

SIP for Colorado. (At this time, EPA is not approving the control measures limiting the emissions from Purina Mills and Electron Corporation. EPA will act on these measures at a later date.) The SIP revisions were submitted by Colorado to satisfy certain federal requirements for an approvable moderate nonattainment area PM_{10} SIP for Denver. Approval of these measures makes them federally enforceable. The EPA will take separate action, as appropriate, on the revisions as a whole at a later date. EPA is also approving revisions to Regulation No. 13 (oxygenated gasoline program) submitted on August 6, 1990, and November 27, 1992, implementing and amending oxygenated gasoline programs in the Fort Collins-Loveland, Colorado Springs, and Boulder-Denver Metropolitan Statistical Areas (MSA) as required by Section 211(m) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (the Act). This action is being taken under Section 110 of the Clean Air Act.

EFFECTIVE DATE: This rule will become effective on August 24, 1994.

ADDRESSES: Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations: Environmental Protection Agency, Region VIII, Air Programs Branch, 999 18th Street, Suite 500, Denver, Colorado 80202–2405; Colorado Air Pollution Control Division, 4300 Cherry Creek Dr. South, Denver, Colorado 80222–1530, and Air and Radiation Docket and Information Center, Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460.

FOR FURTHER INFORMATION CONTACT: Final limited approval—Callie Videtich, Air Programs Branch, U.S. Environmental Protection Agency, Region VIII, Denver, Colorado 80202–2466, (303) 293–1754. Regulation No. 13 final approval—Scott P. Lee, Air Programs Branch, U.S. Environmental Protection Agency, Region VIII, Denver, Colorado 80202–2466, (303) 293–1887.

Denver PM10

SUPPLEMENTARY INFORMATION:

I. Background

The Denver, Colorado area was designated nonattainment for PM_{10} and classified as moderate under sections 107(d)(4)(B) and 188(a) of the Clean Air Act, upon enactment of the Clean Air Act Amendments of 1990.[1] See 56 FR 56694 (Nov. 6, 1991); 40 CFR 81.306 (specifying PM_{10} nonattainment designation for the Denver metropolitan area). The air quality planning requirements for moderate PM_{10} nonattainment areas are set out in subparts 1 and 4 of part D, title I of the Act[2].

The EPA has issued a "General Preamble" describing EPA's preliminary views on how EPA intends to review SIPs and SIP revisions submitted under title I of the Act, including those State submittals containing moderate PM_{10} nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)). Because EPA is describing it's interpretations here only in broad terms, the reader should refer to the General Preamble for a more detailed discussion of the interpretations of title I advanced in this final action and the supporting rationale.

Those States containing initial moderate PM_{10} nonattainment areas (*i.e.*, those areas designated nonattainment for PM10 under section 107(d)(4)(B) of the Act) were required to submit, among other things, the following provisions by November 15, 1991:

(1) Provisions to assure that reasonably available control measures (RACM), (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)) shall be implemented no later than December 10, 1993;

(2) Either a demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994, or a demonstration that attainment by that date is impracticable;

(3) Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994; and

(4) Provisions to assure that the control requirements applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels which exceed the NAAQS in the area. See sections 172(c), 188, and 189 of the Act. Some provisions are due at a later date. States with initial moderate PM_{10} nonattainment areas were required to submit a permit program for the construction and operation of new and modified major stationary sources of PM_{10} by June 30, 1992 (see section 189(a)). Such States also must submit contingency measures by November 15, 1993 that become effective without further action by the State or EPA, upon a determination by EPA that the area has failed to achieve RFP or to attain the PM_{10} NAAQS by the applicable statutory deadline. See section 172(c)(9) and 57 FR 13543–13544.

On December 20, 1993 (at 58 FR 66326), EPA announced its intention to take two separate actions with two independent public comment periods on the SIP revisions submitted by the State of Colorado to satisfy the moderate PM_{10} nonattainment area SIP requirements due November 15, 1991 for the Denver PM_{10} nonattainment area. One proposed action was to grant conditional approval of the SIP revisions due to the State's need to fulfill a final commitment to revise permit limitations at two stationary sources (Purina Mills, and Electron Corporation) prior to December 1, 1993. EPA will take action on the conditional approval at a later date. The second proposed action was to limitedly approve the control measures, excluding the permit limits for Purina Mills and Electron Corporation, contained in the SIP revisions for the limited purpose of strengthening the federally enforceable SIP for Colorado. In the proposed rulemaking actions and related Technical Support Document (TSD), EPA described in detail its interpretations of the Act and its rationale for proposing to approve the control measures for their limited purpose in strengthening the federally approved implementation plan for Denver, taking into consideration the specific factual issues presented.

EPA requested public comments on all aspects of the proposal related to the limited approval (please reference 58 FR 66326). EPA received no comments during the public comment period regarding the proposed limited approval. This final action on the limited approval of the control measures in the Denver moderate nonattainment area PM_{10} SIP revisions is unchanged

[1] The 1990 Amendments to the Clean Air Act made significant changes to the air quality planning requirements for areas that do not meet (or that significantly contribute to ambient air quality in a nearby area that does not meet) the PM_{10} National Ambient Air Quality Standards (see Public Law No. 101–549, 104 Stat. 2399). References herein are to the Clean Air Act, as amended (the Act), 42 U.S.C. 7401, *et seq.*

[2] Subpart 1 contains provisions applicable to nonattainment areas generally, and subpart 4 contains provisions specifically applicable to PM_{10} nonattainment areas. At times, subpart 1 and subpart 4 overlap or conflict. EPA has attempted to clarify the relationship among these provisions in the "General Preamble" and, as appropriate, in today's notice and supporting information.

from the December 20, 1993, proposed approval action.

The discussion herein provides only a broad overview of the proposed action EPA is now finalizing. The public is referred to the December 20, 1993, proposed rule for a more in-depth discussion of the action now being finalized.

II. Response to Comments

EPA did not receive any public comments regarding its December 20, 1993, proposed limited approval of the Denver moderate nonattainment area PM_{10} SIP control measures. (58 FR 66326–66334).

III. This Action

Section 110(k) of the Act sets out provisions governing EPA's review of SIP submittals (see 57 FR 13565–13566). The Governor of Colorado submitted the Denver PM_{10} SIP revision in a letter dated June 7, 1993. That submittal and subsequent submittals made on September 3, 1993, and October 20, 1993, fulfilled commitments made on June 7, 1993, were intended to satisfy those moderate PM_{10} SIP requirements due for Denver on November 15, 1991. As described in EPA's proposed action on this SIP (58 FR 66326–66334, December 20, 1993), the Denver June 7, 1993, moderate nonattainment area PM_{10} plan and subsequent submittals include control measures. EPA may grant a "limited" approval of SIP requirements under section 110(k)(3) of the Act in light of the general authority delegated to EPA under section 301(a) of the Act which allows EPA to take actions necessary to carry out the purposes of the Act. EPA is granting a final limited approval of the referenced PM_{10} control measures for Denver because they strengthen the SIP by advancing the PM_{10} air quality protection goal of the Act. Federal approval of the control measures makes them federally-enforceable. However, this limited approval is not approving those measures as satisfying the RACM requirement or any other specific requirement of the Act, nor does it constitute full approval of the SIP pursuant to section 110(k)(3). Please refer to EPA's notice of proposed rulemaking (58 FR 66326) and the TSD for that action for a more detailed discussion on control measures contained in the Denver plan.

In this notice of final rulemaking action, EPA is announcing its approval of the control measures, excluding the permit limits for Purina Mills and Electron Corporation, contained in the June 7, 1993 Denver PM_{10} SIP and subsequent submittals noted above for their limited purpose in strengthening the SIP.

Four sources/source categories were identified as contributing to the PM_{10} nonattainment problem in Denver and, therefore, were targeted for control in the SIP revisions. Control measures were developed for the following area sources: residential wood combustion, street sanding and sweeping of paved streets, and mobile sources. In addition, controls reducing emissions from stationary sources were also developed.

EPA views the following measures as reasonable, enforceable, and responsible for PM_{10} emissions reductions in the Denver PM_{10} nonattainment area: (1) Colorado Regulation No. 4 which regulates residential wood burning; (2) Colorado Regulation No. 16 which sets sanding and sweeping requirements; (3) the federal tailpipe standards, which provide an ongoing benefit due to fleet turnover and Colorado Regulations 12 and 13 which were developed independently from the PM_{10} SIP but are included because of their particulate emission reduction benefit; and (4) Colorado Regulation No. 1, which provides stationary source emission control regulations for particulates, smokes, carbon monoxide and sulfur oxides.

A more detailed discussion of the individual source contributions and their associated control measures (including available control technology) can be found in the TSD accompanying EPA's proposed approval of the Denver moderate PM_{10} nonattainment area SIP (58 FR 66326). EPA has reviewed the State's documentation and concluded that the control measures on which EPA is taking final action on today serve to strengthen the existing SIP by advancing the PM_{10} air quality protection goal of the Act.

As noted, EPA is finalizing the control measures contained in Colorado's June 7, 1993 SIP submittal and subsequent SIP submittals for the Denver PM_{10} nonattainment area, excluding the permit limits for Purina Mills and Electron Corporation which will be acted on at a later date. This action is explained in the notice of proposed rulemaking (58 FR 66326–66334) and associated TSD.

IV. Final Action—Limited Approval

This document announces EPA's final action on the limited approval rulemaking proposed at 58 FR 66326. As noted elsewhere in this action, EPA received no adverse public comments on the proposed action to approve the control measures for their limited purpose in strengthening the existing SIP. As a direct result, the Regional Administrator has reclassified this action from Table 1 to Table 3 under the processing procedures established at 54 FR 2214, January 19, 1989.

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

Regulation No. 13

SUPPLEMENTARY INFORMATION: On January 11, 1994 (59 FR 1513–1515), EPA published a notice of proposed rulemaking for the State of Colorado. The notice proposed approval of an oxygenated gasoline program.

The formal SIP revisions were submitted by the State of Colorado on August 6, 1990 and November 27, 1992. (The November 27, 1992 revision supersedes the August 6, 1990 submission. EPA mentions the August 6, 1990 submittal as historical information. EPA is taking action on only the November 27, 1992 revision.) The revisions included amended versions of Colorado's Regulation 13. These regulatory changes were adopted by the Colorado Air Quality Control Commission. A more detailed analysis of the state submittal was prepared as part of the proposed action and is contained in a TSD dated September 25, 1993, which is available from the Region VIII office listed in the Addresses section of this document. Other specific requirements of the oxygenated gasoline program and the rationale for EPA's proposed action are explained in the proposed rulemaking and will not be restated here. No public comments were received on the proposal.

I. Final Action—Regulation No. 13

EPA is approving Colorado's Regulation No. 13: Oxygenated Gasoline Program as adopted September 17, 1992 by the Colorado Air Quality Control Commission as part of the Air Quality Implementation Plan for State of Colorado. This Regulation was submitted on November 27, 1992.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of

this action must be filed in the United States Court of Appeals for the appropriate circuit by September 23, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

Executive Order (EO) 12866

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993, memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future notice will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for 2 years. The EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993. OMB has exempted this regulatory action from E.O. 12866 review.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Dated: June 1, 1994.

Nela Y. Cooke,

Acting Regional Administrator.

40 CFR, part 52, Subpart G, is amended as follows:

Subpart G—Colorado

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.320 is amended by adding paragraphs (c)(61) and (c)(67) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(61) The Governor of Colorado submitted a portion of the requirements for the moderate nonattainment area PM_{10} State Implementation Plan (SIP) for Denver, Colorado with a letter dated June 7, 1993, and subsequent submittals dated September 3, 1993, and October 20, 1993, fulfilling most of the commitments made in the June 7, 1993, letter. The submittals were made to satisfy those moderate PM_{10} nonattainment area SIP requirements due for the Denver PM_{10} nonattainment area on November 15, 1991. EPA is approving, for the limited purpose of strengthening the SIP, the control measures contained in the SIP revisions identified above. (EPA is not approving, at this time, the control measures limiting the emissions from Purina Mills and Electron Corporation.)

(i) Incorporation by reference.

(A) Revisions to Regulation No. 4, "Regulation on the Sale of New Woodstoves and the Use of Certain Woodburning Appliances During High Pollution Days," as adopted by the Air Quality Control Commission on June 24, 1993, effective August 30, 1993, as follows: insert new Section VIII and recodification of References Section. This revision pertains to local jurisdiction implementation and enforcement of ordinances and resolutions restricting wood burning on high pollution days.

(B) Regulation No. 16, "Concerning Material Specifications for, Use of, and Clean-up of Street Sanding Material," as adopted by the Air Quality Control Commission on June 24, 1993, effective August 30, 1993, as follows: recodification of Regulation and addition of Sections II and III, which regulate emissions from street sanding and sweeping in the Denver PM_{10} nonattainment area.

(C) Revisions to Regulation No. 1, "Emission Control Regulations for Particulates, Smokes, Carbon Monoxide, and Sulfur Oxides for the State of Colorado," as adopted by the Air Quality Control Commission on August 19, 1993, effective October 30, 1993, as follows: insert new Sections VII and VIII and recodification of the two following Sections, "Emission Regulations Concerning Areas Which are Nonattainment for Carbon Monoxide—Refinery Fluid Bed Catalytic Cracking Units", and "Statements of Basis and Purpose" Sections. The revisions pertain to restrictions on the use of oil as a back-up fuel for certain sources and set new emission limits at the following Public Service Company Power Plants: Cherokee, Arapahoe, and Valmont.

(D) Coors Glass Plant allowable emission limitations on three furnaces.

1. Permit 92JE129–1, effective date January 19, 1993, regulating emissions at the KTG glass melting furnace #1.

2. Permit 92JE129–2, effective date January 19, 1993, regulating emissions at the KTG glass melting furnace #2.

3. Permit 92JE129–3, effective date January 19, 1993, regulating emissions at the KTG glass melting furnace #3.

(E) Conoco Refinery allowable emission limitations from the refinery.

1. Permit 90AD524, effective date March 20, 1991, regulating a Tulsa natural gas fired 20MMbtu/hour heater equipped with low-Nox burners.

2. Permit 90AD053, effective date March 20, 1991, regulating process heaters H–10, H–11 and H–27 and process boilers B4, B6, and B8 all burning fuel gas only.

3. Permit 91AD180–3, effective December 28, 1992, regulating the three stage Claus sulfur recovery unit with tail gas recovery unit.

(ii) Additional material.

(A) Regional Air Quality Council, "Guidelines for Reducing Air Pollution from Street Sanding" sets voluntary guidelines for public works departments to follow to reduce the amount of street sand applied, and includes recommendations for increasing the effectiveness of street cleaning operations.

(B) Adolph Coors Company Brewery permit emission limitations on five boilers. Permits: C–12386–1&2, C–12386–3, C–10660, C–11199, and C–11305.

(67) On November 27, 1992, the Governor of Colorado, submitted a revision to the Colorado SIP. This revision replaces previous versions of Regulation No. 13 with the amended Regulation No. 13 (oxygenated gasoline program) adopted September 17, 1992. Regulation No. 13 requires the oxygenated gasoline programs to be implemented in the Fort Collins-Loveland, Colorado Springs, and Boulder-Denver Metropolitan Statistical Areas (MSA) as required by Section 211(m) of the Clean Air Act Amendments of 1990.

(i) Incorporation by reference.

(A) Revision to Regulation No. 13, "Oxygenated Gasoline Program," as adopted by the Colorado Air Quality Control Commission on September 17, 1992, effective October 10, 1992, as follows: entire Regulation revision. This regulation supersedes and replaces all

previous revisions to Regulation No. 13, (40 CFR, 52.320(46)(2)).

[FR Doc. 94–17692 Filed 7–22–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 435, 440, and 441

[MB–008–FC]

RIN 0938–AC55

Medicaid Program; Home and Community-Based Services and Respiratory Care for Ventilator-Dependent Individuals

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period expands coverage of Medicaid home and community-based services under the waiver provisions of section 1915(c) of the Social Security Act. This final rule also adds coverage of respiratory care services as an optional benefit under State Medicaid plans.

These revisions and additions incorporate changes made by the Consolidated Omnibus Budget Reconciliation Act of 1985 and the Omnibus Budget Reconciliation Act of 1986 and respond to the public comments that we received as a result of the June 1, 1988, publication of a proposed rule. This final rule with comment period also incorporates self-implementing provisions of the Omnibus Budget Reconciliation Act of 1987, the Medicare Catastrophic Coverage Act of 1988, the Technical and Miscellaneous Revenue Act of 1988, and the Omnibus Budget Reconciliation Act of 1990 concerning home and community-based services, and makes other technical changes not specifically related to these statutes.

DATES: Effective Date: This final rule with comment period is effective on August 24, 1994.

Comment Date: Written comments will be accepted on changes as noted in sections II.C.2., II.G.2.b., II.G.3.b., II.G.4.b., II.G.5.b., II.G.6.b., and II.I.2. The comments will be considered if we receive them at the appropriate address, as provided below, no later than 5:00 p.m. on September 23, 1994.

ADDRESSES: Mail written comments (original and two copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: MB–008–FC, P.O. Box 7518, Baltimore, Maryland 21207.

If you prefer, you may deliver your written comments (original and two copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Ave., SW, Washington, DC.

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

Due to staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

If comments concern information collection or recordkeeping requirements, please address a copy of comments to: Office of Management and Budget, Office of Information and Regulatory Affairs, Room 10235, New Executive Office Building, Washington, DC 20503, Attention: Laura Oliven.

In commenting, please refer to file code MB–008–FC. Comments will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington DC on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone (690) 245–7890).

FOR FURTHER INFORMATION CONTACT: Robert C. Wardwell, (410) 966–5659, for Payment and Coverage Policy.

Marinos T. Svolos, (410) 966–4451, for Post-Eligibility Treatment of Income and Resources.

SUPPLEMENTARY INFORMATION:

I. General Background

This final rule with comment period contains final regulations for the provision of Medicaid home and community-based services under waivers granted under section 1915(c) of the Social Security Act (the Act), and for the provision of respiratory care services as an optional benefit under the Medicaid program.

Home and community-based services are those medical assistance services provided under a State waiver that are not otherwise available under a State's Medicaid plan. These services: (1) must be furnished in accordance with an individually written plan of care that is subject to approval by the State Medicaid agency; and (2) may be furnished only to persons who, but for the provision of such services, would otherwise require the level of care provided in a hospital, nursing facility (NF) (formerly referred to as a skilled nursing facility (SNF) or intermediate care facility (ICF)), or intermediate care facility for the mentally retarded (ICF/MR). (Under section 4211(a)(3) of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Public Law 100–203, the distinction between SNFs and ICFs under the Medicaid program ended, effective October 1, 1990. Both of these facilities are now categorized as NFs, as defined in section 1919(a) of the Act, effective October 1, 1990. We generally use the acronym "NF" throughout this rule unless we are quoting directly from a statute or providing an historical reference. Medicaid recognizes two types of long-term care facilities—NFs and ICFs/MR.)

Respiratory care services as medical assistance may be provided as an option under the Medicaid program, as authorized and described in sections 1902(e)(9) and 1905(a)(20) of the Act.

On June 1, 1988, we published a proposed rule in the **Federal Register** (53 FR 19950) proposing to revise the Medicaid regulations governing the provision of home and community-based services under waivers and respiratory care services. This rule proposed to codify in regulations section 9502 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Public Law 99–272, enacted on April 7, 1986, and sections 9408, 9411, and 9435(a) of the Omnibus Budget Reconciliation Act of 1986 (OBRA '86), Public Law 99–509, enacted on October 21, 1986.

Four additional public laws have been passed that contain provisions that impact on the proposed rule. These laws were enacted either immediately preceding or subsequent to the publication of the proposed rule. The public laws are:

- The Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Public Law 100–203, enacted on December 22, 1987 (sections 4102 (b) and (c), 4118, and 4211);
- The Medicare Catastrophic Coverage Act of 1988 (MCCA), Public Law 100–360, enacted on July 1, 1988 (sections 411(k)(10)(A) and 411(k)(10)(H));
- The Technical and Miscellaneous Revenue Act of 1988 (TMRA), Public Law 100–647, enacted on November 10, 1988 (section 8437); and
- The Omnibus Budget Reconciliation Act of 1990 (OBRA '90), Public Law 101–508, enacted on November 5, 1990 (sections 4741 and 4742).

In this final rule with comment period, we are incorporating provisions of these public laws that relate to many of the regulatory provisions in the June 1, 1988, proposed rule. We are inviting public comments on the revisions that

we have made to this proposed rule in response to these legislative changes.

We have also revised the proposed regulations in response to public comments. We received, on a timely basis, 16 letters from individuals, associations, State agencies, and providers of services (primarily home health agencies). While most commenters supported the provisions in the proposed rule, the majority also expressed interest in expanding the waiver program. Some commenters correctly noted that the proposed rule did not include statutory changes made by OBRA '87, MCCA, and TMRA.

Because we have made a substantial number of revisions to the proposed rule in response to legislative changes, we have organized our discussion in this preamble by specific subject areas. We are using this organization to group all of the additions and revisions to each subject in one place. We are presenting the legislative basis for the proposed rule and any subsequent legislative provisions that changed or added to the provisions of the proposed rule. We are following the legislative foundation with a discussion of the proposed regulations for that area, any public comments we received, and our responses to the public comments. We conclude each topic with a description of the applicable provisions contained in this final rule.

II. Home and Community-Based Services Waivers

Section 1915(c) of the Social Security Act authorizes the Secretary to waive certain Medicaid statutory requirements to enable a State to cover a broad array of home and community-based services. Coverage of these services enables elderly, disabled, and chronically ill persons, who would otherwise be institutionalized, to live in the community. Section 1915(c) specifies the services that may be covered, the conditions for granting waivers, and the provisions governing the scope of services under waivers. Section 1915(c) was added to title XIX of the Act by the Omnibus Budget Reconciliation Act of 1981 (OBRA '81), Public Law 97–35, to encourage the provision of services to Medicaid recipients in noninstitutional settings. Prior to the enactment of OBRA '81, the Medicaid program provided limited coverage for long-term care services in noninstitutional settings.

A State may request approval by HCFA of waivers under section 1915(c) to provide home and community-based services that are not otherwise available to certain recipients under the State's Medicaid plan. These services must be furnished in accordance with an individual written plan of care subject to approval by the State's Medicaid agency and may be furnished only if the individual would otherwise require the level of care provided in a hospital, NF, or ICF/MR and if the costs are reimbursable under the State's plan. (The original statute specified SNF or ICF. OBRA '87 struck out SNF or ICF and substituted NF or ICF/MR.)

Existing regulations governing home and community based services under waivers under section 1915(c) appear in various sections of 42 CFR parts 435, 440, and 441. This final rule with comment period contains regulations which amend each of these three parts.

A. Expanded Habilitation Services

1. Background

Prior to the enactment of COBRA, a waiver granted under section 1915(c) of the Act allowed a State to receive Federal financial participation (FFP) for the following services as home and community-based services: case management services, homemaker/home health aide services, personal care services, adult day health services, habilitation services, respite care, and "other" services as requested by the State and approved by the Secretary. Section 9502(a) of COBRA revised section 1915(c) of the Act to explicitly include certain prevocational, supported employment, and educational services as habilitation services under home and community-based services.

Habilitation services are authorized by section 1915(b)(4) of the Act and defined in section 1915(c)(5)(A) of the Act, as amended by section 9502 of COBRA, as services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings. Section 9502(a) of COBRA also added new sections 1915(c)(5) (B) and (C) to the Act that allow a State to request HCFA's approval to include certain additional services previously excluded from coverage in its definition of "habilitation services" for individuals who receive waiver services after discharge from a NF or ICF/MR. Sections 1915(c)(5) (B) and (C) provide that habilitation services include prevocational, educational, and supported employment services, but do not include—

- Special education and related services, as defined in section 602 (16) and (17) of the 1975 Amendments to the Education of the Handicapped Act (Public Law 94–142, now located at 20 U.S.C. 1401 (16) and (17)), that are otherwise available to the individual through a local educational agency; and
- Vocational rehabilitation services that are otherwise available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

Section 9502(j)(1) of COBRA provides that section 9502(a) is effective for services furnished on or after April 7, 1986. Section 4118(j) of OBRA '87 amended section 9502(j)(1) of COBRA to provide that eligibility of previously institutionalized individuals for the expanded habilitation services under a section 1915(c) waiver is determined without regard to whether the individuals were receiving institutional services before their eligibility under the waiver. Section 1915(c)(5) as added by section 9502(a) of COBRA refers to habilitation services, "* * * with respect to individuals who receive such services after discharge from a nursing facility or intermediate care facility for the mentally retarded * * *". In our proposed rule, we interpreted "after discharge" as meaning that an individual is discharged directly into a home and community-based services waiver. (Individuals who have never been institutionalized, however, are not eligible for the expanded habilitation services.) This provision was effective as if it were included in the enactment of section 9502(j)(1) of COBRA. As indicated in the Report of the Committee on the Budget to accompany H.R. 3545 (OBRA '87) (H. Rept. No. 391, 100th Cong., 1st Sess. 537 (1987)), the Congress included this amendment to section 9502(j) because it believed HCFA had misread COBRA in the proposed rule by stating that expanded habilitation services would be provided only to recipients discharged directly from a NF or ICF/MR into a home and community-based services waiver program.

In the proposed rule, we included in regulations the provisions of section 9502(a) by—

- Revising § 440.180 to provide for the expanded definition of habilitation services under paragraphs (b)(6) and (c);
- Adding §§ 440.180(c)(2) and (3) to provide for the inclusion of prevocational, educational, and supported employment services under a home and community-based waiver and for the exclusion of certain services; and adding § 441.302(i) and § 441.303(h) to require documentation to support State health and welfare assurances for the provision of these expanded services.
- Revising § 441.310(a)(3) to provide for limits on FFP for prevocational, educational, and supported employment services.

We received the following comments on this proposal:

Comment: Five commenters raised issues concerning the expanded definition of habilitation to include educational, prevocational, and supported employment services. Some commenters suggested that HCFA was imposing an age minimum of 22 for the expanded habilitation services. Others stated that our definition of prevocational services was too strict and should be more consistent with section 4442.3(B)(3)(a) of the State Medicaid Manual, which distinguishes prevocational services from noncovered vocational services. (This definition was added in HCFA Transmittal No. 37, issued in September 1988.)

Response: We are not imposing a minimum age for the expanded habilitation services. Our discussion of this subject in the preamble of the proposed rule pertained only to the fact that most educational and prevocational services for individuals under 22 years of age ordinarily would be provided under State and Federal programs other than Medicaid. We agree with the commenters concerning the need for more consistency between the regulations defining prevocational services and the related HCFA instructions, and have revised § 440.180(c)(2)(i) of the proposed regulations to make the policy consistent.

2. Provisions of the Final Rule

We are adopting the proposed regulations as final rules, with the following changes:

- We have revised § 440.180(c)(1) to provide that a State may provide expanded habilitation services under a new or amended waiver to recipients who have been discharged from a Medicaid-certified NF or ICF/MR, regardless of when the discharge occurred. We have made a conforming change to § 441.302(i)(2).
- We have revised § 440.180(c)(2)(i) to incorporate a provision to distinguish covered prevocational services from noncovered vocational services.
- We have revised § 441.310(a)(3)(iii) to clarify that FFP is not available for prevocational, educational, or supported employment services, or any combination of these services, as part of habilitation services provided to recipients who were never institutionalized in Medicaid-certified NFs or ICFs/MR.

B. Services to Patients with Chronic Mental Illness

1. Background

Section 9411(d) of OBRA '86 amended section 1915(c)(4)(B) of the Act by adding day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness to the list of services specifically enumerated as home and community-based services. Therefore, effective October 21, 1986 (the date OBRA '86 was enacted), States may request that any of the above services be provided under a waiver or renewal of a waiver for persons diagnosed as chronically mentally ill.

In the proposed rule, we—

- Revised § 440.180 to add a new paragraph (b)(8) to provide for the inclusion of day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services for individuals with chronic mental illness as home and community-based waiver services;
- Added new §§ 441.302(i) and 441.303(i) to specify requirements for written State health and welfare assurances for the provision of these services and for supporting documentation of these assurances;
- Added a new § 441.310(a)(4) to specify limits on FFP for the provision of these services.

We received the following public comment on these proposed regulations:

Comment: One commenter noted that States may provide the specified services to the mentally retarded as well as to the chronically mentally ill.

Response: Section 1915(c)(4)(B) of the Act authorizes the provision of day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness. Neither the statute nor the conference committee report mentions individuals diagnosed as mentally retarded. However, States may request the authority to provide these services to the mentally retarded under the broader waiver authority of section 1915(c)(4)(B) of the Act as "other" services. The "other" services category has been in existence since the home and community-based services waiver program was established, and HCFA has approved a variety of services under this category that States establish as cost-effective and necessary to avoid institutionalization.

2. Provisions of the Final Rule

We are adopting the proposed provisions, with minor editorial changes, as final rules. We have also redesignated § 441.302(i) as § 441.302(j) to accommodate other revisions.

C. Scope of Respite Care

1. Background

Under section 1915(c)(4)(B) of the Act, a State may provide respite care under its home and community-based waiver services program. Respite care may be provided in institutional and noninstitutional settings. However, under existing regulations at § 441.310, FFP is not available for the cost of room and board, except when provided as part of respite care in a State-approved facility that is not a private residence. Because respite care generally should be a short-term service, we have required States to fully document the need for more than 30 days of care.

In the proposed § 440.180(b)(7), in accordance with section 1915(c)(4) of the Act, we imposed a 30-day limitation on the duration of institutional respite care services provided during a waiver year to any individual under a waiver program. We indicated in the proposed rule that we were not placing a limit on noninstitutional respite care but that we would closely review all waiver applications that requested noninstitutional respite care in excess of 30 days per waiver year.

(Note: We have traditionally used the term "waiver year" for any 12-month period for which a waiver applies. While we recognize that the statute uses the term "fiscal year", we have not had a problem with our use of "waiver year" for "fiscal year". Since the term "waiver year" is generally understood and accepted by those involved in the waiver process, we are continuing to use it in the Medicaid regulations. We believe that a switch from the term "waiver year" to "fiscal year" would cause unnecessary confusion.)

Subsequent to the publication of the proposed rule, section 4742(d)(1) of OBRA '90 amended section 1915(c)(4) of the Act to eliminate restrictions on the number of hours or days of respite care that a State may provide in any period under a waiver as long as the State continues to show cost-neutrality in its waiver program. ("Cost-neutrality" means that the average per capita expenditures for individuals under waivers does not exceed what the average per capita expenditures for these individuals would have been if the waiver had not been granted.) Section 4742(d)(2) of OBRA '90 specifies that the changes under section 4742(d)(1) apply as if included under OBRA '81, the original legislation for

the waiver program, enacted August 13, 1981.

We received the following public comments on this proposal:

Comment: Six commenters expressed concerns about the proposed 30-day limit on institutional respite care. Two commenters indicated that room and board should be included under noninstitutional respite care. Three commenters indicated that the 30-day limit is too strict; two recommended a 60-day limit and one a 90-day limit. One of the commenters who recommended a 60-day limit also recommended a 2-week limit on consecutive weeks of institutional respite care.

Response: Section 1915(c)(4) of the Act prohibits the Secretary from placing durational limits on respite care as long as the waiver retains cost-neutrality as required under section 1915(c)(2)(D). The issues raised by the commenters regarding our formerly proposed limits on institutional respite care are now moot.

Section 1915(c)(1) of the Act specifically excludes room and board as a covered waiver service. However, an exception with regard to respite care was included under regulations based on the text of section 1915(c)(4)(B) of the Act, the legislative history of OBRA '81 that amended the Act to include the home and community-based waiver program, and the fundamental nature of respite care services. In discussing the services that could be included under section 1915(c) waiver programs, the Congress explained in H. Rept. No. 208, 97th Cong., 1st Sess. 966 (1981) that respite care services were provided on a short-term basis to individuals unable to care for themselves and designed to fill-in for the absence of care or the "need for relief for those persons normally providing such care." The Congress indicated that such services can be offered in "the home of an individual or an approved facility such as a hospital, nursing home, foster home, or community-residential facility."

Because of the Congress' discussion of certain institutional facilities as locations for the provision of respite care, and the fact that room and board costs are a core aspect of the costs of respite care services offered in these facilities, we believe that the Congress intended to allow for payment of room and board costs as part of the costs of respite care services. Based in part on the cited language from the Conference Report, we have decided to limit institutional respite care to States which limit the facilities authorized to provide such care to (1) Medicaid-certified hospitals and nursing homes, and (2) foster homes and community-residential facilities that meet State standards as specified in an approved waiver. Payment for room and board costs as part of the costs of respite care services can be authorized only for care provided in these facilities.

Section 1915(c)(2)(D) of the Act requires that a State maintain the overall cost-neutrality of its waiver program. Significant increases in respite care, particularly institutional respite care because it is generally costly, could jeopardize the cost-neutrality of a waiver program. A State that wishes to revise its limit on the number of hours or days of respite care in a previously approved waiver program must submit an amendment to its currently operating waiver. The amendment must specify the revised limits and revise the cost-neutrality formula to allow for the increased costs attributable to the revised respite care limits.

2. Provisions of the Final Rule

We are not including in these final regulations any limits on the duration of respite care. However, the State must continue to show cost-neutrality in its waiver program. Because of the changes in the law, the proposed revision to § 440.180(b)(7) that contained limits on respite care has been deleted. We will consider timely comments on this deletion.

D. Permitting Hospital Level of Care for Certain Ventilator-Dependent Recipients

1. Background

Section 9502(b) of COBRA amended sections 1915(c)(1) and (c)(2)(C) of the Act. These amendments allowed States to provide home and community-based services to individuals who are ventilator-dependent and who, but for the provision of home and community-based services, would continue to receive inpatient hospital, NF, or ICF/MR services under a State's Medicaid plan. (The original statute specified SNF or ICF. OBRA '87 struck out "SNF" or "ICF" and substituted "NF" or "ICF/MR".) Thus, sections 1915(c)(1) and (c)(2) of the Act authorized waiver payments for individuals who require an inpatient hospital level of care, if they enter the waiver program directly from a hospital and are ventilator-dependent. Prior to this legislation, only persons requiring NF or ICF/MR levels of care could be covered under a home and community-based waiver program.

Section 9411(a)(1) of OBRA '86 subsequently amended section 1915(c)(1) of the Act to remove the amendments made by section 9502(b) of COBRA and added a broader authority to permit States to extend home and community-based services to individuals who, but for the provision of these services, would require the inpatient hospital level of care. Section 9411(a)(2) of COBRA amended section 1915(c)(2)(B) of the Act to also require the State to provide for an evaluation of the individual's need for inpatient hospital services prior to permitting the use of home and community-based services as an alternative to inpatient hospital services.

In the proposed rule, we revised or added provisions under §§ 441.301(a)(3)(i), (b)(1)(ii), and (b)(1)(iii)(A), §§ 441.302(c)(1), (c)(2)(i), (e), and (f), and §§ 441.303(f)(1), (3), and (5), to incorporate the provisions of section 1915(c)(2). These provisions extended home and community-based services coverage to individuals who would otherwise need inpatient hospital care and required States to provide for an evaluation of the need for inpatient hospital services. In addition, we included a proposed expansion of § 441.303(c)(2) to require States that use a level of care evaluation form other than that used for nursing home placements to assure us that the outcome of that evaluation form is reliable, valid, and fully comparable to the form used for nursing home placement.

2. Provisions of the Final Rule

We did not receive any comments on these provisions. We have, however, made the following clarifying changes in the final rule:

- We substituted "NF" or "ICF/MR" for "SNF" or "ICF" to conform the regulations to OBRA '87.
- We have revised § 441.303(c)(2) by substituting "hospital, nursing facility, or ICF/MR" for "nursing home." Level of care evaluation forms from any of these facilities will not need State assurances for reliability and validity.

E. Bundling of Services

1. Background

We proposed to revise § 441.301(b)(4) to require States to describe the services to be furnished under home and community-based services waivers under section 1915(c) so that each service is separately defined. Multiple services that are generally considered to be separate services cannot be consolidated under a single definition. Commonly accepted terms must be used to describe the service and definitions may not be open-ended in scope.

We received the following comments on the proposed rule:

Comment: Two commenters recommended that States be allowed to combine (bundle) certain services under a single definition under home and community based services waivers under section 1915(c) for ease of reporting.

Response: We believe that services enumerated in the statute (section 1915(c)(4)(B)), such as personal care or adult day health services, must stand alone and not be included in a bundled service. In addition, bundling of these services would not ease the waiver process because the cost of each component of the combined service would need to be computed separately to show how the single service cost was derived. The bundling of several waiver services into a single service definition may also unnecessarily restrict an individual's freedom of choice of providers (section 1902(a)(23) of the Act) by limiting the pool of qualified providers. Bundling would limit the pool of providers able to furnish the bundled service because fewer providers would be capable of furnishing the broader array of services that result when various services are combined into bundles. Under a bundling arrangement, a provider must be able to furnish all of the component services in a bundle to qualify for a provider agreement. We will consider a combined service definition if the State establishes that the bundling of services will permit more efficient delivery of services and not compromise either the availability of services or an individual's free choice of providers. If HCFA authorizes the bundling of services, however, States must continue to compute separately the costs of the component services to support the final cost of the bundled waiver service for the cost-neutrality formula.

2. Provisions of the Final Rule

We have adopted the proposed regulations as final rules with two modifications:

- We have revised proposed § 441.301(b)(4) to specify that HCFA will approve combined service definitions (bundling) if the definitions will permit more efficient delivery of services and not compromise an individual's access to or free choice of providers.

- We have added a new paragraph § 441.303(f)(10) to require States to continue to compute separately the costs and utilization of the component services that compose a HCFA-approved bundled service.

F. Waiver of Comparability Requirement and Certain Income and Resource Eligibility Requirements

1. Waiver of Comparability Requirement

Section 9411(c) of OBRA '86 amended section 1915(c)(3) of the Act to limit the Medicaid State plan requirements under section 1902(a)(10) of the Act that may be waived under section 1915(c) to "comparability" of covered services under section 1902(a)(10)(B); that is, that covered services be equal in amount, duration, and scope for certain Medicaid recipients. Previously, all of section 1902(a)(10) of the Act could be waived by the Secretary if requested by States. By indicating that only section 1902(a)(10)(B) of the Act may be waived, the Congress narrowed the scope of this particular waiver option. Specifically, section 1902(a)(10)(B) of the Act requires that the medical assistance made available to any eligible categorically needy individual may not be less in amount, duration, or scope than the medical assistance made available to any other categorically needy individual, and may not be less in amount, duration, or scope than the medical assistance made available to medically needy individuals. Consequently, a waiver of comparability affords the State an opportunity to target waivers to certain specific groups without providing those services to other groups. The amendment made by section 9411(c) is effective for waivers and renewals of waivers approved on or after October 21, 1986.

Regulations implementing section 1902(a)(10)(B) are located at § 440.240.

In the proposed rule, we revised § 441.301(a)(2) to provide that, when applicable, a request for waiver of Medicaid requirements could include a waiver of sections 1902(a)(1) and (a)(10)(B) of the Act which concern "statewide" application of Medicaid and "comparability of services." Prior to enactment of section 9411 of OBRA '86, a State could request and receive waivers of section 1902(a)(1) and 1902(a)(10) of the Act. A waiver of 1902(a)(10) included waiver of comparability as well as all other subsections in that section of the statute. Section 9411(c) of OBRA '86 limited the waiver authority to section 1902(a)(10)(B) or "comparability of services". Because of this limitation, a State could no longer apply rules for deeming of income and resources for institutionalized medically needy recipients to determine Medicaid eligibility of the waiver population.

2. Medicaid Eligibility Rules

Section 4118(a)(1) of OBRA '87 amended section 1915(c)(3) of the Act to allow States to waive section 1902(a)(10)(C)(i)(III) which contains rules for determining income and resource eligibility for the medically needy. This option allows States to use income and resource methods and standards, other than those that would ordinarily be used for medically needy individuals living in the community, provided that such rules do not conflict with other provisions of the Medicaid statute which States may not waive. That is, the option permits waiver of rules, such as deeming of income and resources, that are applied differently in the community than in an institution and are barriers to participation in a waiver program.

When this provision was enacted, deeming was the primary barrier. Over time, this has changed. There are now other eligibility policies applied in an institutional setting that a State may wish to use instead of policies that would normally be used in the community. For example, under its waiver, a State may wish to apply to a home and community-based waiver recipient living with a spouse, the spousal impoverishment protection rules of section 1924 of the Act which would have applied to this recipient had the recipient been living in a medical institution. As a second example, for its home and community-based recipients, a State might use more liberal income or resource methods that the State has approved under section 1902(r)(2) of the Act for institutionalized individuals who are eligible under a special income level under § 435.231.

If a State elects to use more liberal income rules under this waiver authority, it is still subject to the FFP limits on Medicaid expenditures for the medically needy under section 1903(f) of the Act, as interpreted under § 435.1007. These limits may not be waived. The FFP limit for the medically needy is 133 and 1/3 percent of the highest State's Aid to Families with Dependent Children (AFDC) money payment for a family of the same size which has no income or resources. Because the legislative history explicitly states that the Congress intended that this waiver option permit States to use institutional deeming rules, we are interpreting the FFP limits at § 435.1007 to mean that the income used for purposes of determining if the FFP limits are met is income that would be used in the institutional setting. That is, only the waiver recipient's income

would be used in calculating the FFP limits since spousal and parental income is not deemed to be available in an institution. This interpretation will be reflected in a revision to § 435.1007 in a separate rule.

Prior to this amendment to section 1915(c)(3) and the amendment under section 9411(c) of OBRA '86 limiting waivers under section 1902(a)(10) to "comparability" of covered services under section 1902(a)(10)(B), States had been permitted to waive eligibility requirements for the categorically needy, but not the medically needy. Generally, States used the waiver authority to use institutional income and resource deeming rules. The result of these two amendments to section 1915(c) is that this waiver authority no longer extends to the categorically needy, but extends only to the medically needy. However, a State may continue to use the institutional eligibility rules for categorically needy waiver recipients, if the individuals are members of an eligibility group that the State may elect to cover under section 1902(a)(10)(A)(ii)(VI) of the Act and § 435.217.

3. Post-Eligibility Treatment of Income

In the proposed rule, we revised the post-eligibility rules at § 435.726(c)(1) and § 435.735(c)(1) to include the provisions of section 9502(e) of COBRA and section 9435(a) of OBRA '86. Post-eligibility calculations for individuals who are found eligible under § 435.217 determine how much of eligible waiver recipients' income is applied to the cost of home and community-based waiver services. One of the deductions from waiver recipients' income included in these calculations is a deduction for the maintenance needs of the waiver recipient.

Section 9502(e) of COBRA amended section 1915(c) of the Act to reflect a change in the amount States may protect for the maintenance needs of waiver recipients in the post-eligibility calculations. The amendment in COBRA specifically allows States to use a higher maintenance needs standard for home and community-based recipients than permitted under §§ 435.726 and 435.735(c)(1) for waivers approved or renewed on or after April 7, 1986. The amendment in OBRA '86 further amended section 1915(c) to also permit use of the higher maintenance need standards for waivers approved or renewed before April 7, 1986. In the proposed rule, we provided that the maintenance amount be based on a reasonable assessment of need and that States set an upper limit which cannot be exceeded for any one individual. Should a State choose to use maintenance need standards that vary by individual, it must assure that all individuals in like circumstances are treated comparably.

The proposed rule did not address how the rules used to determine income in the post-eligibility income and resource process for an institutionalized individual who has a spouse who lives in the community would affect home and community-based waiver recipients whose eligibility is based on section 1924 of the Act. We are addressing this issue in a separate rule that will propose further revisions to the post-eligibility regulations. These revisions will address application of the section 1924 rules and other matters. They will include our interpretation of "institutionalized spouse" at section 1924(h)(1) as allowing, on a waiver-by-waiver basis, use of the post-eligibility rules at section 1924(d) to determine Medicaid benefits payable for individuals who are eligible for home and community-based waiver services under § 435.217. That is, an individual would be subject to the section 1924 post-eligibility rules if (1) the individual's State elected the section 1924(h)(1) post-eligibility option, (2) the individual meets the criteria of § 435.217, and (3) the individual has a spouse who is neither institutionalized in a medical institution or nursing facility nor receiving home and community-based waiver services.

We caution States to carefully evaluate how section 1924(d) post-eligibility rules will affect the waiver population. Generally, the election of the section 1924(d) post-eligibility rules would not adversely affect the waiver recipient. However, there is at least one exception with respect to individuals who *are not living* with their community spouses. If the section 1924(d) post-eligibility rules are used for such individuals, the waiver recipient is not likely to have enough protected income to pay for his or her maintenance needs. This situation can occur because only the personal needs allowance for institutionalized individuals is protected in the section 1924 post-eligibility calculation. Income above the personal needs allowance would go either to the community spouse in the form of a monthly income allowance, or for medical and remedial care expenses (including waiver services). Thus, the waiver recipient is not likely to have income to pay for his or her food, clothing, and shelter in the community.

4. Provisions of the Final Rule

We are adopting the proposed § 441.301(a)(2) to allow a State to request a waiver of section 1902(a)(1) or section 1902(a)(10)(B) as final. We are also adding a provision to that section to allow for waiver of the requirements of section 1902(a)(10)(C)(i)(III) of the Act concerning income and resource rules applicable to institutionalized individuals with spouses living in the community, as added by section 4118(a)(1) of OBRA '87.

We are adopting the proposed revisions to § 435.726(c)(1) and § 435.735(c)(1) as final, without further modification.

G. Expenditure for Waiver Services

1. Prohibition on Imposition of Certain Regulatory Limits on Expenditures

a. *Background.* Section 9502(c) of COBRA amended section 1915(c)(2)(D) of the Act and added a new section 1915(c)(6). Section 9502(c)(1) of COBRA clarified section 1915(c)(2)(D) to specify that, under a home and community-based services waiver, a State's estimated average per capita expenditure for individuals under the waiver must not exceed the estimated average per capita expenditure for services without the waiver. We refer to this as "a cost-neutrality test for section 1915(c) waivers." (We have always interpreted section 1915(c)(2)(D) of the Act in this manner and previously implemented the applicable standards accordingly.) The cost estimate formula is located in regulations at § 441.303(f)(1).

Section 1915(c)(6) of the Act, as enacted by section 9502(c)(2) of COBRA, directs the Secretary to abolish the regulatory limitation concerning home and community-based services waiver expenditures. This expenditure limitation appears in existing regulations at §§ 441.302(e)(2) and 441.310(a)(2) and requires a State to provide satisfactory assurance that actual total expenditures for home and community-based services and the State's claim for FFP for the services will not exceed the State's approved estimates for waiver services. Under the existing regulations, expenditures that exceed the State's approved estimates would not have been eligible for FFP.

In the proposed rule, we revised § 441.302 (e) and (f) that deal with a State's assurances on the cost-neutrality of its waiver programs. Section 441.302(e) deals with a State's estimates as contained in its waiver proposals and § 441.302(f) deals with a State's actual expenditures as reported on the State's annual expenditure reports as required

under section 1915(c)(2)(E) of the Act. We inserted "100 percent" in each section to clearly indicate the intention of section 9502(c) of COBRA that a waiver be cost-neutral (formerly referred to as "cost-effective"). The Congress intended that expenditures made under a State waiver not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made if the waiver had not been granted.

We also proposed revisions to § 441.304(d) to indicate that we will review all estimates very closely to determine if they are reasonable and based on statistically supportable assumptions. For waivers that are approved and operational, we will compare the data the State must furnish annually on its actual experience (HCFA form 372) with the approved expenditures the State estimated would occur absent the waiver. If we find that actual expenditures exceed the State's approved estimates for expenditures absent the waiver, we will require the State to amend its estimates for the subsequent waiver year(s). We will compare the revised estimates with the State's actual experience to determine if these estimates are reasonable. We may terminate a waiver if we find that, based on the revised estimates in the amendment request, the waiver is not cost-neutral or that the revised estimates are unreasonable. For waiver renewal requests, we will compare the estimated expenditures for the renewal period against the State's actual experience as shown in its annual reports. Based on this comparison, we will not approve a waiver renewal request if we find that the renewal request is not cost-neutral or that the estimates are not reasonable based on the annual reports.

These revisions were required by section 9502(c)(2) of COBRA.

We received the following public comments on these proposed provisions.

Comment: A State agency suggested that a single recipient's cost not be used to determine the waiver's cost effectiveness.

Response: In virtually all cases, we determine the cost-neutrality of a waiver request by comparing the average costs for all recipients under the waiver to the estimated average costs absent the waiver. The only time we would review a single recipient's cost under a home and community-based services waiver would be when a waiver serves only one person. If the recipient's costs exceeded the appropriate institutional costs, the waiver would not be cost-neutral. However, section 1915(c)(4)(A) of the Act authorizes a State, at its option, to limit home and community-based services waivers to those recipients for whom the State has a reasonable expectation that the cost of medical assistance under the waiver for those individuals will not exceed the cost of medical assistance for those same recipients absent the waiver. Thus, this section of the Act permits States to include (1) only recipients whose costs under a waiver are reasonably expected to be less than or the same as the appropriate institutional costs under medical assistance and (2) individual recipients whose waiver costs are reasonably expected to exceed institutional costs under medical assistance (if the waiver did not apply), as long as the estimated average per capita cost with the waiver does not exceed the estimated average per capita cost absent the waiver.

Comment: Two commenters asserted that a State should not be required to submit an amendment to its waiver proposal if the State exceeds its approved cost and utilization estimates.

Response: Section 1915(c)(2)(D) of the Act requires that we assess the reasonableness of a State's estimates of the cost-neutrality of its program. The amendment must be submitted prior to the expiration of the waiver year in question and must include cost and utilization changes for the current waiver year and all waiver years that follow through the term of the approved waiver request. If a State anticipates substantive changes in its cost and utilization estimates, we believe that the State should be required to submit amendments to explain the basis and extent of the changes. The State's recomputed cost-effectiveness formula, based on the revised cost and utilization, must substantiate continued cost-neutrality.

Comment: One commenter requested that we simplify the waiver application process which includes estimations of expenditures based on an equation specified in the regulations.

Response: We agree with the commenter's request. We are making a significant change in the formula values proposed at § 441.303(f)(1) to simplify the waiver cost-neutrality formula and thus reduce the overall complexity of the waiver application procedure. We are reducing the formula by retaining only those formula values which are critical in assessing the cost-neutrality of the program: D, D′, G, and G′.

Section 1915(c)(2)(D) requires that States make assurances, satisfactory to the Secretary, that waiver programs will be cost-neutral to the Medicaid program. Cost-neutrality is defined in terms which require that the average per capita annual Medicaid expenditure with the waiver in place not exceed the average per capita annual Medicaid expenditure without the waiver. The waiver formula is intended to provide a uniform method of providing data to the Secretary, sufficient to allow a determination of whether the State's estimate of per capita cost-neutrality is reasonable. We believe that, based on many years of program experience, the formula can be simplified to its key elements. Specifically, we would retain the two factors which represent average per-capita costs for waiver and other Medicaid services under the waiver (D and D′). These would be compared to the average per capita cost for alternative institutional care and other related Medicaid expenditures without the waiver (G and G′). To ensure these factors are inclusive of all relevant Medicaid expenditures, we have redefined D′ and G′ to include all other medical assistance expenditures and expanded services not under a State plan for early and periodic screening, diagnostic and treatment (EPSDT) services recipients. The meanings of D and G remain unchanged, but the definitions have been revised for clarity. We are also deleting the requirement at proposed § 441.303(f)(3) that States must submit data on the estimated number of beneficiaries and expenditures for those who would receive hospital, NF, or ICF/MR services. With our simplification and redefinition of formula values, there is no longer a need for these data. We are renumbering the remaining paragraphs in section (f) accordingly.

The following are our new definitions:

D = the estimated annual average per capita Medicaid cost for home and community-based services for individuals in the waiver program.

D′ = the estimated annual average per capita Medicaid cost for all other services provided to individuals in the waiver program.

G = the estimated annual average per capita Medicaid cost for hospital, NF, or ICF/MR care that would be incurred for individuals served in the waiver, were the waiver not granted.

G′ = the estimated annual average per capita Medicaid costs for all services other than those included in factor G for individuals served in the waiver, were the waiver not granted.

Even though we have eliminated the "C" value (number of unduplicated waiver individuals a State intends to serve for each year of the waiver) from the equation, we will continue to require each State to report this information to us as part of a waiver

request. This number may be revised when a State determines that it needs to increase or decrease the number of individuals it estimates it would serve under the waiver. We will include this number in our approval notices.

b. *Provisions of the final rule.* We are revising § 441.303(f) to include the changes noted above. We are simplifying the formula at § 441.303(f)(1). We are providing in § 441.303(f)(2) that, for purposes of the formula, the prime factors include the average per capita cost for all services provided under the State plan that are not accounted for in other formula values and include expanded EPSDT services.

To further simplify the waiver application process, we are also revising § 441.304 by deleting paragraph (a)(2), renumbering paragraphs (a)(1)(i) and (a)(1)(ii) as paragraphs (a)(1) and (a)(2), and revising paragraph (b). Section 441.304(b) will now read: HCFA will determine whether a request for extension of an existing waiver is actually an extension request or a request for a new waiver. If a State submits an extension request that would add a new group to the existing group of recipients covered under the waiver (as defined under § 441.301(b)(6)), HCFA will consider it to be two requests: one as an extension request for the existing group, and the other as a new waiver request for the new group. Waivers may be extended for additional 5-year periods.

2. Computation of Estimated Expenditures Under Waivers for Individuals With a Particular Illness or Condition

a. *Background.* Section 9502(d) of COBRA added a new section 1915(c)(7) of the Act that authorized States that have established or wish to establish separate waivers for institutionalized, physically disabled individuals to estimate the average per capita expenditure for such individuals separately from the expenditures for all other individuals in NFs and ICFs/MR. Section 9411(a)(3) of OBRA '86 subsequently changed section 1915(c)(7) to allow such separate demonstrations of cost-neutrality to be applied in any waiver targeted to inpatients with particular illnesses or conditions. In both cases, the specific group of eligible individuals must have been inpatients in hospitals, NFs, or ICFs/MR prior to being deinstitutionalized into the waiver program. Prior to the enactment of COBRA, States were not authorized to compute expenditures differently for a specific group of individuals by comparing costs to those in that group only, rather than total inpatient populations.

Section 9411(a)(3) of OBRA '86 amended section 1915(c)(7) of the Act to allow States the option of using an alternative method for estimating costs under section 1915(c)(2)(D) of the Act. This alternative method applies to waivers for individuals with a particular illness or condition, who are inpatients in hospitals, NFs, or ICFs/MR. The State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals who are inpatients of those respective facilities. Alternatively, States may continue to use the usual method of estimating average per capita expenditures; that is, include the utilization and cost of all Medicaid recipients otherwise using a hospital, NF, or ICF/MR.

In the Conference Committee report for OBRA '86 (H. Rept. No. 1012, 99th Cong., 2d Sess. 400 (1986)), the Congress indicated its intention by stating that "illness or diagnosis" meant, for example, acquired immune deficiency syndrome (AIDS), or AIDS-related condition (ARC) and that "condition" meant, for example, chronic mental illness or ventilator dependency. Thus, for waivers directed to any specified group, States may make expenditure estimates specific to that group of patients who are inpatients of hospitals, NFs, or ICFs/MR, distinguished by illness or condition.

As with all home and community-based waivers, States must furnish reasonable and verifiable cost estimates for waivers dealing with individuals with a specific illness or condition.

The provisions of section 1915(c)(7) of the Act, as amended by OBRA '86, apply to applications for waivers (or renewals) approved on or after October 21, 1986.

Section 8437(a) of TMRA made a further amendment to section 1915(c)(7)(A) of the Act to extend the principle of specific illness or condition cost estimates to individuals "who would require the level of care provided in hospitals, NFs or ICFs/MR." As amended by TMRA, section 1915(c)(7)(A) specifies that, for a home and community-based services waiver that applies to individuals with a particular illness or condition, who are inpatients in, or who would require the level of care provided in, hospitals, NFs, or ICFs/MR, the Secretary must allow the State to determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals who are inpatients in, or who would require the level of care provided in, those respective facilities. This provision applies to eligible individuals whether or not those individuals are institutionalized prior to entering the waiver.

Section 8437(b) of TMRA made the amendments to section 1915(c)(7)(A) effective for waiver applications submitted before, on, or after November 10, 1988, the date TMRA was enacted.

In the proposed rule, we revised § 441.303(f)(3) to provide that, for waivers that apply only to individuals with a particular illness or condition (formerly referred to as physically disabled in section 9502(d) of COBRA) who are inpatients in hospitals, NFs, or ICFs/MR, the State may determine the average per capita expenditures that would have been made in each waiver year for those individuals under the State plan separately from the expenditures for other inpatients of the respective certified facilities.

We did not receive public comments on this specific provision.

b. *Provisions of the final rule.* We are adopting this proposed provision as final with the change described below. We will consider timely comments submitted on this change.

We have revised proposed § 441.303(f)(4) (and renumbered it as § 441.303(f)(3) to accommodate other revisions) to include reference to individuals who would require the level of care provided in hospitals, NFs, or ICFs/MR. In addition, we have revised this section to allow an agency to (1) exclude expenditures for other individuals in the affected hospitals, NFs, or ICFs/MR when estimating average per capita expenditures for a waiver for individuals with a particular illness or condition who would otherwise require hospital, NF, or ICF/MR level of care, as provided for in section 8437(a) of TMRA; and (2) support the accompanying data with documentation to verify that the cost-effectiveness estimates for these illness or condition specific waivers are reasonable as required under section 1915(c)(2)(D) of the Act.

3. Computation of Estimated Expenditures Under Waiver for Institutionalized Developmentally Disabled Individuals

a. *Background.* Section 4118(k) of OBRA '87 added a new paragraph (B) to section 1915(c)(7) of the Act concerning computation of the average per capita expenditure estimates made by a State under section 1915(c)(2)(B) of the Act for a waiver that applies only to

individuals with developmental disabilities who are inpatients in a nursing facility. (The original wording of the statute specified SNFs and ICFs.) The new provision states that, if the State has determined, on the basis of an evaluation under section 1915(c)(2)(B) of the Act, that individuals need the level of care provided in an ICF/MR, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals under the State plan based on the average per capita expenditures under the State plan for services to individuals who are inpatients of ICFs/MR (rather than NFs).

We have determined that the evaluation required under section 1915(c)(2)(B) of the Act should be completed as part of the preadmission screening annual resident review (PASARR) required under section 1919(e)(7)(B) of the Act entitled "State Requirements for Annual Resident Review." Section 1919(e)(7)(B)(ii) requires that, as of April 1, 1990, in the case of each resident of a nursing facility who is mentally retarded, the State mental retardation or developmental disability authority must review and determine—

(1) Whether or not the resident, because of the resident's physical and mental condition, requires the level of services of an intermediate care facility described under section 1905(d) (ICF/MR); and

(2) Whether or not the resident requires specialized services for mental retardation.

We assume that the evaluation of need noted above would be accomplished during the annual resident review. (The requirement that the States use the PASARR process in conducting these evaluations was established by HCFA and is not contained in section 1915(c)(2)(B) of the Act.)

Section 411(k)(10)(H) of MCCA amended section 1915(c)(7)(B) of the Act to clarify that, in making estimates as to cost-neutrality in a waiver that applies exclusively to developmentally disabled individuals under section 1915(c)(7)(B) of the Act, who have been identified as inappropriately placed in NFs, yet requiring the level of services provided by an ICF/MR, the State may estimate utilization without regard to the availability of ICF/MR beds for such inpatients. Therefore, section 1915(c)(7)(B) exempts States from the requirement to demonstrate ICF/MR bed capacity for recipients served by waivers proposed under section 1915(c)(7)(B) of the Act.

b. *Provisions of the final rule.* We have added a new § 441.303(f)(4) to provide that, in making estimates for a separate waiver program that applies only to individuals (1) who are developmentally disabled, (2) who are inpatients of a NF, and (3) who have been determined by the State through the PASARR process (section 1919(e)(7)(B) of the Act) to require the level of care provided in an ICF/MR, the State may determine the average per capita expenditures that would have been made in a fiscal year for those individuals based on the average per capita expenditures for inpatients in an ICF/MR. When submitting estimates of institutional costs without the waiver, the State may use the average per capita costs of ICF/MR care even though the deinstitutionalized developmentally disabled individuals were inpatients of NFs. We will consider timely comments submitted on this addition.

4. Computation of Expenditure Estimates for Persons With Mental Retardation or a Related Condition in a Decertified Facility

a. *Background.* Section 4742(c)(1) of OBRA '90 added a new section 1915(c)(7)(C) to the Act relating to waivers for individuals with mental retardation or a related condition who are residents in an ICF/MR that has had its participation under the State's Medicaid plan terminated. This added provision allows a State, when making estimates under section 1915(c)(2)(D) of the Act, to determine the average per capita expenditures under a waiver that would have been made in a fiscal year for those individuals without regard to the termination and as if Medicaid institutional payment continued. Termination of an ICF/MR's participation under a State plan does not affect estimates made under section 1915(c)(2)(D).

Section 4742(c)(2) provides that this provision applies as if included in the enactment of OBRA '81, but only applies to facilities terminated on or after November 5, 1990, the enactment date of OBRA '90.

b. *Provisions of the final rule.* We are adding a new § 441.303(f)(7) to state that in making estimates for waivers that apply to persons with mental retardation or related conditions, States may include costs and utilization of Medicaid residents in ICFs/MR that have been terminated on or after November 5, 1990, when determining the average per capita expenditure that would have been made in a waiver year. We will consider timely comments submitted on this addition.

5. Adjustments in Estimates To Include Preadmission Screening Requirements

a. *Background.* Section 4742(e) of OBRA '90 provides that, under section 1915(c) of the Act, a State may adjust its waiver estimates, submitted under section 1915(c)(2)(D) of the Act, of average per capita expenditures for individuals with mental retardation or a related condition to include expenditures made on or after January 1, 1989, that result from the preadmission screening program required under section 1919(e)(7)(B) of the Act. The State may include increases in expenditures for, or utilization of, ICFs/MR resulting from its preadmission screening program for making determinations for individuals with mental retardation admitted to NFs on or after January 1, 1989.

b. *Provisions of the final rule.* We are adding a new section 441.303(f)(9) to incorporate the provisions of section 4742(e) of OBRA '90. We will consider timely comments submitted on this addition.

6. Treatment of Room and Board in Submitting Estimates of Expenditures for Personal Caregivers

a. *Background.* Section 1915(c)(1) of the Act provides for payment, as medical assistance, of part or all of the cost of home and community-based services under an approved waiver (other than room and board). Except for respite care furnished in a State-approved facility that is not a private residence, FFP is not available for room and board as part of a home and community-based service.

Section 4741(a)(1) of OBRA '90 amended section 1915(c)(1) to specify that, for purposes of this section of the Act, "the term 'room and board' shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded."

b. *Provisions of the final rule.* We are adding a new § 441.303(f)(8) to provide that, in submitting estimates for waivers that include personal caregivers as a waiver service, the State may include a portion of the rent and food attributed to the unrelated personal caregiver who resides in the waiver recipient's home or residence. The method of apportioning the costs of rent and food is determined by the State, subject to

review and approval by HCFA. The method used must be explained fully to receive HCFA's approval. A personal caregiver provides a waiver service to meet the recipient's physical, social, or emotional needs (as opposed to services not directly related to the care of the recipient; that is, housekeeping or chore services). FFP for live-in caregivers is not available if the recipient lives in the caregiver's home or in a residence that is owned or leased by the caregiver. We have interpreted language in the statute that rent and food costs attributable to the live-in caregiver may now be included in the State's estimates of cost-neutrality to include situations in which the live-in caregiver resides in the recipient's home and the recipient would incur additional costs for such a caregiver. When the recipient lives with the caregiver, the caregiver incurs the additional costs for the recipient. We believe the payment to the caregiver for the recipient's rent and food would violate the room and board exclusion under section 1915(c)(1) of the Act. We will consider timely comments on this addition.

H. Coordinated Services Between Maternal and Child Health Programs and Home and Community-Based Service Programs

1. Background

Section 9502(h) of COBRA added a new section 1915(c)(8) to the Act. This section allows the State agency that administers the Medicaid plan to make cooperative arrangements, whenever appropriate, with the State agency that administers the program for children with special health care needs under the Maternal and Child Health Program (Title V of the Act), to improve access to coordinated services to meet the children's needs. The amendment made by section 9502(h) was effective April 7, 1986.

In the proposed rule, we redesignated the existing § 441.306 as § 441.308 and added a new § 441.306 to incorporate the provisions of section 1915(c)(8) of the Act, as added by section 9502(h) of COBRA.

We did not receive any public comments on this provision.

2. Provisions of the Final Rule

We are adopting the proposed regulations, without modification, as final rules.

I. Limitation on Participants in Waiver Programs

1. Background

Section 9502(i) of COBRA added a new section 1915(c)(9) to the Act. This addition provides that when a waiver contains a limit on the number of individuals who can receive home and community-based services, the State may substitute additional individuals to replace any recipients who die or become ineligible for Medicaid services under the State plan. This provision was effective on April 7, 1986.

In the proposed rule, we redesignated existing § 441.305 as § 441.307 and added a new § 441.305 to provide that a State may substitute additional individuals to replace those under a home and community-based services waiver who die or become ineligible for waiver services, when the waiver contains a federally imposed limit on the number of individuals receiving waiver services, as specified in section 1915(c)(9) of the Act, as added by section 9502(i) of COBRA.

Section 4118(b) (entitled "Increase in Number of Individuals Who May Be Served Under Model Home and Community-Based Services Waiver) of OBRA '87 amended section 1915(c) of the Act by adding a new paragraph (10) that states that "No waiver under this subsection shall limit by an amount less than 200 the number of individuals in the State who may receive home and community-based services under such waiver." We interpreted this provision as restricting the Secretary's ability to limit the number of recipients a State could serve in a model waiver program. That is, the Secretary may not place a limit below 200 on the number of persons a State may serve. While the provision could, arguably, be read to limit the actual number of individuals who may receive model waiver services to no less than 200, based on the legislative history, and the history of the section 1915(c) program, we believe that this reading is unsupportable. First, model waiver programs have historically had a Federally established limit of 50 individuals who could receive services. Second, the limited size of the program is specifically noted in the OBRA '87 Conference Report (H. Rept. No. 495, 100th Cong., 1st Sess. 755 (1987)), in the section describing the current state of the law. Finally, section 4118 of MCCA is entitled "Increase in Number of Individuals Who May Be Served Under Model Home and Community-Based Services Waiver." On these bases, we believe that the Congress intended to enable States to serve a greater number of persons while maintaining the Secretary's authority to impose a limit on programs which she believes are of excessive size.

Section 411(k)(10)(A) of MCCA further amended section 1915(c)(10) of the Act in an attempt to clarify the language in section 4118(b) of OBRA '87, and confirmed our interpretation of the Congress' intent in enacting that provision. This amendment restricts the Secretary's power to limit the number of persons who can receive home and community-based waivers to no lower than 200. Again, in light of the history of the waiver program and the legislative history of this provision, we interpret this amendment to restrict the Secretary's power to limit the number of participants in the model waiver program only. Historically, there has been no limit on the number of participants in the regular home and community-based waiver programs, whereas there has been a 50-person Federally imposed limit on the number of persons who can participate in a model waiver. Also, section 411(k)(10)(A) was specifically enacted to remedy the ambiguity in section 4118(b), which itself was aimed only at model waivers. We believe, therefore, that this provision enables the Secretary to limit the number of participants in a model home and community-based program to 200 persons, or any amount above 200. Through these regulations, the Secretary has opted to impose a maximum limit of 200 persons for any State waiver program. On an individual State basis, an approved State plan may contain a maximum limit that is lower than 200. Thus, no State may serve any more than 200 persons, but any State may be limited to a lower number as approved in its waiver program. There is no comparable limit on regular waiver programs. Thus, the 200-person limit represents the maximum number of individuals that a State may serve under a "model" home and community-based services waiver at any one time.

A State may, in accordance with section 1915(c)(9) of the Act, replace individuals who die or lose Medicaid eligibility for State plan services. However, the State is still limited to serving no more than the number approved in its model waiver request, or 200 individuals, at any time.

Section 411(k)(10)(A) is effective as if included in the enactment of OBRA '87, that is, December 22, 1987. Thus, States may continue to serve less than 200 recipients under approved model waivers and renew these requests by any number of recipients up to the new 200-person limit. States with model waivers approved prior to December 21, 1987, may submit an amendment to obtain approval to serve clients in excess of those originally approved, up to the new 200-person limit.

We received the following comments on the proposed rule:

Comment: Two commenters recommended that States be allowed to substitute recipients in a home and community-based services waiver program under section 1915(c) of the Act, as is permitted under a model waiver program.

Response: The model waiver program derives its legal base from the same statutory authority as the section 1915(c) waiver program but administratively it has been limited in the total number of recipients that could be served. The original limit was 50 individuals. As we stated above, the amendment made by section 4118(b) of OBRA '87 increased the limit on model waivers to 200 individuals and the amendment made by section 9502(i) of COBRA authorized substitution for recipients who die or lose Medicaid eligibility. Although States may replace recipients, there is no authorization for exceeding (at any point in time) the 200-person limit on the model waiver request.

In contrast, HCFA has never prohibited the substitution of recipients under the section 1915(c) waiver program. In fact, we require that the utilization estimates submitted prior to approval must be based on unduplicated recipient counts, not "slots" or full-time equivalents. "Unduplicated" means that once a recipient is counted in a particular setting (in a NF, for example), that recipient cannot be recounted in that setting if readmitted during the reporting period (waiver year). This is the same reporting principle used in HCFA Forms 64 and 2082. State waiver utilization estimates must include an adjustment for Medicaid recipients who die, lose eligibility, or leave the program for any reason (institutionalization, for example). Therefore, substitutions are expected, and all persons replaced should already be incorporated into the waiver utilization estimates approved for each year of every waiver program. Because the unduplicated recipient count includes reasonable estimates of substitution and the statute requires reasonableness of estimates and cost-neutrality, we are requiring waiver amendments if the State expects to exceed its approved cost and utilization estimates, regardless of the reason for the change.

Comment: Two commenters stated that HCFA is narrowing the legislative intent by requiring institutional bed capacity to offset increases in waiver recipients, especially since section 9502(c)(2) of COBRA eliminated HCFA's proposed cap on total waiver costs as established under § 441.304(d)(1). The proposed cap was the product of the State's estimate of waiver participants times the estimated average per capita cost.

Response: We agree. The regulatory cap on total waiver costs has already been eliminated by legislative action (section 1915(c)(6) of the Act). Moreover, we believe the requirement that States establish that there would be sufficient institutional bed capacity for their waiver population in the event there was no waiver should be rescinded. While this requirement served a sound analytical purpose as part of the cost-neutrality test in the early days of the program, our experience over the last several years has shown it to be of diminishing value. The requirement placed an unreasonable burden on States by requiring them to project the estimated development of additional institutional capacity. That additional burden was never the requirement's intent and its development was contrary to the interests of the States and the Federal Government. Moreover, States have generally been successful in documenting additional bed capacity sufficient to allow the expansion of their waiver programs. Because the bed capacity test has become an unnecessary and nonproductive exercise, we are deleting this requirement. In lieu of this test, and in the absence of information to the contrary, we will accept a State's assurance that, absent the waiver, recipients in the waiver would receive the appropriate level of Medicaid funded institutional care. Also, because the elimination of the bed capacity test recognizes that data regarding program utilization will no longer be relevant to the waiver application process, we have simplified the waiver formula to eliminate those formula values that relate to utilization. Instead, the formula now deals exclusively with program costs, with and without the waiver. As noted above, we will continue to require States to submit estimates of the number of unduplicated waiver recipients it will serve in each year of the waiver term. This figure will be indicated as "C" value and may be revised as a State deems necessary.

2. Provisions of the Final Rule

We have adopted, as final, the revised § 441.303(f) and the proposed new § 441.305 that incorporated the provision of section 1915(c)(9) of the Act as added by section 9502(i) of COBRA, with one change: We have revised paragraph § 441.305(b) to specify that there is a 200-person limit (instead of 50) for model waivers under section 1915(c)(10) as amended by section 411(k)(10)(A) of MCCA. The revised § 441.303(f) reads, "An explanation with supporting documentation satisfactory to HCFA of how the agency estimated the average per capita expenditures for services." We will consider timely comments on these revisions.

We are also redesignating proposed § 441.302(g) as (h) and adding a new § 441.302(g) to require that a State provide assurance that, absent a waiver, recipients in the waiver would receive the appropriate type of Medicaid-funded institutional care (hospital, NF, or ICF/MR) that they require. We will consider timely comments on this addition.

J. Waiver Extensions and Renewals

1. Background

Initially, section 1915(c) of the Act provided that approved home and community-based services waivers could be granted for an initial term of 3 years and could be extended for additional 3-year periods if a State requests an extension. The Secretary could approve a request for a waiver extension if the extension request met the waiver requirements for the extended period and HCFA determined that the State met all of the required assurances for the term of the initial waiver.

Section 9502(f) of COBRA provided that the Secretary, upon a State's request, may extend any home and community-based services waiver that expired on or after September 30, 1985, and before September 30, 1986, subject to the State's meeting all requirements for the waiver. The extension granted must be for a period of not less than 1 year and no more than 5 years.

Section 9502(g) of COBRA amended section 1915(c)(3) of the Act to revise the periods of time for which a waiver may be renewed from additional 3-year periods to additional 5-year periods under section 9502(j)(6) of COBRA. This amendment is effective for waiver renewals approved on or after September 30, 1986.

In our proposed rule, we revised § 441.304(a) to change waiver extension or renewal periods to reflect the statutory requirements. We did not receive any public comments on this provision.

Section 4102(c) of OBRA '87 provided that the Secretary extend approval of a State's section 1915(c) waiver for the elderly on the same terms and conditions through September 30, 1988, when (1) the State as of December 1, 1987, had a waiver approved for elderly individuals under section 1915(c) of the Act; (2) the waiver was scheduled to

expire before July 1, 1988; and (3) the State notified the Secretary of its intention to file an application for a waiver under section 1915(d) of the Act.

2. Provisions of the Final Rule

We have adopted, as a final rule, the proposed § 441.304(a) to change the waiver extension and renewal periods to conform to section 1915(c)(3), as amended by section 9502(g) of COBRA. We have not included in the final rule changes to paragraph (a)(2) that were included in the proposed rule because those changes are no longer necessary.

K. Technical/Administrative Changes

1. Terminology Change

We have revised proposed § 440.185 and amended § 441.301 through § 441.304 and § 441.310 by changing references to "SNF" and "ICF" to "NF" to conform them to nomenclature changes made to section 1915(c) by section 4211(a)(3) of OBRA '87.

2. Independent Assessment

Although not specifically addressed in the proposed rule, a State agency asserted that our requirement in § 441.303(g) for an independent assessment of a State's waiver program that evaluates the quality of care, the access to care, and the cost effectiveness is costly and duplicates HCFA's regional office (RO) reviews.

Since the publication of this requirement (50 FR 10028, March 13, 1985), various State agencies have asserted that the requirement is costly, unproductive, and duplicative of RO assessments. We agree with the commenter and are making the independent assessment voluntary. If a State determines it will contract for an independent assessment, FFP is available for the costs attributable to the assessment. The results should be forwarded to HCFA by the 90th day prior to expiration of the approved waiver and cover at least the first 24 or 48 months of the waiver.

3. Provision of Final Rule

We are revising 441.303(g) to read as follows: "The agency, at it option, may provide for an independent assessment of its waiver that evaluates the quality of care provided, access to care, and the cost-neutrality. The results of the assessment should be submitted to HCFA at least 90 days prior to the expiration of the waiver and cover the first 24 or 48 months of the waiver. If a State chooses to provide for an independent assessment, FFP is available for the costs attributable to the independent assessment."

III. Respiratory Care Services

A. Background

Until the enactment of OBRA '86, the Medicaid statute did not permit payment for respiratory therapy services in a patient's home as a separate and distinct State plan service. Previously, such services could only be provided as a component of other State plan services or as a home and community-based service under a section 1915(c) waiver. For example, certain types of respiratory therapy services in the home were available when provided as a medically necessary component of covered home health nursing services. States also had the option of providing respiratory therapy services as an element of three other optional Medicaid benefits: medical or remedial care provided by a licensed practitioner, private duty nursing, and rehabilitative services. Thus, when respiratory care was available previously under the Medicaid State plan, it was provided as a part of a broader coverage authority. Because these authorities did not allow respiratory care services to be directed only to a specific population but required that such services be available to all recipients, very few States provided coverage for respiratory care services. Moreover, while respiratory care services could be provided to a specific population under a home and community-based services waiver, States' use of this waiver process to provide coverage was limited.

Section 9408(a) of OBRA '86 amended section 1902(e) of the Act to provide, under paragraph (9), that, at the option of the State, a State Medicaid plan may be amended to include respiratory care services as medical assistance for an individual who:

- Is medically dependent on a ventilator for life support at least 6 hours per day;
- Has been so dependent on ventilator support for at least 30 consecutive days as an inpatient (or the maximum number of days of inpatient care authorized under the State plan, if less than 30 days) as demonstrated by a continuous stay in one or more hospitals, NFs, or ICFs/MR;
- But for the availability of respiratory care services, would require respiratory care as an inpatient in a hospital, NF, or ICF/MR and would be eligible to have payment made for inpatient care under the State plan;
- Has adequate social support services to be cared for at home; and
- Wishes to be cared for at home.

Under this provision, respiratory care services are services provided on a part-time basis in the home of the individual by a respiratory therapist or other health care professional who is trained in respiratory therapy (as determined by the State). The services under this benefit may not be included within other items and services furnished to these individuals as medical assistance under the State Medicaid plan.

Section 9408(b) of OBRA '86 amended section 1902(a)(10) of the Act by adding item (IX) in the matter following section 1902(a)(10)(E), to provide that a State is not required to make respiratory care services (as defined in section 1902(e)(9)(C) of the Act) available, or available in the same amount, duration, and scope, to individuals who do not meet the criteria in section 1902(e)(9)(A) of the Act. However, if the State provides this benefit, it is required to make respiratory care services available in the same amount, duration, and scope to all Medicaid recipients who do meet the criteria in section 1902(e)(9)(A) of the Act.

Section 9408(c) of OBRA '86 includes respiratory care services under the definition of medical assistance in section 1905(a)(20) of the Act and makes technical conforming amendments to sections 1902(a)(10)(C)(iv) and 1902(j) of the Act.

In our proposed rule, we added—

- A new § 440.185 to allow a State the option to amend State Medicaid plan coverage of respiratory therapy services for ventilator-dependent individuals under the specific conditions of coverage that were enumerated by section 9408(a) of OBRA '86;
- A new § 440.250(o) to the list of exceptions to the comparability of service requirement. In following the statutory language in section 9408(a) of OBRA '86, we also indicated that respiratory care services for ventilator-dependent individuals are exempt from the general comparability requirement that services be provided in equal amount, duration, and scope to any eligible group under the State plan. We have, however, required comparability of services among those Medicaid-eligible persons under the State plan satisfying the explicit conditions of coverage for these services.

Six entities submitted comments concerning respiratory care services as a new optional Medicaid benefit.

Comment: One commenter asked whether respiratory care equipment, particularly ventilators, would be covered as equipment under the new benefit.

Response: Ventilators will not be covered under this benefit. Section 1902(e)(9) of the Act, as added by section 9408 of OBRA '86, provides for respiratory therapy services, not

equipment, to be provided to ventilator-dependent individuals as an optional service. The statute and accompanying conference committee report (H. Rept. No. 1012, 99th Cong., 2d Sess. 413–414 (1986)) do not suggest that equipment required in the home (such as ventilators, needed to sustain the recipient's health and welfare) would be included. Such equipment is supplied by the State as a home health benefit under § 440.70(b)(3), that mandates the provision of medical supplies, equipment, and appliances suitable for use in the home. In addition, States that pay for the optional prosthetic devices benefit may cover ventilators as a prosthetic device that supports a weak or deformed portion of the body under § 440.120(c)(3).

Comment: Another commenter asked us to define a recipient's home.

Response: A recipient's home is a place of residence other than a hospital, NF, ICF/MR, or other institution as defined at § 435.1009. We have revised § 440.185 to specify that a recipient's home does not include these facilities.

Comment: Two commenters suggested that more medical direction be required in decisions regarding the provision of respiratory therapy at home. One commenter proposed the use of medically sound criteria to determine eligibility and the other commenter recommended that more physician oversight and involvement in the direction of care be required.

Response: We agree with the commenters concerning the need for greater medical direction for individuals in need of respiratory care services. We have added § 440.185(a)(6) to require the direction of a physician who is familiar with the technical and medical components of home ventilator support and who has determined that in-home care is safe and feasible.

Comment: One commenter stated that the regulations implementing the option to provide respiratory care services are too restrictive and limited as a Medicaid State plan option because respiratory care services would be limited to individuals who (1) need at least 6 hours of ventilator support for life support, (2) depend on ventilator support for at least 30 consecutive days and (3) require respiratory care as an inpatient.

Response: Our proposed regulations closely followed the statutory language and the only restrictions we imposed were those contained in the statute. In response to comments, we are now adding the requirement that a recipient receive respiratory care services under the direction of a physician who is familiar with the technical and medical components of home ventilator support and who has determined that in-home care is safe and feasible.

Comment: One commenter was concerned that the payment rate for in-home respiratory therapy would not be adequate.

Response: Under the Medicaid program, the State establishes the payment rate within broad Federal guidelines. We believe it would be inappropriate to dictate a special payment procedure for this service.

Comment: One commenter requested that HCFA specifically refer to "respiratory therapy technician" as approved provider of respiratory care services to effectively recognize another level of skilled respiratory care practitioner.

Response: Section 9408(a) of OBRA '86 does not anticipate or require that we specify which practitioners or technicians are accepted by the States as providers. In the proposed rule (53 FR 19957 and 19960), we designated a broad and inclusive category "other health care professional trained in respiratory therapy (as determined by the State)" in the preamble and in § 440.185 of the regulation text. This "other" category could include the respiratory therapy technician as well as other types of skilled practitioners to the degree that they are recognized under State law.

B. Provisions of the Final Rule

We are adopting the proposed regulations under § 440.185 and § 440.250(o) as final rules with the following modifications:

- We have added § 440.185(a)(6) to require that (1) an individual who receives home respiratory care must receive these services under the care of a physician who is familiar with the technical and medical components of home ventilator support, and (2) that this physician must determine medically that in-home care is safe and feasible for the recipient.
- We have revised § 440.185(b) to specify the facilities that are not considered to be a recipient's home.

IV. Regulatory Impact Analysis

A. Introduction

Any impact of this final rule with comment period upon providers will be the result of individual State decisions as developed in waiver requests and including coverage of respiratory care for ventilator-dependent individuals. Due to the positive reception of the home and community-based waiver program, we believe that this rule will be well-received by those concerned with such programs. This rule generally benefits States and providers. The revisions to regulations covering home and community-based waivers offer broader service coverage than current rules and may result in new waiver applications and expansion of existing waivers. Thus, there may be more funds flowing through waivers. Because of the appeal of the program to States, the proportion of Medicaid expenditures flowing through home and community-based waivers is growing. The broader coverage made possible under this final rule with comment period is one factor that offers opportunity for further growth. Waivers would also be approved for longer periods, which may increase the aggregate magnitude of granted waivers.

Thus, although this final rule with comment period should contribute to the growth of expenditures under waivers, we are unable to isolate the effects of this final rule from other factors affecting the growth of waivers.

If this final rule with comment period results in a substantial increase in the growth of waivers, it could affect small entities. Most entities would benefit—contingent upon State decisions that cannot be predicted. Although the changes being implemented in this final rule will facilitate the approval of an increased volume of waivers, we do not expect the rule in itself to increase waivers to the extent that a demonstrable significant economic impact would result. With the exception of the revision to § 441.303(f)(1) that eliminates the bed capacity (also called the "cold bed test") factor from the annual average per capita expenditures estimate, regulations establishing terms or conditions of Federal grants, contracts, or financial assistance call for a different form of regulatory analysis than do other types of regulations. In some instances, an extensive benefit-cost analysis may be appropriate to inform the Congress and the President more fully about the desirability of the program, but this would not ordinarily be required in a regulatory impact analysis. The primary function of an RIA for this type of regulation should be to verify that the terms and conditions are the minimum necessary to achieve the purpose for which the funds were appropriated. Beyond controls to prevent abuse and to ensure that funds appropriated to achieve a specific purpose are channeled efficiently toward that end, maximum discretion should be allowed in the use of Federal funds particularly when the recipient is a State or local government.

B. Regulatory Flexibility Act

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a final rule does not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we consider all providers to be small entities. Thus, both those providers that lose patients deinstitutionalized into the home or community and the home and community-based providers of services that receive these patients/recipients are small entities. This final rule will also affect States and Medicaid recipients, but they are not considered small entities under the RFA.

C. Effect on Medicaid Program Costs

We anticipate that the discretionary provision to eliminate the bed capacity test may result in the following costs:

MEDICAID COSTS

[In millions rounded to the nearest $5 million]

Fiscal year	Federal costs	State costs
1994	$85	$65
1995	110	85
1996	135	100
1997	160	120
1998	190	145
1999	225	170

These cost increases are due to the expectation that more individuals will be eligible for home and community-based waiver services under Medicaid as a result of the elimination of the bed capacity test. However, it should be noted that the State costs reflected in the above chart may include costs that are currently being, or will be in the future, spent by States to provide medical assistance under programs other than Medicaid. Additionally, we believe that costs for waiver growth may be limited as a result of the fiscal capacities of the States.

Under section 1915(c)(2)(D) of the Act, the estimated average per capita expenditure under a home and community-based waiver may not exceed 100 percent of the estimated average per capita expenditure that the State reasonably estimates would have been made if the waiver had not been granted. All States have assured HCFA of this as a condition of waiver approval. Thus, under the law, this final rule is expected to be technically budget neutral with the exception of the costs associated with the elimination of the bed capacity test. However, section 9502 of COBRA and sections 9408 and 9411 of OBRA '86 have negligible costs associated with them overall. It is difficult to determine and may be impossible to assess precisely whether these changes would substantially affect the rate of growth in Medicaid expenditures.

We expect coverage of home respiratory care for ventilator-dependent individuals to have a similar impact. This new program also allows home care as an alternative to institutionalization. New programs may be added as alternatives to institutionalization as a result of this final rule with comment period.

We do not expect that the adoption of this final rule with comment period will result in a major increase in costs or prices for consumers, individual industries, or local government agencies in any geographic region. Employment in institutional care is more capital intensive; home and community services are more labor intensive. Increased costs or revenue losses may be experienced by providers (both their owners and employees) that formerly served institutionalized recipients. Although an institutional provider of services may be adversely affected by the existence of a waiver in its area, it may choose to provide services covered under a home and community-based waiver, and the adverse impact probably will be offset by increased business.

In conclusion, home and community-based waivers and respiratory care for ventilator-dependent individuals generally may result in services being furnished in different settings, often by different providers, with possibly some losses in revenue by some providers offset by increases to other providers. We do not consider this redistributive effect to be significant. We do expect recipients to benefit from a deinstitutionalized life and from the services that may be provided under these provisions.

D. Rural Hospital Impact Statement

Section 1102(b) of the Social Security Act (the Act) requires the Secretary to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside a metropolitan statistical area. We have determined and the Secretary certifies that this final rule with comment period will not have a significant impact on the operations of a substantial number of small rural hospitals.

E. Executive Order 12866

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

V. Recordkeeping and Reporting Requirements

Sections 440.180, 441.301 and 441.303 of this final rule with comment period contain information collection requirements that are subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980. The public is not required to comply with the information collection requirements until OMB approves these requirements under section 3507 of the Paperwork Reduction Act (44 U.S.C. 3507). A notice will be published in the **Federal Register** when approval is obtained.

List of Subjects

42 CFR Part 435

Aid to families with dependent children, Grant programs-health, Medicaid, Supplemental security income (SSI).

42 CFR Part 440

Grant programs-health, Medicaid.

42 CFR Part 441

Family planning, Grant programs-health, Infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

42 CFR chapter IV, subchapter C is amended as set forth below:

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

A. Part 435 is amended as follows:

1. The authority citation for part 435 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 435.726, the section heading is revised; the introductory text of paragraph (c) is republished; and paragraph (c)(1) is revised to read as follows:

§ 435.726 Post-eligibility treatment of income of individuals receiving home and community-based services furnished under a waiver: Application of patient income to the cost of care.

* * * * *

(c) In reducing its payment for home and community-based services, the agency must deduct the following

amounts, in the following order, from the individual's total income (including amounts disregarded in determining eligibility):

(1) An amount for the maintenance needs of the individual that the State may set at any level, as long as the following conditions are met:

(i) The deduction amount is based on a reasonable assessment of need.

(ii) The State establishes a maximum deduction amount that will not be exceeded for any individual under the waiver.

* * * * *

3. In § 435.735, the introductory text of paragraph (c) is republished; and paragraph (c)(1) is revised to read as follows:

§ 435.735 Post-eligibility treatment of income and resources of individuals receiving home and community-based services furnished under a waiver: Application of patient income to the cost of care.

* * * * *

(c) In reducing its payment for home and community-based services, the agency must deduct the following amounts, in the following order, from the individual's total income (including amounts disregarded in determining eligibility):

(1) An amount for the maintenance needs of the individual that the State may set at any level, as long as the following conditions are met:

(i) The deduction amount is based on a reasonable assessment of need.

(ii) The State establishes a maximum deduction amount that will not be exceeded for any individual under the waiver.

* * * * *

PART 440—SERVICES: GENERAL PROVISIONS

B. Part 440 is amended as follows:

1. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 440.180 is revised to read as follows:

§ 440.180 Home or community-based services.

(a) *Description and requirements for services.* "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter.

(1) These services may consist of any or all of the services listed in paragraph (b) of this section, as those services are defined by the agency and approved by HCFA.

(2) The services must meet the standards specified in § 441.302(a) of this chapter concerning health and welfare assurances.

(3) The services are subject to the limits on FFP described in § 441.310 of this chapter.

(b) *Included services.* Home or community-based services may include the following services, as they are defined by the agency and approved by HCFA:

(1) Case management services.

(2) Homemaker services.

(3) Home health aide services.

(4) Personal care services.

(5) Adult day health services.

(6) Habilitation services.

(7) Respite care services.

(8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

(9) Other services requested by the agency and approved by HCFA as cost effective and necessary to avoid institutionalization.

(c) *Expanded habilitation services, effective April 7, 1986*—(1) *General rule.* Expanded habilitation services are those services specified in paragraph (c)(2) of this section, that are provided to recipients who have been discharged from a Medicaid-certified NF or ICF/MR, regardless of when the discharge occurred.

(2) *Services included.* The agency may include as expanded habilitation services the following services:

(i) Prevocational services, which means services that prepare an individual for paid or unpaid employment and that are not job-task oriented but are, instead, aimed at a generalized result. These services may include, for example, teaching an individual such concepts as compliance, attendance, task completion, problem solving and safety. Prevocational services are distinguishable from noncovered vocational services by the following criteria:

(A) The services are provided to persons who are not expected to be able to join the general work force or participate in a transitional sheltered workshop within one year (excluding supported employment programs).

(B) If the recipients are compensated, they are compensated at less than 50 percent of the minimum wage;

(C) The services include activities which are not primarily directed at teaching specific job skills but at underlying habilitative goals (for example, attention span, motor skills); and

(D) The services are reflected in a plan of care directed to habilitative rather than explicit employment objectives.

(ii) Educational services, which means special education and related services (as defined in sections 602(16) and (17) of the Education of the Handicapped Act) (20 U.S.C. 1401 (16 and 17)) to the extent they are not prohibited under paragraph (c)(3)(i) of this section.

(iii) Supported employment services, which facilitate paid employment, that are—

(A) Provided to persons for whom competitive employment at or above the minimum wage is unlikely and who, because of their disabilities, need intensive ongoing support to perform in a work setting;

(B) Conducted in a variety of settings, particularly worksites in which persons without disabilities are employed; and

(C) Defined as any combination of special supervisory services, training, transportation, and adaptive equipment that the State demonstrates are essential for persons to engage in paid employment and that are not normally required for nondisabled persons engaged in competitive employment.

(3) *Services not included.* The following services may not be included as habilitation services:

(i) Special education and related services (as defined in sections 602(16) and (17) of the Education of the Handicapped Act) (20 U.S.C. 1401 (16) and (17)) that are otherwise available to the individual through a local educational agency.

(ii) Vocational rehabilitation services that are otherwise available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

(d) *Services for the chronically mentally ill*—(1) *Services included.* Services listed in paragraph (b)(8) of this section include those provided to individuals who have been diagnosed as being chronically mentally ill, for which the agency has requested approval as part of either a new waiver request or a renewal and which have been approved by HCFA on or after October 21, 1986.

(2) *Services not included.* Any home and community-based service, including those indicated in paragraph (b)(8) of this section, may not be included in home and community-based service waivers for the following individuals:

(i) For individuals aged 22 through 64 who, absent the waiver, would be

institutionalized in an institution for mental diseases (IMD); and, therefore, subject to the limitation on IMDs specified in § 435.1008(a)(2) of this subchapter.

(ii) For individuals, not meeting the age requirements described in paragraph (d)(2)(i) of this section, who, absent the waiver, would be placed in an IMD in those States that have not opted to include the benefits defined in § 440.140 or § 440.160.

3. Section 440.185 is added to read as follows:

§ 440.185 Respiratory care for ventilator-dependent individuals.

(a) "Respiratory care for ventilator-dependent individuals" means services that are not otherwise available under the State's Medicaid plan, provided on a part-time basis in the recipient's home by a respiratory therapist or other health care professional trained in respiratory therapy (as determined by the State) to an individual who—

(1) Is medically dependent on a ventilator for life support at least 6 hours per day;

(2) Has been so dependent for at least 30 consecutive days (or the maximum number of days authorized under the State plan, whichever is less) as an inpatient in one or more hospitals, NFs, or ICFs/MR;

(3) Except for the availability of respiratory care services, would require respiratory care as an inpatient in a hospital, NF, or ICF/MR and would be eligible to have payment made for inpatient care under the State plan;

(4) Has adequate social support services to be cared for at home;

(5) Wishes to be cared for at home; and

(6) Receives services under the direction of a physician who is familiar with the technical and medical components of home ventilator support, and who has medically determined that in-home care is safe and feasible for the individual.

(b) For purposes of paragraphs (a)(4) and (5) of this section, a recipient's home does not include a hospital, NF, ICF/MR or other institution as defined in § 435.1009.

4. In § 440.250, a new paragraph (o) is added to read as follows:

§ 440.250 Limits on comparability of services.

* * * * *

(o) If the agency makes respiratory care services available under § 440.185, the services need not be made available in equal amount, duration, and scope to any individual not eligible for coverage under that section. However, the services must be made available in equal amount, duration, and scope to all individuals eligible for coverage under that section.

* * * * *

C. Part 441 is amended as follows:

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

1. The authority citation for Part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 441.301, paragraph (a) is revised; the introductory text of paragraph (b) is revised; the introductory text of paragraph (b)(1) is republished; paragraph (b)(1)(ii) is revised; a new paragraph (b)(1)(iii) is added; and paragraph (b)(4) is revised to read as follows:

§ 441.301 Contents of request for a waiver.

(a) A request for a waiver under this section must consist of the following:

(1) The assurances required by § 441.302 and the supporting documentation required by § 441.303.

(2) When applicable, requests for waivers of the requirements of section 1902(a)(1), section 1902(a)(10)(B), or section 1902(a)(10)(C)(i)(III) of the Act, which concern respectively, statewide application of Medicaid, comparability of services, and income and resource rules applicable to individuals with spouses living in the community.

(3) A statement explaining whether the agency will refuse to offer home or community-based services to any recipient if the agency can reasonably expect that the cost of the services would exceed the cost of an equivalent level of care provided in—

(i) A hospital (as defined in § 440.10 of this chapter);

(ii) A NF (as defined in section 1919(a) of the Act); or

(iii) An ICF/MR (as defined in § 440.150 of this chapter), if applicable.

(b) If the agency furnishes home and community-based services, as defined in § 440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must—

(1) Provide that the services are furnished—

* * * * *

(ii) Only to recipients who are not inpatients of a hospital, NF, or ICF/MR; and

(iii) Only to recipients who the agency determines would, in the absence of these services, require the Medicaid covered level of care provided in—

(A) A hospital (as defined in § 440.10 of this chapter);

(B) A NF (as defined in section 1919(a) of the Act); or

(C) An ICF/MR (as defined in § 440.150 of this chapter);

* * * * *

(4) Describe the services to be furnished so that each service is separately defined. Multiple services that are generally considered to be separate services may not be consolidated under a single definition. Commonly accepted terms must be used to describe the service and definitions may not be open ended in scope. HCFA will, however, allow combined service definitions (bundling) when this will permit more efficient delivery of services and not compromise either a recipient's access to or free choice of providers.

* * * * *

3. In § 441.302, the introductory paragraph is revised; paragraphs (c) and (e) are revised; paragraph (f) is redesignated as paragraph (h) and republished; and new paragraphs (f), (g), (i), and (j) are added to read as follows:

§ 441.302 State assurances.

Unless the Medicaid agency provides the following satisfactory assurances to HCFA, HCFA will not grant a waiver under this subpart and may terminate a waiver already granted:

* * * * *

(c) *Evaluation of need.*—Assurance that the agency will provide for the following:

(1) *Initial evaluation.*—An evaluation of the need for the level of care provided in a hospital, a NF, or an ICF/MR when there is a reasonable indication that a recipient might need the services in the near future (that is, a month or less) unless he or she receives home or community-based services. For purposes of this section, "evaluation" means a review of an individual recipient's condition to determine—

(i) If the recipient requires the level of care provided in a hospital as defined in § 440.40 of this subchapter, a NF as defined in section 1919(a) of the Act, or an ICF/MR as defined by § 440.150 of this subchapter; and

(ii) That the recipient, but for the provision of waiver services, would otherwise be institutionalized in such a facility.

(2) *Periodic reevaluations.*—Reevaluations, at least annually, of each recipient receiving home or community-based services to determine if the recipient continues to need the level of care provided and would, but for the provision of waiver services, otherwise be institutionalized in one of the following institutions:

(i) A hospital;
(ii) A NF; or
(iii) An ICF/MR.

* * * * *

(e) *Average per capita expenditures.*—Assurance that the average per capita fiscal year expenditures under the waiver will not exceed 100 percent of the average per capita expenditures that would have been made in the fiscal year for the level of care provided in a hospital, NF, or ICF/MR under the State plan had the waiver not been granted.

(1) These expenditures must be reasonably estimated and documented by the agency.

(2) The estimate must be on an annual basis and must cover each year of the waiver period.

(f) *Actual total expenditures.*—Assurance that the agency's actual total expenditures for home and community-based and other Medicaid services under the waiver and its claim for FFP in expenditures for the services provided to recipients under the waiver will not, in any year of the waiver period, exceed 100 percent of the amount that would be incurred by the State's Medicaid program for these individuals, absent the waiver, in—

(1) A hospital;
(2) A NF; or
(3) An ICF/MR.

(g) *Institutionalization absent waiver.*—Assurance that, absent the waiver, recipients in the waiver would receive the appropriate type of Medicaid-funded institutional care (hospital, NF, or ICF/MR) that they require.

(h) *Reporting.*—Assurance that annually, the agency will provide HCFA with information on the waiver's impact. That information must be consistent with a data collection plan designed by HCFA and must address the waiver's impact on—

(1) The type, amount, and cost of services provided under the State plan; and

(2) The health and welfare of recipients.

(i) *Habilitation services.*—Assurance that prevocational, educational, or supported employment services, or a combination of these services, if provided as habilitation services under the waiver, are—

(1) Not otherwise available to the individual through a local educational agency under section 602 (16) and (17) of the Education of the Handicapped Act (20 U.S.C. 1401 (16 and 17)) or as services under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730); and

(2) Furnished only to individuals who have been deinstitutionalized, regardless of discharge date from a Medicaid-certified NF or ICF/MR.

(3) Furnished as part of expanded habilitation services on or after April 7, 1986, if the State has requested and received HCFA's approval under a waiver or an amendment to a waiver.

(j) *Day treatment or partial hospitalization, psychosocial rehabilitation services, and clinic services for individuals with chronic mental illness.* Assurance that FFP will not be claimed in expenditures for waiver services including, but not limited to, day treatment or partial hospitalization, psychosocial rehabilitation services, and clinic services provided as home and community-based services to individuals with chronic mental illnesses if these individuals, in the absence of a waiver, would be placed in an IMD and are—

(1) Age 22 to 64;

(2) Age 65 and older and the State has not included the optional Medicaid benefit cited in § 440.140; or

(3) Age 21 and under and the State has not included the optional Medicaid benefit cited in § 440.160.

4. In § 441.303, the introductory paragraph is revised; the introductory text of paragraph (c) is republished; paragraph (c)(2) is revised; the introductory text of paragraph (f) is revised; paragraphs (f)(1) and (f)(2) are revised; (f)(3) is removed; paragraph (f)(4) is redesignated as paragraph (f)(3) and revised; new paragraphs (f)(4), (5), (6), (7), (8), (9), and (10) are added; paragraph (g) is revised; and new paragraphs (h) and (i) are added to read as follows:

§ 441.303 Supporting documentation required.

The agency must furnish HCFA with sufficient information to support the assurances required by § 441.302. Except as HCFA may otherwise specify for particular waivers, the information must consist of the following:

* * * * *

(c) A description of the agency's plan for the evaluation and reevaluation of recipients, including—

* * * * *

(2) A copy of the evaluation form to be used; and if it differs from the form used in placing recipients in hospitals, NFs, or ICFs/MR, a description of how and why it differs and an assurance that the outcome of the new evaluation form is reliable, valid, and fully comparable to the form used for hospital, NF, or ICF/MR placement;

* * * * *

(f) An explanation with supporting documentation satisfactory to HCFA of how the agency estimated the average per capita expenditures for services.

(1) The annual average per capita expenditure estimate of the cost of home and community-based and other Medicaid services under the waiver must not exceed the estimated annual average per capita expenditures of the cost of services in the absence of a waiver. The estimates are to be based on the following equation:

$D+D' \leq G+G'$.

The symbol "≤" means that the result of the left side of the equation must be less than or *equal* to the result of the right side of the equation.

D = the estimated annual average per capita Medicaid cost for home and community-based services for individuals in the waiver program.

D′ = the estimated annual average per capita Medicaid cost for all other services provided to individuals in the waiver program.

G = the estimated annual average per capita Medicaid cost for hospital, NF, or ICF/MR care that would be incurred for individuals served in the waiver, were the waiver not granted.

G′ = the estimated annual average per capita Medicaid costs for all services other than those included in factor G for individuals served in the waiver, were the waiver not granted.

(2) For purposes of the equation, the prime factors include the average per capita cost for all State plan services and expanded EPSDT services provided that are not accounted for in other formula values.

(3) In making estimates of average per capita expenditures for a waiver that applies only to individuals with a particular illness (for example, acquired immune deficiency syndrome) or condition (for example, chronic mental illness) who are inpatients in or who would require the level of care provided in hospitals as defined by § 440.10, NFs as defined in section 1919(a) of the Act, or ICFs/MR, the agency may determine the average per capita expenditures for these individuals absent the waiver without including expenditures for other individuals in the affected hospitals, NFs, or ICFs/MR.

(4) In making estimates of average per capita expenditures for a separate waiver program that applies only to individuals identified through the preadmission screening annual resident review (PASARR) process who are developmentally disabled, inpatients of a NF, and require the level of care provided in an ICF/MR as determined by the State on the basis of an evaluation under § 441.303(c), the agency may determine the average per capita expenditures that would have been made in a fiscal year for those

individuals based on the average per capita expenditures for inpatients in an ICF/MR. When submitting estimates of institutional costs without the waiver, the agency may use the average per capita costs of ICF/MR care even though the deinstitutionalized developmentally disabled were inpatients of NFs.

(5) For persons diverted rather than deinstitutionalized, the State's evaluation process required by § 441.303(c) must provide for a more detailed description of their evaluation and screening procedures for recipients to ensure that waiver services will be limited to persons who would otherwise receive the level of care provided in a hospital, NF, or ICF/MR, as applicable.

(6) The State must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. This number will constitute a limit on the size of the waiver program unless the State requests and the Secretary approves a greater number of waiver participants in a waiver amendment.

(7) In determining the average per capita expenditures that would have been made in a waiver year, for waiver estimates that apply to persons with mental retardation or related conditions, the agency may include costs of Medicaid residents in ICFs/MR that have been terminated on or after November 5, 1990.

(8) In submitting estimates for waivers that include personal caregivers as a waiver service, the agency may include a portion of the rent and food attributed to the unrelated personal caregiver who resides in the home or residence of the recipient covered under the waiver. The agency must submit to HCFA for review and approval the method it uses to apportion the costs of rent and food. The method must be explained fully to HCFA. A personal caregiver provides a waiver service to meet the recipient's physical, social, or emotional needs (as opposed to services not directly related to the care of the recipient; that is, housekeeping or chore services). FFP for live-in caregivers is not available if the recipient lives in the caregiver's home or in a residence that is owned or leased by the caregiver.

(9) In submitting estimates for waivers that apply to individuals with mental retardation or a related condition, the agency may adjust its estimate of average per capita expenditures to include increases in expenditures for ICF/MR care resulting from implementation of a PASARR program for making determinations for individuals with mental retardation or related conditions on or after January 1, 1989.

(10) For a State that has HCFA approval to bundle waiver services, the State must continue to compute separately the costs and utilization of the component services that make up the bundled service to support the final cost and utilization of the bundled service that will be used in the cost-neutrality formula.

(g) The State, at its option, may provide for an independent assessment of its waiver that evaluates the quality of care provided, access to care, and cost-neutrality. The results of the assessment should be submitted to HCFA at least 90 days prior to the expiration date of the approved waiver-period and cover the first 24 or 48 months of the waiver. If a State chooses to provide for an independent assessment, FFP is available for the costs attributable to the independent assessment.

(h) For States offering habilitation services that include prevocational, educational, or supported employment services, or a combination of these services, consistent with the provisions of § 440.180(c) of this chapter, an explanation of why these services are not available as special education and related services under sections 602 (16) and (17) of the Education of the Handicapped Act (20 U.S.C. 1401 (16, and 17)) or as services under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. section 730);

(i) For States offering home and community-based services for individuals diagnosed as chronically mentally ill, an explanation of why these individuals would not be placed in an institution for mental diseases (IMD) absent the waiver, and the age group of these individuals.

5. In § 441.304, paragraphs (a), (b), and (d) are revised to read as follows:

§ 441.304 Duration of a waiver.

(a) The effective date for a new waiver of Medicaid requirements to provide home and community-based services approved under this subpart is established by HCFA prospectively on or after the date of approval and after consultation with the State agency. The initial approved waiver continues for a 3-year period from the effective date. If the agency requests it, the waiver may be extended for additional periods unless—

(1) HCFA's review of the prior waiver period shows that the assurances required by § 441.302 were not met; and

(2) HCFA is not satisfied with the assurances and documentation provided by the State in regard to the extension period.

(b) HCFA will determine whether a request for extension of an existing waiver is actually an extension request or a request for a new waiver. If a State submits an extension request that would add a new group to the existing group of recipients covered under the waiver (as defined under § 441.301(b)(6)), HCFA will consider it to be two requests: One as an extension request for the existing group, and the other as a new waiver request for the new group. Waivers may be extended for additional 5-year periods.

* * * * *

(d) If HCFA finds that an agency is not meeting one or more of the requirements for a waiver contained in this subpart, the agency is given a notice of HCFA's findings and an opportunity for a hearing to rebut the findings. If HCFA determines that the agency is not in compliance with this subpart after the notice and any hearing, HCFA may terminate the waiver. For example, a State submits to HCFA a waiver request for home and community-based services that includes an estimate of the expenditures that would be incurred if the services were provided to the covered individuals in a hospital, NF, or ICF/MR in the absence of the waiver. HCFA approves the waiver. At the end of the waiver year, the State submits to HCFA a report of its actual expenditures under the waiver. HCFA finds that the actual expenditures under the waiver exceed 100 percent of the State's approved estimate of expenditures for these individuals in a hospital, NF, or ICF/MR in the absence of the waiver. HCFA next requires the State to amend its estimates for subsequent waiver year(s). HCFA then compares the revised estimates with the State's actual experience to determine if the revised estimates are reasonable. HCFA may terminate the waiver if the revised estimates indicate that the waiver is not cost-neutral or that the revised estimates are unreasonable.

§ 441.305 [Redesignated as § 441.307]

6. Section 441.305 is redesignated as § 441.307.

7. A new § 441.305 is added to read as follows:

§ 441.305 Replacement of recipients in approved waiver programs.

(a) *Regular waivers.* A State's estimate of the number of individuals who may receive home and community-based services must include those who will replace recipients who leave the program for any reason. A State may replace recipients who leave the program due to death or loss of eligibility under the State plan without

regard to any federally-imposed limit on utilization, but must maintain a record of recipients replaced on this basis.

(b) *Model waivers.*

(1) The number of individuals who may receive home and community-based services under a model waiver may not exceed 200 recipients at any one time.

(2) The agency may replace any individuals who die or become ineligible for State plan services to maintain a count up to the number specified by the State and approved by HCFA within the 200-maximum limit.

§ 441.306 [Redesignated as § 441.308]

8. Section 441.306 is redesignated as § 441.308.

9. A new § 441.306 is added to read as follows:

§ 441.306 Cooperative arrangements with the Maternal and Child Health program.

Whenever appropriate, the State agency administering the plan under Medicaid may enter into cooperative arrangements with the State agency responsible for administering a program for children with special health care needs under the Maternal and Child Health program (Title V of the Act) in order to ensure improved access to coordinated services to meet the children's needs.

10. Section 441.310 is revised to read as follows:

§ 441.310 Limits on Federal financial participation (FFP).

(a) FFP for home and community-based services listed in § 440.180 of this chapter is not available in expenditures for the following:

(1) Services provided in a facility subject to the health and welfare requirements described in § 441.302(a) during any period in which the facility is found not to be in compliance with the applicable State standards described in that section.

(2) The cost of room and board except when provided as—

(i) Part of respite care services in a facility approved by the State that is not a private residence; or

(ii) For waivers that allow personal caregivers as providers of approved waiver services, a portion of the rent and food that may be reasonably attributed to the unrelated caregiver who resides in the same household with the waiver recipient. FFP for a live-in caregiver is not available if the recipient lives in the caregiver's home or in a residence that is owned or leased by the provider of Medicaid services (the caregiver). For purposes of this provision, "board" means 3 meals a day or any other full nutritional regimen and does not include meals provided as part of a program of adult day health services as long as the meals provided do not constitute a "full" nutritional regimen.

(3) Prevocational, educational, or supported employment services, or any combination of these services, as part of habilitation services that are—

(i) Provided prior to April 7, 1986;

(ii) Provided in approved waivers that include a definition of "habilitation services" but which have not included prevocational, educational and supported employment services in that definition;

(iii) Provided to recipients who were never institutionalized in a Medicaid certified NF or ICF/MR; or

(iv) Otherwise available to the recipient under either special education and related services as defined in section 602(16) and (17) of the Education of the Handicapped Act (20 U.S.C. 1401 (16) and (17)) or vocational rehabilitation services available to the individual through a program funded under section 110 of the Rehabilitation Act of 1973 (29 U.S.C. 730).

(4) For waiver applications and renewals approved on or after October 21, 1986, home and community-based services provided to individuals aged 22 through 64 diagnosed as chronically mentally ill who would be placed in an institution for mental diseases. FFP is also not available for such services provided to individuals aged 65 and over and 21 and under as an alternative to institutionalization in an IMD if the State does not include the appropriate optional Medicaid benefits specified at §§ 440.140 and 440.160 of this chapter in its State plan.

(b) FFP is available for expenditures for expanded habilitation services, as described in § 440.180, if the services are included under a waiver or waiver amendment approved by HCFA on or after April 7, 1986.

(Catalog of Federal Assistance Program No. 93.778, Medical Assistance Program)

Dated: May 11, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: June 21, 1994.

Donna E. Shalala,

Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

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AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants petitions for reconsideration of previous order amending the Commission's rules regarding document specifications. The rule is amended to eliminate the character per inch requirement for Commission filings. Instead, the amended rule requires that Commission filings must utilize type of at least 12-point in height, must be double spaced, and must be filed on A4 or 8.5 × 11 inch (21.6 cm. × 27.9 cm.) paper with the printed material not exceeding 6.5 × 9.5 inches (16.5 cm. × 24.1 cm.).

EFFECTIVE DATE: July 25, 1994.

FOR FURTHER INFORMATION CONTACT: S. Lee Martin, Office of General Counsel (202) 418-1758.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's memorandum opinion and order, adopted on July 7, 1994, and released on July 20, 1994. The full text of the memorandum opinion and order is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, D.C. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., Suite 140, 2100 M Street NW., Washington, DC 20037.

Summary of Memorandum Opinion and Order

1. By its order the Commission granted reconsideration of a previous order, Amendment of Section 1.49 of the Commission's Rules, 58 FR 63087 (Nov. 30, 1993), that was intended to ensure against the circumvention of the page limitations by the use of printing reduction processes. To achieve this goal more effectively, the Commission determined on reconsideration that it would eliminate the character per inch requirement, but that it would amend § 1.49(a) to specify with greater precision the acceptable format for Commission filings. These changes are designed to ensure that all parties filing a particular pleading have an equal opportunity to make a substantive presentation to the Commission without regard to whether they have access to

sophisticated word processing equipment.

2. Section 1.49(a) continues to require that all Commission filings be double spaced, but the rule is amended to specify a distance of at least 7/32 of an inch (0.158 cm.) between the lines. Although footnotes and quoted material may be single spaced, parties are cautioned against abusing the page limitations with filings that contain excessive single spaced material. The permissible paper size is unchanged but the rule is amended to specify that the margins must be set so that the printed material does not exceed 6.5 × 6.9 inches (16.5 × 24.1 cm.).

3. The Commission has adopted the suggestion that pleadings must utilize 12-point or larger type, but it has deleted the character per inch requirement. Such requirement was deemed unnecessary in light specifications as to point size, margins, and the minimum distance between each line of text.

4. The Commission also amended 47 CFR 1.50 to reflect that briefs should be typewritten or mechanically produced unless the Commission specifically requests printed briefs, and that typewritten or mechanically produced briefs must meet all the general format specifications that are set forth in section 1.49(a) of the rules.

List of Subjects for 47 CFR Part 1

Administrative practice and procedure, Pleadings, Briefs, and other papers.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1—[AMENDED]

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.49 is amended by revising paragraph (a) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

(a) All pleadings and documents filed in any Commission proceeding shall be typewritten or prepared by mechanical processing methods, and shall be filed on A4 (21 cm. × 29.7 cm.) or on 8½ × 11 inch (21.6 cm. × 27.9 cm.) paper with the margins set so that the printed material does not exceed 6½ × 9½ inches (16.5 cm. × 24.1 cm.). The printed material may be in any typeface of at least 12-point (0.42333 cm. or 12/72") in height. The body of the text must be double spaced with a minimum distance of 7/32 of an inch (0.5556 cm.) between each line of text. Footnotes and long, indented quotations may be single spaced, but must be in type that is 12-point or larger in height, with at least 1/16 of an inch (0.158 cm.) between each line of text. Counsel are cautioned against employing extended single spaced passages or excessive footnotes to evade prescribed pleading lengths. If single-spaced passages or footnotes are used in this manner the pleading will, at the discretion of the Commission, either be rejected as unacceptable for filing or dismissed with leave to be refiled in proper form. Pleadings may be printed on both sides of the paper. Pleadings that use only one side of the paper shall be stapled, or otherwise bound, in the upper left-hand corner; those using both sides of the paper shall be stapled twice, or otherwise bound, along the left-hand margin so that it opens like a book. The foregoing shall not apply to printed briefs specifically requested by the Commission, official publications, charted or maps, original documents (or admissible copies thereof) offered as exhibits, specially prepared exhibits, or if otherwise specifically provided. All copies shall be clearly legible.

* * * * *

3. Section 1.50 is revised to read as follows:

§ 1.50 Specifications as to briefs.

The Commission's preference is for briefs that are typewritten or prepared by mechanical processing methods. Printed briefs will be accepted only if specifically requested by the Commission. Typewritten or mechanically produced briefs must conform to all of the specifications for pleadings and documents set forth in § 1.49.

[FR Doc. 94–17991 Filed 7–22–94; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 301

[Docket No. 931235–4107; I.D. 071594H]

Pacific Halibut Fisheries

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

ACTION: Notice of inseason action.

SUMMARY: The Assistant Administrator for Fisheries, NOAA, on behalf of the International Pacific Halibut Commission (IPHC), publishes notice of this inseason action pursuant to IPHC regulations approved by the U.S. Government to govern the Pacific halibut fishery. This action is intended to enhance the conservation of Pacific halibut stocks in order to help sustain them at an adequate level in the northern Pacific Ocean and Bering Sea.

EFFECTIVE DATE: July 12, 1994, through October 31, 1994.

FOR FURTHER INFORMATION CONTACT: Steven Pennoyer, telephone 907–586–7221; Gary Smith, telephone 206–526–6140; or Donald McCaughran, telephone 206–634–1838.

SUPPLEMENTARY INFORMATION: The IPHC, under the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (signed at Ottawa, Ontario, on March 2, 1953), as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979), has issued this inseason action pursuant to IPHC regulations governing the Pacific halibut fishery. The regulations have been approved by the Secretary of State (59 FR 22522, May 2, 1994). On behalf of the IPHC, this inseason action is published in the **Federal Register** to provide additional notice of its effectiveness, and to inform persons subject to the inseason action of the restrictions and requirements established therein.

Inseason Action

1994 Halibut Landing Report No. 11, Area 2A to Reopen on July 19

The July 6 fishing period in Area 2A (Washington, Oregon, and California) resulted in a catch of 125,000 lb (56.7 mt), leaving nearly 54,000 lb (24.5 mt) yet to be caught from the 178,750 lb (81 mt) catch limit. Area 2A will reopen on July 19 for 10 hours from 8:00 a.m. to 6:00 p.m. local time. Fishing period limits as indicated in the following table will be in effect for this opening. Note that the fishing period limits for the three smallest vessel classes have all been set at the same level.

Vessel class		Fishing period limit (pounds)	
Length	Letter	Dressed, head-on	Dressed, head-off [1]
0–25	A	225	200
26–30	B	225	200
31–35	C	225	200
36–40	D	395	350
41–45	E	425	375
46–50	F	510	450
51–55	G	570	500
56+	H	850	750

[1] Weights are after 2 percent has been deducted for ice and slime if fish are not washed prior to weighing.

The fishing period limit is shown in terms of dressed, head-off weight as well as dressed, head-on weight. Fishermen should be aware that regulations require that all halibut from Area 2A be landed with heads on. The fishing period limit applies to the vessel, not the individual fisherman, and any landings over the vessel limit will be subject to forfeiture and may result in a fine.

Area 4C to Reopen on August 2

The IPHC has determined that nearly 676,000 lb (306.6 mt) were harvested from Area 4C during 14 1-day fishing periods between June 3 and June 30. As the total catch is 24,000 lb (10.9 mt) less than the catch limit of 700,000 lb (317.5 mt), the IPHC will reopen Area 4C for a single 24-hour fishing period commencing at 12:00 noon Alaska Daylight Time on August 2 and ending at 12:00 noon Alaska Daylight Time on August 3. A 1,500 lb (0.7 mt) catch limit will apply to all vessels during this fishing period instead of the 10,000 lb (4.5 mt) limit specified in the 1994 Pacific Halibut Fisheries Regulations.

September Fishing Periods and Limits in Areas 2C, 3A, and 3B

The IPHC has determined that fishing period limits will not be required in Area 2C during the September opening, but will be required in Areas 3A and 3B to avoid exceeding the catch limit.

The IPHC has set the fishing period in all three areas at 48 hours. The fishing periods will open on September 12 at 12:00 noon Alaska Daylight Time, and close on September 14 at 12:00 noon Alaska Daylight Time. Fishing period limits for Areas 3A and 3B are as follows:

Vessel class		Fishing period limits (pounds, dressed, heads off)	
Length	Letter	Area 3A	Area 3B
0–25	A	600	600
26–30	B	900	900
31–35	C	2,700	2,700
36–40	D	3,500	3,500
41–45	E	5,600	5,600
46–50	F	7,900	7,900
51–55	G	11,600	11,600
56+	H	20,000	20,000

The above fishing period limits reflect the historical average catch, adjusted by anticipated fleet size and catch rate to avoid exceeding the catch limit. The appropriate length and letter for each vessel class is printed on each halibut license. Decals showing the letter have been supplied with the license and should be displayed on the vessel.

In the event that the catch limit in one or more of the three areas is not attained, and sufficient poundage remains to permit further fishing, the next scheduled fishing period is October 10. NMFS should be contacted regarding sablefish retention during the halibut opening.

Dated: July 18, 1994.

David S. Crestin,

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

[FR Doc. 94–17919 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–22–W

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50 CFR Part 301

[Docket No. 931235–4107; I.D. 071594F]

Pacific Halibut Fisheries

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

ACTION: Notice of inseason action.

SUMMARY: The Assistant Administrator for Fisheries, NOAA, on behalf of the International Pacific Halibut Commission (IPHC), publishes notice of this inseason action pursuant to IPHC regulations approved by the U.S. Government to govern the Pacific halibut fishery. This action is intended to enhance the conservation of Pacific halibut stocks in order to help sustain them at an adequate level in the northern Pacific Ocean and Bering Sea.

EFFECTIVE DATE: July 6, 1994, through September 30, 1994.

FOR FURTHER INFORMATION CONTACT: Steven Pennoyer, telephone 907-586-7221; Gary Smith, telephone 206-526-6140; or Donald McCaughran, telephone 206-634-1838.

SUPPLEMENTARY INFORMATION: The IPHC, under the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (signed at Ottawa, Ontario, on March 2, 1953), as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979), has issued this inseason action pursuant to IPHC regulations governing the Pacific halibut fishery. The regulations have been approved by the Secretary of State (59 FR 22522, May 2, 1994). On behalf of the IPHC, this inseason action is published in the **Federal Register** to provide additional notice of its effectiveness, and to inform persons subject to the inseason action of the restrictions and requirements established therein.

Inseason Action

1994 Halibut Landing Report No. 9

Last Oregon Sport Season Canceled, 30–Fathom Fishery to Continue

The final sport Pacific halibut season scheduled to begin August 6 in all depths between Cape Falcon (lat. 45°46′00″N.) and the California border (lat. 42°00′00″N.) has been canceled. Insufficient catch limit remains to allow for a complete day of fishing. Therefore, the current sport halibut fishery inside the 30-fathom curve nearest to the coastline as plotted on National Ocean Service charts numbered 18520, 18580, and 18600 from Cape Falcon to the California border will continue until the overall catch limit for this area is reached. The fishery is open 7 days a week with a daily bag limit of two halibut per person, one with a minimum overall size limit of 32 in (81.3 cm) and the second with a minimum overall size limit of 50 in (127 cm). This fishery will close when the remaining catch limit of 2,610 lb (1.2 mt) is reached and the season is closed by the Commission, or September 30, whichever occurs first.

Strait of Juan de Fuca and Puget Sound Sport Fishery Closes

Sport fishing for Pacific halibut in the Strait of Juan de Fuca and Puget Sound (waters east of a line from Bonilla Point, lat. 48°35′44″N., long. 124°43′00″W., to the buoy adjacent to Duntz Rock, lat. 48°24′55″N., long. 124°44′50″W., to Tatoosh Island lighthouse, lat. 48°23′30″N., long. 124°44′00″W., to Cape Flattery, lat. 48°22′55″N., long. 124°43′42″W.) closed, as scheduled, at 11:59 p.m. on July 5. Sport fishing for Pacific halibut will remain closed for the rest of 1994.

Dated: July 18, 1994

David S. Crestin,

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

[FR Doc. 94–17921 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–22–F

National Oceanic and Atmospheric Administration

50 CFR Part 301

[Docket No. 931235–4107; I.D. 071594G]

Pacific Halibut Fisheries

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

ACTION: Notice of inseason action.

SUMMARY: The Assistant Administrator for Fisheries, NOAA, on behalf of the International Pacific Halibut Commission (IPHC), publishes notice of this inseason action pursuant to IPHC regulations approved by the U.S. Government to govern the Pacific halibut fishery. This action is intended to enhance the conservation of Pacific halibut stocks in order to help sustain them at an adequate level in the northern Pacific Ocean and Bering Sea.

EFFECTIVE DATE: July 7, 1994, through October 31, 1994.

FOR FURTHER INFORMATION CONTACT: Steven Pennoyer, telephone 907-586-7221; Gary Smith, telephone 206-526-6140; or Donald McCaughran, telephone 206-634-1838.

SUPPLEMENTARY INFORMATION: The IPHC, under the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (signed at Ottawa, Ontario, on March 2, 1953), as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979), has issued this inseason action pursuant to IPHC regulations governing the Pacific halibut fishery. The regulations have been approved by the Secretary of State (59 FR 22522, May 2, 1994). On behalf of the IPHC, this inseason action is published in the **Federal Register** to provide additional notice of its effectiveness, and to inform persons subject to the inseason action of the restrictions and requirements established therein.

Inseason Action

1994 Halibut Landing Report No. 10

Area 4B to Close July 9

The IPHC estimates that 15 percent (315,000 lb (142.9 mt)) of the catch limit in Area 4B (Aleutian Islands) will be taken by the end of the July 9 fishing period. As it was decided at the 1994 Annual Meeting to reserve 85 percent of the Area 4B catch for the August 15 fishery, the IPHC is canceling fishing periods scheduled from July 11 through August 14. Therefore, Area 4B will close on July 9 at 8:00 p.m. Alaska Daylight Time and reopen on August 15 to take the remaining catch limit.

Dated: July 18, 1994.

David S. Crestin,

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

[FR Doc. 94–17920 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–22–F

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50 CFR Part 672

[Docket No. 931199–4042; I.D. 071894A]

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 the "other rockfish" species category in the Eastern Regulatory Area in the Gulf of Alaska (GOA). This action is necessary to fully utilize the total allowable catch (TAC) for the "other rockfish" species category in the Eastern Regulatory Area.

EFFECTIVE DATE: 12 noon, Alaska local time (A.l.t.), July 20, 1994, until 12 midnight, A.l.t., December 31, 1994.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, 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)(B), the annual TAC for the "other rockfish" species category in the Eastern Regulatory Area, was established by the final 1994 specifications (59 FR 7647, February 16, 1994), as 1048 metric tons (mt). The specifications also closed the directed fishery for the "other rockfish" species category in the Eastern Regulatory Area under § 672.20(c)(2)(ii). NMFS has determined that as of July 2, 1994, 917 mt remains unharvested.

The Director, Alaska Region, NMFS, has determined that the 1994 TAC for the "other rockfish" species category in the Eastern Regulatory Area has not been reached and that the remaining amount is sufficient to support a directed fishery. Therefore, NMFS is rescinding the previous closure and is opening directed fishing for the "other rockfish" species category in the Eastern Regulatory Area, effective at 12 noon, A.l.t., July 20, 1994.

All other closures remain in full force and effect.

Classification

This action is taken under 50 CFR 672.20 and is exempt from OMB review under E.O. 12866.

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

Dated: July 19, 1994.

David S. Crestin,

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

[FR Doc. 94–17933 Filed 7–19–94; 3:59 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 59, No. 141
Monday, July 25, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

RIN 3150–AD94

Environmental Review for Renewal of Operating Licenses

AGENCY: Nuclear Regulatory Commission.

ACTION: Supplemental proposed rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing a supplement to the proposed rule concerning the environmental review for renewal of operating licenses. The supplement would revise the definition of purpose and need for the proposed Federal action that will be used in the environmental review of applications for renewal of nuclear power plant operating licenses. This action was developed in response to public comments on the proposed rule. The redefinition presented in the supplement to the proposed rule would also affect the identification of alternatives to the proposed action that will be considered in environmental reviews for license renewal.

DATES: Submit comments by September 8, 1994. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Send comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. ATTN: Docketing and Service Branch.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 a.m. and 4:15 p.m. Federal workdays.

Comments received on the proposed rule as well as other documents relevant to this rulemaking are available for inspection at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Donald P. Cleary, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone: (301) 415–6263.

SUPPLEMENTARY INFORMATION:

Background

On September 17, 1991 (56 FR 47016), the NRC published in the Federal Register proposed amendments to its environmental protection regulations, 10 CFR Part 51, that would establish new requirements for the environmental review of applications to renew operating licenses for nuclear power plants. Concurrently, the NRC published NUREG–1437,[1] a draft Generic Environmental Impact Statement (GEIS) that contained the analysis which NRC proposed to codify in 10 CFR Part 51. In commenting on the proposed rule and the draft GEIS, a number of States expressed dissatisfaction with the treatment of need for generating capacity, alternative energy sources, and certain other issues. They expressed strong concerns that the proposed rule would intrude adversely on traditional State regulatory authority over these matters. They expressed concern that designation of need for generating capacity and alternative energy sources as Category 1 [2] issues would substantially eliminate public participation, would adversely affect independent State consideration of these matters, and would inadequately provide for use of current, project specific information.

The Commission instructed the NRC staff to develop an options paper for responding to these State concerns, to solicit State views on the options, and to present these options to the Commission. To facilitate discussion of these matters the NRC staff developed an options paper entitled "Addressing The Concerns Of States And Others Regarding The Role Of Need For Generating Capacity, Alternative Energy Sources, Utility Costs, And Cost-Benefit Analysis In NRC Environmental Reviews For Relicensing Nuclear Power Plants: An NRC Staff Discussion Paper." A **Federal Register** notice (January 18, 1994; 59 FR 2542) announced the scheduling of three regional workshops and the availability of the options paper.

The workshops were held during the month of February 1994, in Rockville, MD (February 9, 1994), Rosemont, IL (February 15, 1994), and Chicopee, MA (February 17, 1994). Discussants represented seven States, the National Association of Utility Regulatory Commissioners, three public advocacy groups, the Nuclear Utility Management and Resources Council (now known as the Nuclear Energy Institute (NEI)) and the NRC. Representatives of several other States, public advocacy groups, and industry actively participated from the floor. A transcript of each workshop was taken. Subsequent to the workshops, written comments were filed by eight States, three public advocacy groups, the Nuclear Energy Institute (NEI) and two utilities. In addition, subsequent to the workshops and receipt of most of the written comments, the NRC staff met with the Environmental Protection Agency (EPA) and the Council on Environmental Quality to discuss the staff's proposed options and the comments and options offered by the States. EPA submitted written comments on May 11, 1994.

In their written submittal, NEI and Yankee Atomic Electric Company (YAEC) each presented an approach to the handling of need and alternatives in the rule that they believe would resolve the concerns expressed by the States. These proposals had not been adequately developed for discussion at the time of the regional workshops. Because the NRC staff needed to better understand these proposals before reporting to the Commission on a recommended approach, a public meeting with NEI and YAEC was held on May 16, 1994. The meeting was announced in the **Federal Register** (May 4, 1994; 59 FR 23030). Participants in the regional workshops were notified of the meeting in advance and later furnished with the meeting transcript.

[1] Copies of NUREG–1437 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Mail Stop SSOP, Washington, DC 20402–9328. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC 20555–0001.

[2] Category definitions:

Category 1—A generic conclusion on the impact has been reached for all affected nuclear power plants.

Category 2—A generic conclusion on the impact has been reached for all nuclear power plants that fall within defined bounds.

Category 3—A generic conclusion on the impact was not reached for any nuclear power plant.

After considering the range of options, the NRC staff has narrowed its consideration to two basic approaches to the treatment of "purpose and need" and "alternatives" that will best satisfy the concerns of the States and meet the requirements of the National Environmental Policy Act of 1969 (NEPA). One approach has been proposed by the State of New York and was endorsed by several other States. The other approach, recommended in this document, was developed by the NRC staff after consideration of the meeting transcripts and written comments. Borrowing from some of the elements of the YAEC and NEI proposals, the NRC staff has developed its own approach which it believes would contribute substantially to resolving the concerns raised by the States. Both approaches are discussed below.

The State Approach

The approach proposed by the State of New York is a modification of the Option 2 as discussed in the NRC staff options paper. There are three major elements to the State option. Quoting from the written submittal of the State of New York:

i. the text of the actual rule should be modified to include, and each individual relicensing decision should include, statements that the NRC's findings with respect to need for generating capacity and alternative energy sources are only intended to assist the NRC in meeting its NEPA obligations and do not preclude the States from making their own determinations with respect to these issues;

ii. determinations regarding the issues of need for generating capacity and alternative energy sources should be designated "Category 3" conclusions requiring site-specific review, rather than "Category 1" generic conclusions; and

iii. all NRC project specific EIS and relicensing decisions should make reference to State determinations on the issues of need for generating capacity and alternative energy sources, and should defer to and be guided by those State determinations to the maximum degree possible pursuant to NEPA.

The purpose and need for the proposed Federal action (renewal of an operating license) continues to be defined in terms of the need for power. This approach would address some of the State concerns because the NRC would no longer perform the alternatives and need for power analyses unless State analyses of these issues were inadequate or non-existent. The NRC staff does not recommend this option, however, for several reasons. First of all, the NRC would have to develop guidelines for determining the acceptability of State analyses. Some States may view the application of these guidelines as an intrusion on their planning process. In addition, some States may not be prepared to submit the required information to the NRC in a timely fashion given the differing time-tables used by States in their energy planning process. Finally, some States may not be capable of submitting the required information to the NRC.

Recommended Approach

Based on the information gathered at the various public meetings and from written comments, the NRC staff has developed the following recommended approach. The major features of the recommended approach are:

- Redefine the purpose and need for the proposed action (renewal of an operating license) as preserving continued operation of a nuclear power plant as a safe option that State regulators and utility officials may consider in their future energy planning decisions.
- Consider a range of alternatives to the proposed action to identify any action that may reasonably serve the stated purpose and need. Review the environmental impacts of any such alternatives.
- Consider the environmental consequences of the "no action" alternative to license renewal, which the NRC is required to do by NEPA, i.e., the environmental impact of a range of energy sources that might be used if NRC should preclude the option of continued operation (license renewal).
- Change NRC's NEPA decision standard for license renewal so that renewal does not depend on an NRC conclusion that operation is the preferred NEPA option. Instead, license renewal would depend on an NRC conclusion that continued operation of a nuclear power plant is within the reasonable range of alternatives considered and should not be rejected as an option for future consideration.

Under the NRC staff's recommended approach, the definition of the purpose and need of the Federal action in the GEIS would read:

> The purpose and need of the proposed action is to preserve the option of continued operation of the nuclear power plant for State regulators and utility officials in their future energy planning decisions.

In formulating this proposed purpose and need statement, the NRC staff has attempted to consider the perspective of State regulators, the needs of license renewal applicants, the nature of the applications at issue, and the function that the NRC plays in the decisional process. This proposed definition does not indicate an endorsement by the NRC of nuclear power operation as a preferred energy source. Instead, the proposed definition is intended to convey that, absent findings in the Atomic Energy Act safety review or in the NEPA environmental analysis that would lead the NRC to reject a license renewal application, the NRC will not interfere with the energy planning decisions of state regulators and utility officials. It would also be explained in the GEIS that a renewed license is not a mandate nor a commitment to operate but is simply documentation that the licensee can meet the NRC's public health and safety requirements.

The GEIS would continue to include a full discussion of the environmental impacts of license renewal, the purpose and need for license renewal, alternatives that can serve that purpose and need, the no action alternative, and the environmental consequences of the no action alternative. In doing so, the NRC would fulfill its obligations under NEPA to consider alternatives to the proposed action. The GEIS would contain no discussion of need for power, the economic competitiveness of nuclear power, or other economic considerations related to these issues.

In applying the proposed definition of purpose and need to the GEIS, the NRC staff has identified only two basic alternatives which reasonably flow from the proposed approach: renewing an operating license, which would preserve the option, and not renewing the operating license (the no action alternative), which would not preserve the option but is nevertheless required under NEPA. The NRC staff will give further consideration to identifying additional alternatives and is soliciting public comment by means of this document. If any other reasonable alternatives are identified, the environmental impacts associated with them will be assessed.

However, the NRC staff will examine the environmental impacts of alternative sources of energy in its analysis of the no action alternative. The implementation of the no action alternative, i.e., NRC's rejection of a license renewal application, would create a range of potential environmental impacts including those impacts which would result from the possible replacement of the nuclear plant's power by some other source of energy. Accordingly, under the NRC staff's proposed approach, the NRC staff

will examine in the GEIS the full range of environmental impacts of other sources of energy in order to ensure a full consideration of the no action alternative.

The NRC would use the statement of purpose and need as a basis for its decision standard in weighing the differences between license renewal and the various alternatives involved. Final determinations concerning alternatives in the GEIS would involve the following decision criterion: NRC would use the information on environmental impacts to reject the license renewal option only if the data concerning environmental impacts and alternatives, including the no action alternative, indicates that it would be unreasonable for the NRC to preserve the option of nuclear power generation for future decision makers.

For the no action alternative, the NRC would reject the license renewal option only if the environmental impacts of license renewal were so much worse than those of other sources of energy that the NRC would be justified in eliminating the nuclear power plant as a tool for future energy planners. It would not be necessary for the NRC to find in the GEIS that existing nuclear power plants will be the preferred source of energy. The NRC would only have to find that the environmental impacts of nuclear plants place them within a "reasonable range" of future energy options viewed from the perspective of environmental impacts. If, in an individual relicensing action, new and significant information created a doubt concerning previous conclusions in the GEIS, the NRC would consider that information to determine if the previous determinations in the GEIS were no longer valid for that particular plant.

This decision method used in the recommended approach would allow the NRC to take a hard look at the environmental impacts of the proposed action and, at the same time, demonstrate an appreciation of the primacy and expertise of the States in the area of energy planning. This proposed standard for decision making in the GEIS would differ from current NRC practice for application of NEPA at the construction permit and the operating license stages and in the proposed amendments to 10 CFR Part 51 for license renewal. Currently, at the construction permit stage, the NRC compares the proposed action and the alternatives using a cost-benefit analysis which includes consideration of the need for power and other economic considerations related to power generation. Under the current approach, the NRC rejects the licensing action if the NEPA analysis demonstrates that an alternative is "obviously superior."

The recommended approach would avoid NRC determinations on such economic issues and, instead, focus NRC's analysis in the GEIS on the environmental impacts of license renewal and the associated alternatives. For the purposes of the license renewal GEIS, the proposed approach would replace the obviously superior standard with a standard which requires the environmental impacts of the alternatives considered to be so superior to the impacts of nuclear power as to justify the preclusion of nuclear plant operation as an option for future decision makers. In other words, based on the analysis of environmental impacts, the proposed action must be in the "reasonable range" of alternatives in order to justify NRC approval. Whether the definition of purpose and need proposed for the license renewal stage should also be applied at the construction permit and operating license stage is under review by the NRC staff. That determination will be made separately from the license renewal rulemaking.

The NRC staff believes that of the options considered, the recommended approach will resolve concerns expressed by the States and meet the original objectives of the rulemaking, i.e., to increase regulatory efficiency and stability. The NRC notes that the primary elements of this approach are a departure from past NRC practice as applied at the construction permit and operating license stage. However, the proposed purpose and need statement and the reasonable range decision standard represent an approach to this issue which reflects the differing set of circumstances pertinent to decisions about continued operation of existing nuclear power plants. The NRC staff believes that the definition and explanation of purpose and need and the identification and consideration of alternatives is consistent with the trend of current NEPA case law which allows an agency to consider an applicant's wants when the agency formulates the goals of its own proposed action (see e.g., *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190 (D.C. Cir. 1991); *City of Grapevine, Tex.* v. *Dept. of Transportation*, 17 F.3d 1502 (D.C. Cir. 1994)). Therefore, the staff believes that its approach will address the concerns of the States and meet the requirements of NEPA at the same time.

Within 30 days from the close of the public comment period the NRC staff will report on the comments received. If the public comments indicate opposition to this approach or the desirability of making significant modifications to the approach, the NRC staff will seek Commission guidance. Otherwise the NRC staff intends to proceed with incorporation of the recommended approach in the final GEIS and the final rule.

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335).

Dated at Rockville, Maryland, this 8th day of July, 1994.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 94–17985 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AB42

Risk-Based Capital Standards; Bilateral Netting Requirements

AGENCY: Federal Deposit Insurance Corporation (FDIC or Corporation).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing to amend its risk-based capital standards to recognize the risk reducing benefits of netting arrangements. Under the proposal, state nonmember banks would be permitted to net, for risk-based capital purposes, interest and exchange rate contracts (rate contracts) subject to legally enforceable bilateral netting contracts that meet certain criteria. The FDIC is proposing these amendments on the basis of proposed revisions to the Basle Accord which would permit the recognition of such netting arrangements. The effect of the proposed amendments would be to allow state nonmember banks to net positive and negative mark-to-market values of rate contracts in determining the current exposure portion of the credit equivalent amount of such contracts to be included in risk-weighted assets.

DATES: Comments must be received by the FDIC on or before August 24, 1994.

ADDRESSES: Send comments to Robert E Feldman, Acting Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Comments may be hand delivered to room F–402, 1776 F Street NW., Washington, DC, on business days between 8:30 a.m. and 5:00 p.m. [Fax

number: (202) 898–3838.] Comments may be inspected at the FDIC's Reading Room, room 7118, 550 17th Street NW., Washington, DC between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: William A. Stark, Assistant Director, (202) 898–6972, Curtis Wong, Capital Markets Specialist, (202) 898–7327, Division of Supervision, FDIC, 550 17th Street NW., Washington, DC 20429; Jeffrey M. Kopchik, Counsel, (202) 898–3872, Christopher Curtis, Senior Counsel, (202) 898–3728, FDIC, Legal Division, 550 17th Street NW., Washington, DC 20429; Linda L. Stamp, Counsel, (202) 736–0161, FDIC, Legal Division, 1717 H Street NW., Washington DC 20429.

SUPPLEMENTARY INFORMATION:

A. Background

The international risk-based capital standards (Basle Accord) [1] include a framework for calculating risk-weighted assets by assigning assets and off-balance sheet items, including interest and exchange rate contracts, to broad risk categories based primarily on credit risk. The FDIC adopted in 1989 similar frameworks to assess the capital adequacy of state nonmember banks. Banks must hold capital against their overall credit risk, that is, generally, against the risk that a loss will be incurred if a counterparty defaults on a transaction.

Under the risk-based capital framework, off-balance sheet items are incorporated into risk-weighted assets by first determining the on-balance sheet credit equivalent amounts for the items and then assigning the credit equivalent amounts to the appropriate risk category according to the obligor, or if relevant, the guarantor or the nature of the collateral. For many types of off-balance sheet transactions, the on-balance sheet credit equivalent amount is determined by multiplying the face amount of the item by a credit conversion factor. For interest and exchange rate contracts however, credit equivalent amounts are determined by summing two amounts: the current exposure and the estimated potential future exposure.[2]

The current exposure (sometimes referred to as replacement cost) of a contract is derived from its market value. In most instances the initial market value of a contract is zero.[3] A bank should mark-to-market all of its rate contracts to reflect the current market value of the transaction in light of changes in the market price of the contracts or in the underlying interest or exchange rates. Unless the market value of a contract is zero, one party will always have a positive mark-to-market value for the contract, while the other party (counterparty) will have a negative mark-to-market value.

A bank holding a contract with a positive mark-to-market value is "in-the-money," that is, it would have the right to receive payment from the counterparty if the contract were terminated. Thus, a bank that is in-the-money on a contract is exposed to counterparty credit risk, since the counterparty could fail to make the expected payment. The potential loss is equal to the cost of replacing the terminated contract with a new contract that would generate the same expected cash flows under the existing market conditions. Therefore, the in-the-money institution's current exposure on the contract is equal to the market value of the contract. An institution holding a contract with a negative mark-to-market value, on the other hand, is "out-of-the-money" on that contract, that is, if the contract were terminated, the institution would have an obligation to pay the counterparty. The institution with the negative mark-to-market value has no counterparty credit exposure because it is not entitled to any payment from the counterparty in the case of counterparty default. Consequently, a contract with a negative market value is assigned a current exposure of zero. A current exposure of zero is also assigned to a contract with a market value of zero, since neither party would suffer a loss in the event of contract termination. In summary, the current exposure of a rate contract equals either the positive market value of the contract or zero.

The second part of the credit equivalent amount for rate contracts, the estimated potential future exposure (often referred to as the add-on), is an amount that represents the potential future credit exposure of a contract over its remaining life. This exposure is calculated by multiplying the notional principal amount of the underlying contract by a credit conversion factor that is determined by the remaining maturity of the contract and the type of contract.[4] The potential future credit exposure is calculated for all contracts, regardless of whether the mark-to-market value is zero, positive, or negative.

The potential future exposure is added to the current exposure to arrive at a credit equivalent amount.[5] Each credit equivalent amount is then assigned to the appropriate risk category, according to the counterparty or, if relevant, the guarantor or the nature of the collateral. The maximum risk weight applied to such rate contracts is 50 percent.

B. Netting and Current Risk-Based Capital Treatment

The FDIC and the Basle Supervisors' Committee have long recognized the importance and encouraged the use of netting arrangements as a means of improving interbank efficiency and reducing counterparty credit exposure. Netting arrangements are increasingly being used by institutions engaging in rate contracts. Often referred to as master netting contracts, these arrangements typically provide for both payment and close-out netting. Payment netting provisions permit an institution to make payments to a counterparty on a net basis by offsetting payments it is obligated to make with payments it is entitled to receive and, thus, to reduce

[1] The Basle Accord is a risk-based framework that was proposed by the Basle Committee on Banking Supervision (Basle Supervisors' Committee) and endorsed by the central bank governors of the Group of Ten (G–10) countries in July 1988. The Basle Supervisors' Committee is comprised of representatives of the central banks and supervisory authorities from the G–10 countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United Kingdom, and the United States) and Luxembourg.

[2] Exchange rate contracts with an original maturity of 14 calendar days or less and instruments traded on exchanges that require daily payment of variation margin are excluded from the risk-based ratio calculations.

[3] An options contract has a positive value at inception, which reflects the premium paid by the purchaser. The value of the option may be reduced due to market movements but it cannot become negative. Therefore, unless an option has zero value, the purchaser of the option contract will always have some credit exposure, which may be greater than or less than the original purchase price, and the seller of the option contract will never have credit exposure.

[4] For interest rate contracts with a remaining maturity of one year or less, the factor is 0% and for those over one year, the factor is .5%. For exchange rate contracts with a maturity of one year or less, the factor is 1% and for those over one year the factor is 5%.

Because exchange rate contracts involve an exchange of principal upon maturity and are generally more volatile, they carry a higher conversion factor. No potential future credit exposure is calculated for single-currency interest-rate swaps in which payments are made based on two floating indices (basis swaps).

[5] This method of determining credit equivalent amounts for rate contracts is known as the *current exposure method*, which is used by most international banks. The Basle Accord permits, subject to each country's discretion, an alternative method for determining the credit equivalent amount known as the *original exposure method*. Under this method, the capital charge is derived by multiplying the notional principal amount of the contract by a credit conversion factor, which varies according to the original maturity of the contract and whether it is an interest or exchange rate contract. The conversion factors, which are greater than those used under the current exposure method, make no distinction between current exposure and potential future exposure.

its costs arising out of payment settlements.

Close-out netting provisions permit the netting of credit exposures if a counterparty defaults or upon the occurrence of another event such as insolvency or bankruptcy. If such an event occurs, all outstanding contracts subject to the close-out provisions are terminated and accelerated, and their market values are determined. The positive and negative market values are then netted, or set off, against each other to arrive at a single net exposure to be paid by one party to the other upon final resolution of the default or other event.

The potential for close-out netting provisions to reduce counterparty credit risk, by limiting an institution's obligation to the net credit exposure, depends upon the legal enforceability of the netting contract, particularly in insolvency or bankruptcy.[6] In this regard, the Basle Accord noted that while close-out netting could reduce credit risk exposure associated with rate contracts, the legal status of close-out netting in many of the G–10 countries was uncertain and insufficiently developed to support a reduced capital charge for such contracts.[7] There was particular concern that a bank's credit exposure to a counterparty was not reduced if liquidators of a failed counterparty might assert the right to "cherry-pick," that is, demand performance on those contracts that are favorable and reject contracts that are unfavorable to the defaulting party.

Concern over "cherry-picking" led the Basle Supervisors' Committee to limit the recognition of netting in the Basle Accord. The only type of netting that was considered to genuinely reduce counterparty credit risk at the time the Accord was endorsed was netting accomplished by novation.[8] Under legally enforceable netting by novation, "cherry-picking" cannot occur and, thus, counterparty risk is genuinely reduced. The Accord stated that the Basle Supervisors' Committee would continue to monitor and assess the effectiveness of other forms of netting to determine if close-out netting provisions could be recognized for risk-based capital purposes.

C. Basle Supervisors' Committee Proposal

Since the Basle Accord was adopted, a number of studies have confirmed that close-out netting provisions can serve to reduce counterparty risk. In response to the conclusions of these studies, as well as to industry support for greater acceptance of netting contracts under the risk-based capital framework, the Basle Supervisors' Committee issued a consultative paper on April 30, 1993, proposing an expanded recognition of netting arrangements in the Basle Accord.[9] Under the proposal, for purposes of determining the current exposure amount of rate contracts subject to legally enforceable bilateral close-out netting provisions (that is, close-out netting provisions with a single counterparty), an institution could net the contracts' positive and negative mark-to-market values.

Specifically, the Basle proposal states that a bank would be able to net rate contracts subject to a legally valid bilateral netting contract for risk-based capital purposes if it satisfied the appropriate national supervisor(s) that:

(1) in the event of a counterparty's failure to perform due to default, bankruptcy or liquidation, the banking organization's claim (or obligation) would be to receive (or pay) only the net value of the sum of unrealized gains and losses on included transactions;

(2) it has obtained written and reasoned legal opinions stating that in the event of legal challenge, the netting would be upheld in all relevant jurisdictions; and

(3) it has procedures in place to ensure that the netting arrangements are kept under review in light of changes in relevant law.

The Basle Supervisors' Committee agreed that if a national supervisor is satisfied that a bilateral netting contract meets these minimum criteria, the netting contract may be recognized for risk-based capital purposes without raising safety and soundness concerns. The Basle Supervisors' Committee proposal includes a footnote stating that if any of the relevant supervisors is dissatisfied with the status of the enforceability of a netting contract under its laws, the netting contract would not be recognized for risk-based capital purposes by either counterparty.

In addition, the Basle Supervisors' Committee is proposing that any netting contract that includes a *walkaway clause* be disqualified as an acceptable netting contract for risk-based capital purposes. A walkaway clause is a provision in a netting contract that permits the non-defaulting counterparty to make only limited payments, or no payments at all, to the estate of the defaulter even if the defaulter is a net creditor under the contract.

Under the proposal, a state nonmember bank would calculate one current exposure under each qualifying bilateral netting contract. The current exposure would be determined by adding together (netting) the positive and negative market values for all individual interest rate and exchange rate transactions subject to the netting contract. If the net market value is positive, that value would equal the current exposure. If the net market value is negative or zero, the current exposure would be zero. The add-on for potential future credit exposure would be determined by calculating individual potential future exposures for each underlying contract subject to the netting contract in accordance with the procedure already in place in the Basle Accord.[10] A bank would then add together the potential future credit exposure amount (always a positive value) of each individual contract subject to the netting arrangement to arrive at the total potential future exposure it has under those contracts with the counterparty. The total potential future exposure would be added to the net current exposure to

[6] The primary criterion for determining whether a particular netting contract should be recognized in the risk-based capital framework is the enforceability of that netting contract in insolvency or bankruptcy. In addition, the netting contract as well as the individual contracts subject to the netting contract must be legally valid and enforceable under non-insolvency or non-bankruptcy law, as is the case with all contracts.

[7] While payment netting provisions can reduce costs and the credit risk arising out of daily settlements with a counterparty, such provisions are not relevant to the risk-based capital framework since they do not in any way affect the counterparty's gross obligations.

[8] Netting by novation is accomplished under a written bilateral contract providing that any obligation to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date. The previously existing contracts are extinguished and a new contract, for the single net amount, is legally substituted for the amalgamated gross obligations. Parties to the novation contract, in effect, offset their obligations to make payments on individual transactions subject to the novation contract with their right to receive payments on other transactions subject to the contract. The FDIC's risk-based capital standards provide for the same treatment of rate contracts as the Basle Accord, but require that banks use the current exposure method. The FDIC, in adopting its standards, generally stated it would work with the Basle Supervisors' Committee in its continuing efforts with regard to the recognition of netting provisions for capital purposes.

[9] The paper is entitled "The Prudential Supervision of Netting, Market Risks and Interest Rate Risk." The section applicable to netting is subtitled "The Supervisory Recognition of Netting for Capital Adequacy Purposes."

[10] Under the proposal, a state nonmember bank could net in this manner for risk-based capital purposes if it uses, as all U.S. banking organizations are required to use, the current exposure method for calculating credit equivalent amounts of rate contracts. Banks using the original exposure method would use revised conversion factors until market risk-related capital requirements are implemented, at which time the original exposure method will no longer be available for netted transactions.

arrive at one credit equivalent amount that would be assigned to the appropriate risk category.

D. The Banking Agencies' Proposal

The FDIC concurs with the Basle Supervisors' Committee determination that the legal status of close-out netting provisions has developed sufficiently to support the expanded recognition of such provisions for risk-based capital purposes. Therefore, the FDIC is proposing to amend its risk-based capital standards in a manner consistent with the Basle Supervisors' Committee's proposed revision to the Basle Accord. The FDIC's proposed amendments would allow banks to net the positive and negative market values of interest and exchange rate contracts subject to a qualifying, legally enforceable bilateral netting contract to calculate one current exposure for that netting contract.

The FDIC's proposed amendments would add provisions to its standards setting forth criteria for a qualifying bilateral netting contract and an explanation of how the credit equivalent amount should be calculated for such contracts. The risk-based capital treatment of an individual contract that is not subject to a qualifying bilateral netting contract would remain unchanged.

For interest and exchange rate contracts that are subject to a qualifying bilateral netting contract under the proposed standards, the credit equivalent amount would equal the sum of (i) the current exposure of the netting contract and (ii) the sum of the add-ons for all individual contracts subject to the netting contract. (As with all contracts, mark-to-market values for netted contracts would be measured in dollars, regardless of the currency specified in the contract.) The current exposure of the bilateral netting contract would be determined by adding together all positive and negative mark-to-market values of the individual contracts subject to the bilateral netting contract.[11] The current exposure would equal the sum of the market values if that sum is positive, or zero if the sum of the market values is zero or negative. The potential future exposure (add-on) for each individual contract subject to the bilateral netting contract would be calculated in the same manner as for non-netted contracts. These individual potential future exposures would then be added together to arrive at one total add-on amount.

The proposed amendments provide that a bank may net, for risk-based capital purposes, interest and exchange rate contracts only under a written bilateral netting contract that creates a single legal obligation covering all included individual rate contracts and that does not contain a walkaway clause. In addition, if a counterparty fails to perform due to default, insolvency, bankruptcy, liquidation or similar circumstances, the bank must have a claim to receive a payment, or an obligation to make a payment, for only the net amount of the sum of the positive and negative market values on included individual contracts.

The FDIC's proposal requires that a bank obtain a written and reasoned legal opinion(s), representing that an organization's claim or obligation, in the event of a legal challenge, including one resulting from a failure to perform due to default, insolvency, bankruptcy, or similar circumstances, would be found by the relevant court and administrative authorities to be the net sum of all positive and negative market values of contracts included in the bilateral netting contract.[12] The legal opinion normally would cover (i) the law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities and, if a branch of the counterparty is involved, the law of the jurisdiction in which the branch is located; (ii) the law that governs the individual contracts covered by the bilateral netting contract; and (iii) the law that governs the netting contract. The multiple jurisdiction requirement is designed to ensure that the netting contract would be upheld in any jurisdiction where the contract would likely be enforced or whose law would likely be applied in an enforcement action, as well as the jurisdiction where the counterparty's assets reside.

A legal opinion could be prepared by either an outside law firm or in-house counsel. If a bank obtained an opinion on the enforceability of a bilateral netting contract that covered a variety of underlying contracts, it generally would not need a legal opinion for each individual underlying contract that is subject to the netting contract, so long as the individual underlying contracts were of the type contemplated by the legal opinion covering the netting contract.

The complexity of the legal opinions will vary according to the extent and nature of the bank's involvement in rate contracts. For instance, a bank that is active in the international financial markets may need opinions covering multiple foreign jurisdictions as well as domestic law. The FDIC expects that in many cases a legal opinion will focus on whether a contractual choice of law would be recognized in the event of default, insolvency, bankruptcy or similar circumstances in a particular jurisdiction rather than whether the jurisdiction recognizes netting. For example, a U.S. institution might engage in interest rate swaps with a non-U.S. institution under a netting contract that includes a provision that the contract will be governed by U.S. law. In this case the U.S. institution should obtain a legal opinion as to whether the netting would be upheld in the U.S. and whether the foreign courts would honor the choice of U.S. law in default or in an insolvency, bankruptcy, or similar proceeding.

For a bank that engages solely in domestic rate contracts, the process of obtaining a legal opinion may be much simpler. For example, for an institution that is an end-user of a relatively small volume of domestic rate contracts, the standard contracts used by the dealer bank may already have been subject to the mandated legal review. In this case the end-user institution may obtain a copy of the opinion covering the standard dealer contracts, supported by the bank's own legal opinion.

The proposed amendments require a bank to establish procedures to ensure that the legal characteristics of netting contracts are kept under review in the light of possible changes in relevant law. This review would apply to any conditions that, according to the required legal opinions, are a prerequisite for the enforceability of the netting contract, as well as to any adverse changes in the law.

As with all of the provisions of the risk-based capital standards, a bank must maintain in its files

[11] For regulatory capital purposes, the FDIC would expect that institutions would normally calculate the current exposure of a bilateral netting contract by consistently including *all* contracts covered by that netting contract. In the event a netting contract covers transactions that are normally excluded from the risk-based ratio calculation—for example, exchange rate contracts with an original maturity of fourteen calendar days or less or instruments traded on exchanges that require daily payment of variation margin—institutions may elect to consistently either include or exclude all mark-to-market values of such transactions when determining net current exposures.

[12] The Financial Accounting Standards Board (FASB) has issued Interpretation No. 39 (FIN 39) relating to the "Offsetting of Amounts Related to Certain Contracts." FIN 39 generally provides that assets and liabilities meeting specified criteria may be netted under generally accepted accounting principles (GAAP). However, FIN 39 does not specifically require a written and reasoned legal opinion regarding the enforceability of the netting contract in bankruptcy and other circumstances. Therefore, under this proposal a bank might be able to net certain contracts in accordance with FIN 39 for GAAP reporting purposes, but not be able to net those contracts for risk-based capital purposes.

documentation adequate to support any particular risk-based capital treatment. In the case of a bilateral netting contract, a bank must maintain in its files documentation adequate to support the bilateral netting contract. In particular, this documentation should demonstrate that the bilateral netting contract would be honored in all relevant jurisdictions as set forth in this rule. Typically, these documents would include a copy of the bilateral netting contract, legal opinions and any related English translations.

The FDIC would have the discretion to disqualify any or all contracts from netting treatment for risk-based capital purposes if the bilateral netting contract, individual contracts, or associated legal opinions do not meet the requirements set out in the applicable standards. In the event of such a disqualification, the affected individual contracts subject to the bilateral netting contract would be treated as individual non-netted contracts under the standards.

As a general matter, relevant legal provisions for banks in the U.S. make it clear that netting contracts with close-out provisions enable such organizations to setoff included individual transactions and reduce the obligations to a single net amount in the event a counterparty fails to perform due to default, insolvency, bankruptcy, liquidation or similar circumstances. The FDIC notes that pursuant to section 11(e) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1821(e), the FDIC, in its capacity as conservator or receiver of a failed insured depository institution, may transfer all or none of a failed institution's qualified financial contracts (QFCs) [13] with a given counterparty and its affiliates to an assuming insured depository institution. Such a transfer by the FDIC as receiver, if accompanied by the statutorily mandated notice, overrides any contractual right the counterparty might otherwise have to terminate, close-out, and net its contracts by reason of the appointment of the FDIC as receiver. Further, the FDIC as conservator may, under section 11(e) of the FDI Act, enforce continued performance of QFCs without transferring them, even if the contracts contain clauses that would otherwise enable the counterparty to treat them as in default, and hence to terminate and net them, by reason of the appointment of a conservator.[14]

The FDIC is of the opinion that its transfer and enforcement powers under the FDI Act are consistent with the netting provisions of the FDIC Improvement Act of 1991 (FDICIA). Those provisions specifically sanction the enforceability of bilateral netting contracts (12 U.S.C. 4403(a)); so do the FDI Act's QFC provisions (12 U.S.C. 1821(e)(8)(A)(iii), (E)(iii)). The FDIC's transfer and enforcement powers, described in the text, are associated with its power to override a different kind of contractual provision—the so-called "ipso facto" clauses that permit a counterparty to terminate a contract by reason of the appointment of a receiver or conservator even if there has been no default in performance. Although such clauses may activate netting clauses, they are not themselves specifically addressed in, or protected by, the FDICIA netting provisions. Thus, there is no conflict of language between the FDI Act's QFC provisions and the FDICIA netting provisions. Nor is there any inconsistency in the statutes' underlying policy. The policy of the FDI Act's QFC provisions, like that of the FDICIA netting provisions, is to preserve a counterparty's net position: If the FDIC does not transfer or enforce a counterparty's QFCs, then the contracts may be terminated and netted to the extent provided by their terms; and if the contracts are transferred or enforced, then the netting provisions continue in force as a part of the entire complex of contractual obligations. The transfer and enforcement provisions of the FDI Act do no more than to preserve the continuity of contractual relationships in cases of receivership and conservatorship, an effect that the FDIC believes to be consistent with the letter and spirit of the FDICIA netting provisions.

In the event that QFCs are transferred from a failed institution to a new depository institution, the amount of credit risk the non-failed counterparty is exposed to remains the same. Thus, the netting provisions in the contracts may be enforced against or by the assuming insured depository institution in the event of a subsequent default. Therefore, the FDIC would not regard a netting contract as unenforceable, for risk-based capital purposes, simply because the FDIC as receiver might transfer it within the limited circumstances prescribed in section 11(e) of the FDI Act. In the case of QFCs enforced without transfer by the FDIC as conservator, the counterparty would continue to enjoy its contractual rights to terminate and net such enforced contracts by reason of a default in performance (as distinct from a contractually defined default by reason of appointment of a conservator). In this regard, the FDIC would not regard a netting contract as unenforceable simply because the FDIC as conservator might enforce the underlying contracts within the circumstances prescribed in section 11(e) of the FDI Act.[15]

The FDIC's proposal provides that netting by novation arrangements would *not* be grandfathered under the standards if such arrangements do not meet all of the requirements proposed for qualifying bilateral netting contracts. Although netting by novation would continue to be recognized under the proposed standards, institutions may not have the legal opinions or procedures in place that would be required by the proposed amendments. The FDIC believes that holding all bilateral netting contracts to the same standards will promote certainty as to the legal enforceability of the contracts and decrease the risks faced by counterparties in the event of a default.

The FDIC is seeking comment on all aspects of its proposed amendments to the risk-based capital standards. In addition, the FDIC notes that under current risk-based capital standards for individual contracts, the degree to which collateral is recognized in assigning the appropriate risk weight is based on the market value of the collateral in relation to the credit equivalent amount of the rate contract. The FDIC is seeking comment on the nature of collateral arrangements and the extent to which collateral might be recognized in bilateral netting contracts, particularly taking into account legal implications of collateral arrangements (e.g., whether the collateral pledged for an individual transaction would be available to cover the net counterparty exposure in the event of legal challenge)

[13] The scope of this transfer power is established in the FDIC Statement of Policy on Qualified Financial Contracts adopted December 12, 1989. The term QFC is defined in section 11(e)(8)(D)(i) of the FDI Act. It includes securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and any similar agreement that the FDIC determines by regulation to be a QFC. Interest and exchange rate contracts, as specifically referred to in the risk-based capital guidelines, are generally QFCs.

[14] The Board of Governors of the Federal Reserve System (Fed), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS) (collectively, the other banking agencies) either have published or are in the process of publishing notices of proposed rulemaking amending their risk-based capital guidelines which are similar to the FDIC's proposal. The other banking agencies are not addressing the scope of the FDIC's transfer and enforcement powers under section 11 of the FDI Act.

[15] To facilitate the utilization of risk reducing bilateral netting contracts which will permit institutions to take advantage of the new capital standards prescribed in this proposal, the FDIC has determined not to exercise any potential power as a conservator selectively to enforce or to repudiate QFCs with the same counterparty that are subject to a bilateral netting contract. The FDIC would not regard bilateral netting contracts as unenforceable solely by reason of the apparent presence of such a power in section 11(e) of the FDI Act.

and procedural difficulties in monitoring collateral levels.

Regulatory Flexibility Act Analysis

The FDIC does not believe adoption of this proposal as a final rule would have a significant economic impact on a substantial number of small business entities (in this case, small banking organizations), in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). In this regard, the final rule would reduce certain regulatory burdens on banking organizations as it would reduce the capital charge on certain transactions.

Banks that enter into bilateral netting contracts must obtain a legal opinion(s) on the enforceability of those contracts if they wish to net for purposes of calculating their capital ratio. A small institution may find it more burdensome to obtain a legal opinion(s) than a large institution. A small institution, however, is more likely than a large institution to enter into relatively uncomplicated transactions under standard bilateral netting contracts and may need only to review a legal opinion that has already been obtained by its counterparties. The benefits to a small institution of lower capital charges after netting will likely outweigh the burdens of obtaining the necessary legal opinions.

Paperwork Reduction Act

The FDIC has determined that the proposed amendments, if adopted, would not significantly increase the regulatory burden of state nonmember banks pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

List of Subjects in 12 CFR Part 325

Bank deposit insurance, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State nonmember banks.

For the reasons set out in the preamble, the Board of Directors of the FDIC proposes to amend 12 CFR part 325 as follows:

PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 3907, 3909; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note) Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

2. In appendix A to part 325, section II.E. is amended by revising the first sentence of the introductory text of II.E.1. and removing the footnote in II.E.1.(a); removing the last two sentences of the second paragraph of II.E.2.; and adding new II.E.3. to read as follows:

Appendix A to Part 325—Statement of Policy on Risk-Based Capital

* * * * *

II. * * *

E. * * *

1. *Credit Equivalent Amounts for Interest Rate and Foreign Exchange Rate Contracts.* The credit equivalent amount of an off-balance sheet rate contract that is not subject to a qualifying bilateral netting contract in accordance with section III.E.3. of this appendix A is equal to the sum of (i) the current exposure (which is equal to the mark-to-market value[39] and is sometimes referred to as the replacement cost) of the contract and (ii) an estimate of the potential future credit exposure over the remaining life of the contract. * * *

* * * * *

3. *Netting.* (1) For purposes of this appendix A, netting refers to the offsetting of positive and negative mark-to-market values when determining a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting of rate contracts is recognized for purposes of calculating the credit equivalent amount provided that:

(a) The netting is accomplished under a written netting contract that creates a single legal obligation, covering all included individual contracts, with the effect that the bank would have a claim or obligation to receive or pay, respectively, only the net amount of the sum of the positive and negative mark-to-market values on included individual contracts in the event that a counterparty, or a counterparty to whom the contract has been validly assigned, fails to perform due to any of the following events: default, bankruptcy, liquidation, or similar circumstances.

(b) The bank obtains a written and reasoned legal opinion(s) representing that in the event of a legal challenge, including one resulting from a failure to perform due to default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be such a net amount under:

(i) the law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities and, if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(ii) the law that governs the individual contracts covered by the netting contract; and

(iii) the law that governs the netting contract.

(c) The bank establishes and maintains procedures to ensure that the legal characteristics of netting contracts are kept under review in the light of possible changes in relevant law.

(d) The bank maintains in its files documentation adequate to support the netting of rate contracts, including a copy of the bilateral netting contract and necessary legal opinions.

(2) A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount.[40]

(3) By netting individual contracts for the purpose of calculating its credit equivalent amount, a bank represents that it has met the requirements of this appendix A and all the appropriate documents are in the bank's files and available for inspection by the FDIC. Upon determination by the FDIC that a bank's files are inadequate or that a netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (b)(i) through (iii) of this section, underlying individual contracts may be treated as though they were not subject to the netting contract.

(4) The credit equivalent amount of rate contracts that are subject to a qualifying bilateral netting contract is calculated by adding (i) the current exposure of the netting contract and (ii) the sum of the estimates of the potential future credit exposure on all individual contracts subject to the netting contract.

(5) The current exposure of the netting contract is determined by summing all positive and negative mark-to-market values of the individual transactions included in the netting contract. If the net sum of the mark-to-market values is positive, then the current exposure of the netting contract is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the current exposure of the netting contract is zero.

(6) For each individual contract included in the netting contract, the

[39] Mark-to-market values should be measured in dollars, regardless of the currency or currencies specified in the contract, and should reflect changes in both interest (or foreign exchange) rates and in counterparty credit quality.

[40] For purposes of this section, a walkaway clause means a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payment at all, to a defaulter or to the estate of a defaulter, even if a defaulter or the estate of a defaulter is a net creditor under the contract.

potential future credit exposure is estimated in accordance with section II.E.1. of this appendix A.[41]

(7) Examples of the calculation of credit equivalent amounts for these types of contracts are contained in Table IV.

* * * * *

3. Appendix A to part 325 is amended by revising the last three sentences of the last paragraph under the heading "Credit Conversion for Interest Rate and Foreign Exchange Rate Related Contracts" in Table III and adding new Table IV to read as follows:

* * * * *

III. * * *

Credit Conversion for Interest Rate and Foreign Exchange Rate Related Contracts

* * * * *

* * * In the event a netting contract covers transactions that are normally not included in the risk-based ratio calculation—for example, exchange rate contracts with an original maturity of fourteen calendar days or less or instruments traded on exchanges that require daily payment of variation margin—an institution may elect to consistently either include or exclude all mark-to-market values of such transactions when determining a net current exposures. Multiple contracts with the same counterparty may be netted for risk-based capital purposes pursuant to section II.E.3. of this appendix.

TABLE IV.—CALCULATION OF CREDIT EQUIVALENT AMOUNTS FOR INTEREST RATE AND FOREIGN EXCHANGE RATE RELATED TRANSACTIONS FOR STATE NONMEMBER BANKS

Type of contract (remaining maturity)	Potential exposure					Current Exposure		Credit equivalent amount
	Notional principal (dollars)	x	Potential exposure conversion	=	Potential exposure (dollars)	Mark-to-market value [1]	Current exposure (dollars) [2]	
(1) 120-day forward foreign exchange	5,000,000		.01		50,000	100,000	100,000	150,000
(2) 120-day forward foreign exchange	6,000,000		.01		60,000	−120,000	.....	60,000
(3) 3-year single currency fixed/floating interest rate swap	10,000,000		.005		50,000	200,000	200,000	250,000
(4) 3-year single currency fixed/floating interest rate swap	10,000,000		.005		50,000	−250,000	.....	50,000
(5) 7-year cross-currency floating/floating interest rate swap	20,000,000		.05		1,000,000	−1,300,000	.....	1,000,000
Total	.....	...	.....	.....	1,210,000	.....	300,000	1,510,000

If contracts (1) through (5) above are subject to a qualifying bilateral netting contract, then the following applies:

	Potential exposure (dollars) (from above)	Mark-to-market value (from above)	Current exposure (dollars)	Credit equivalent amount
(1)	50,000	100,000		
(2)	60,000	−20,000		
(3)	50,000	200,000		
(4)	50,000	−250,000		
(5)	1,000,000	−1,300,000		
Total	1,210,000	−1,370,000	.....	1,210,000

[1] These numbers are purely for illustration.
[2] The larger of zero or a positive mark-to-market value.

[41] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

By order of the Board of Directors.

Dated at Washington, D.C. this 8th day of June, 1994.

Federal Deposit Insurance Corporation.

Robert E. Feldman

Acting Executive Secretary.

[FR Doc. 94–17762 Filed 7–22–94; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[INTL–0066–92]

RIN 1545–AS68

Change From the Dollar Approximate Separate Transactions Method (DASTM) to the Profit and Loss Method of Accounting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed Income Tax Regulations that would require a qualified business unit (QBU) using the dollar approximate separate transactions method of accounting (DASTM) to change its functional currency when the local currency ceases to be hyperinflationary. These regulations provide rules for taxpayers to determine when a change from DASTM is required and provide guidance on required adjustments relating to the change in method.

DATES: Comments and requests for a public hearing must be received by September 23, 1994.

ADDRESSES: Send submissions to: CC:DOM:CORP:T:R (INTL–0066–92), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Jacob Feldman or Teresa B. Hughes, (202) 622–3870 (not a toll free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 985 of the Internal Revenue Code of 1986. The proposed regulations would require a qualified business unit that uses the dollar approximate separate transactions method to change its functional currency and its method of accounting to the profit and loss method when the QBU is no longer operating in an environment that has a hyperinflationary currency.

Explanation of Provisions

Proposed § 1.985–1(b)(2)(ii)(E) provides that a QBU required to use the dollar as its functional currency pursuant to § 1.985–1(b)(2) or a QBU that has elected to use the dollar as its functional currency pursuant to § 1.985–2 must redetermine its functional currency if for three consecutive taxable years the currency of the QBU's economic environment is not a hyperinflationary currency. The change in functional currency is treated as made with the consent of the Commissioner, and the adjustments required under § 1.985–5 must be made in connection with the change.

The IRS believes it appropriate to require a QBU that is no longer operating in a hyperinflationary environment to stop using the dollar to compute its income or loss or earnings and profits because of the general preference expressed in section 985(b) to use the currency of the QBU's economic environment for this purpose. A three year measurement period for determining non-hyperinflationary status was thought desirable to avoid frequent changes in functional currency for QBUs operating in borderline hyperinflationary environments. Comments are requested as to whether the three year period is appropriate.

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 also has 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 Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Jacob Feldman and Teresa B. Hughes of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, IRS. 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 Amendment 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. In § 1.985–1, paragraph (b)(2)(ii)(E) is added to read as follows:

§ 1.985–1 Functional currency.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(E) *Change in functional currency when currency ceases to be hyperinflationary—(1) In general.* A QBU that has been required to use the dollar as its functional currency under paragraph (b)(2) of this section, or has elected to use the dollar as its functional currency under paragraph (b)(2)(ii)(B)(*2*) of this section or § 1.985–2, must change its functional currency as of the first day of the first taxable year that follows three consecutive taxable years in which the currency of its economic environment, determined under paragraph (c)(2) of this section, is not a hyperinflationary currency. The functional currency of the QBU for such year shall be determined in accordance with paragraph (c) of this section. For purposes of § 1.985–4, the change is considered to be made with the consent of the Commissioner. See § 1.985–5 for adjustments that are required upon a change in functional currency.

(*2*) *Effective date.* Section 1.985–1(b)(2)(ii)(E) is effective for taxable years beginning after the date which is 30

days after the publication of final regulations in the **Federal Register**.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94–17569 Filed 7–22–94; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Virgin Islands National Park; Proposed Boat Mooring Rules

AGENCY: National Park Service, Interior.

ACTION: Public hearing.

SUMMARY: The National Park Service is proposing a rule designed to protect the coral reefs and turtle grass beds in Virgin Islands National Park. The proposed rule will address allowable boat mooring practices in the park, and a public hearing will be conducted to provide an opportunity for interested parties to comment on the proposed rule.

The proposed rule will prohibit vessels longer than 210 feet from anchoring anywhere within the park's boundaries; restrict vessels between 125 and 210 feet in length to anchoring only in Francis Bay in water depths greater than 30 feet; prohibit any boats from anchoring in Salt Pond and Reef Bay on the park's southern shores. Boats 55 feet in length or less will be allowed to tie up to moorings that will be provided in those areas. Only one boat will be allowed to tie up at each mooring, and the use of anchors while attached to the mooring will be prohibited.

DATES: There will be two hearing dates: Wednesday, August 24, 1994, beginning at 7:00 p.m. and Thursday, August 25, 1994, beginning at 7:00 p.m.

ADDRESSES:

August 24—Legislature of the Virgin Islands, Capital Building, Veteran's Drive, St. Thomas, VI 00802

August 25—Virgin Islands Territorial Court, Boulon Center—2nd Floor, Cruz Bay, St. John, VI 00830

FOR FURTHER INFORMATION CONTACT: Mr. Francis Peltier, Superintendent, Virgin Islands National Park, 6301 Estate Nazareth, Charlotte Amalie, VI 00802–3406, (809) 775–6238.

SUPPLEMENTARY INFORMATION: People who want to speak at the hearing will be allotted at least five minutes and will be expected to confine remarks to the proposed anchoring and mooring rules. Written comments may also be submitted to Virgin Islands National Park headquarters.

James W. Coleman, Jr.,

Regional Director, Southeast Region.

[FR Doc. 94–17980 Filed 7–22–94; 8:45 am]

BILLING CODE 4310–70–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20, 22, and 90

[GN Docket No. 93–252, FCC 94–191]

Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services

AGENCY: Federal Communications Commission.

ACTION: Second further notice of proposed rulemaking.

SUMMARY: The Commission has adopted a Second Further Notice of Proposed Rulemaking (Second Further Notice) in response to a Congressional mandate directing the agency to implement sections 2(n) and 332 of the Communications Act of 1934 as amended by title VI, section 6002(b) of the Omnibus Budget Reconciliation Act of 1993. The intended effect of this Second Further Notice is to implement this legislation by soliciting comment on conforming the Commission's technical, operational, and licensing rules for commercial mobile radio service providers, including licensees in services formerly classified as private.

DATES: Comments must be filed on or before August 9, 1994, and reply comments must be filed on or before August 19, 1994.

ADDRESSES: Federal Communications Commission, 1919 M Street NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Office of Plans and Policy Contact: Greg Rosston, (202) 418–2030. Common Carrier Bureau Contact: Leila Brown, (202) 418–1300.

SUPPLEMENTARY INFORMATION: This is the text of the Commission's Second Further Notice of Proposed Rulemaking, GN Docket No. 93–252, FCC 94–191, adopted July 18, 1994, and released July 20, 1994 (Second Further Notice). This Notice is available for inspection and copying during normal business hours in the FCC Public Reference Center, Room 239, 1919 M Street NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc. 2100 M Street NW., suite 140, Washington DC 20037, (202) 857–3800.

Second Further Notice of Proposed Rulemaking

A. Introduction

1. In a prior Further Notice of Proposed Rulemaking in this docket 58 FR 53169, October 14, 1993, the Commission requested comment on whether it should establish a general cap on the amount of commercial mobile radio service (CMRS) spectrum for which an entity may be licensed in a particular geographic market. The purpose of that proposal is to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market. Additionally, the Spectrum Cap Notice sought comment on rules for administering a spectrum cap, if the Commission adopted a spectrum aggregation limit. The Spectrum Cap Notice invited comments on whether the Commission should apply personal communications services (PCS) spectrum aggregation and cellular-PCS cross ownership attribution standards, adopted in the Broadband PCS Order, to a general CMRS spectrum cap.

2. On June 13, 1994, the Commisson released an Order reconsidering and clarifying the rules for broadband PCS. The Broadband PCS Reconsideration Order retained certain limitations on the amount of PCS spectrum that can be obtained in any geographic service area. Generally, an entity may acquire attributable interests in a maximum of 40 MHz of licensed broadband PCS spectrum. Parties with attributable cellular interests, however, may obtain only 10 MHz of licensed broadband PCS spectrum if the population in the cellular service area overlaps 10 percent of the population in the relevant PCS market. In addition, after January 1, 2000, entities with attributable cellular interests may acquire an additional 5 MHz of broadband PCS spectrum, for a total of 15 MHz of PCS spectrum in their cellular service areas. The Broadband PCS Reconsideration Order also specified certain interests that the Commission would consider attributable interests in order to determine the maximum amount of PCS spectrum for which an entity may be licensed.

3. On June 29, 1994, the Commission adopted an Order establishing competitive bidding procedures for broadband PCS. The Commission adopted a "Competitive Opportunity Plan" in the Broadband PCS Auction Rules Order, under which

"entrepreneurs' blocks" are established as a means of fulfilling the statutory mandate to ensure that businesses owned by minorities or women (or both), small businesses, and rural telephone companies are provided with full opportunities to participate in providing broadband PCS services. The Competitive Opportunity Plan, *inter alia*, establishes installment payment plans for applicants eligible for entrepreneurs' block licenses, and also establishes a system of bidding credits for small businesses and businesses owned by minorities or women (or both).

4. The purposes of this Second Further Notice is to explore whether the Commission should consider additional non-equity relationships to be attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap. In addition, we seek comment regarding whether any attribution rules we adopt in this proceeding should apply differently depending on whether the applicant or licensee involved is a designated entity. We also seek comment regarding how much non-equity relationships should be construed in the context of determining whether the designated entity has de facto and de jure control of the licensee. Finally, commenters should address how such relationships in the designated entity context balance the need to allow designated entities to attract needed expertise, capital and infrastructure while avoiding the creation of fronts or shams.

B. Discussion.

5. One of the purposes of this proceeding is to examine resale agreements, management contracts, joint marketing agreements, and other similar arrangements for the purpose of determining whether these arrangements should be treated as attributable interests in applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. We recognize at the outset that any agreement that confers on a party other than the licensee de facto control over an FCC-licensed facility will be considered an attributable interest. Therefore, commenters should address whether there are relationships, not included in the PCS attribution rules, that do not rise to the level of control, but nonetheless should be considered attributable because these interests may affect the incentive or ability of PCS and other CMRS licensees to compete vigorously in the marketplace, or because they may affect the number of effective competing providers or the independence of pricing decisions by service providers.

6. Management Agreements: We request comment on whether management agreements or similar arrangements that do not confer de facto control on a party other than the licensee should be considered attributable interests. We are concerned, for example, that a management agreement may permit the manager access to market sensitive information (e.g., business plans, customer lists, product and service development, marketing strategies); if the manager is also a licensee offering a competing service, access to this information might enable it to impede vigorous competition. We also seek comment regarding the issue of whether such management agreements, although not amounting to de facto control, may involve levels of integration between the managed licensee and the manager's company which have the effect of reducing competitive choices in the marketplace or of creating a sham or front corporation to take advantage of designated entity provisions.

7. By way of background, we note that we have established several criteria that we have determined to be probative with regard to the issue of whether a licensee, through management agreements or other means, and in contravention of our rules, has relinquished control of and responsibility for its licensed facilities. These criteria, first articulated in Intermountain, include the following questions:

- Does the license have unfettered use of all facilities and equipment? If the licensee retains such use, this will support a finding that the licensee has not relinquished control to a third party through a management agreement or other arrangement.
- Has the licensee relinquished control of daily operations? Retention of such control by the licensee contributes to a finding that the licensee has not relinquished control over the licensed facilities.
- Does the licensee determine and carry out policy decisions, including the preparation and filing of applications with the Commission? If it is demonstrated that the licensee has retained control of policy decisions, this serves as another contributing factor in determining that the licensee has not relinquished control of its licensed facilities to a third party.
- Is the licensee is charge of employment, supervision, and dismissal of personnel? Retention of control over such personnel matters would tend to support a conclusion that the licensee has not relinquished control to a third party through a management agreement or other arrangement.
- Is the licensee in charge of the payment of financing obligations, including expenses arising out of operation of the licensed facilities? If the licensee has retained responsibility for such expenses, such retention of control will be taken into account in determining whether the licensee has relinquished control of its facilities to a third party.
- Does the licensee receive monies and profits derived from operation of the licensed facilities? Again, the role of the licensee with regard to receipt of profits and other monies is one of the determining factors with regard to whether the licensee has relinquished control of its facilities to a third party through a management agreement or other arrangement.

In this proceeding our purpose is to examine whether management agreements which do not involve any relinquishment of control under the Intermountain test still should be deemed to confer attributable interests to the managing party under the agreement. We seek comment on this issue.

8. In particular, commenters should address the following questions. First, could management agreements be structured in such a way that the manager's access to the type of information described in the preceding paragraph would not necessarily have any adverse effect on competition? Commenters should address the specific components of such management agreements, and discuss how these components would protect against anti-competitive effects. Commenters also should address whether examination of such management agreements would require an unreasonable expenditure of Commission staff and other resources and whether there are effective alternatives to such a review procedure that would address our concern.

9. Second, should a management agreement be treated as an attributable interest in all cases, including the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, and any overall CMRS spectrum aggregation cap the Commission may establish in this docket? In addressing this question, commenters should explore any factors and considerations that would support a conclusion that treatment of a management agreement as an attributable interest would be necessary or appropriate in certain of these cases, but not in others.

10. Third, if we conclude that management agreements or similar arrangements should be treated as attributable interests, what administrative rules would be necessary to enforce such a rule? Would reporting requirements be necessary to enable the Commission to record and monitor instances in which CMRS licensees enter into management agreements for the operation of their systems? For example, in the SMR industry, some private radio licensees have entered into agreements that permit a third party manager to use the system's entire capacity. Although we have reclassified interconnected wide area SMRs as CMRS, SMRs licensed as of August 10, 1993 will continue to be regulated as PMRS during the transition period and SMRs that are not interconnected will remain PMRS. We seek comment on how we should treat such arrangements for purposes of attribution.

11. Finally, if we conclude that management agreements or similar arrangements should be treated as attributable interests, how should our rules apply in the case of designated entities? Specifically, we seek comment regarding the following issues: Are there policies or other considerations that would warrant applying management contract attribution rules differently in the case of designated entities? Should management agreements be attributable for purposes of application of the 10 percent cap relating to entrepreneurs' block licenses? Should management contracts affect eligibility for provisions provided for designated entities?

12. Resale. Similarly, we request comment on whether any resale agreements should be considered an interest attributable to a reseller in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. The Commission has defined resale as an "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service to the public (with or without 'adding value') for profit." We have required cellular licensees to provide resale, except that a cellular licensee may restrict resale by a facilities-based competitor after the competitor has been licensed for five years. We note that resellers of commercial mobile radio services have been classified as CMRS providers, and they may offer services that compete with other commercial mobile radio services.

13. In most instances, we are not concerned that a reseller could exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided over that spectrum because other resellers could enter into such resale arrangements. Under these circumstances, we see no reason to attribute the spectrum of the underlying service provider to resellers for purposes of spectrum caps. Some parties, however, have expressed concern that resale agreements may be used to circumvent the spectrum caps. In the context of common carrier regulation, it seems unlikely that any resale agreement short of a transfer of control could reduce the quantity of service available to the public. As a result, we currently do not think that resale agreements should be considered attributable interests, but we invite comments from parties that believe there are competitive concerns.

14. Joint Marketing Agreements. We also request comment on whether joint marketing agreements should constitute an attributable interest in the contest of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. Under a joint marketing agreement, two or more CMRS providers would pool their resources to market their services to consumers. One aspect of this joint venture may be to market the services of various CMRS providers under a common name. We believe that such joint ventures may be beneficial to both licensees and consumers because of the savings that could be realized by pooling resources for advertising and direct sales. These savings could then be passed on to the consumer.

15. The Commission previously examined whether to limit various joint ventures in the context of our broadcast ownership rules. In that context, the Commission examined joint advertising sales, shared technical facilities, and joint programming arrangements (or "time brokerage"). We noted that such joint ventures are not precluded by any Commission rule or policy so long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. The Commission did not impose any additional restrictions on operational joint venture arrangements, but noted that all broadcast licensees are subject to compliance with the antitrust laws and maintenance of editorial control. The Commission, however, did limit time brokerage arrangements in the same local market so that:

> Where an individual or entity owns or has an attributable interest in one or more stations in a market, time brokerage of any other station in that market form more than 15 percent of the brokered station's broadcast hours per week will result in counting the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules.

16. As explained in Radio Ownership Rules, our rules or policies do not prohibit joint marketing ventures so long as a licensee maintains *de facto* control over the licensed facilities and complies with the antitrust laws. In the context of CMRS or PCS joint ventures, we need not concern ourselves with programming diversity because CMRS providers are, by definition, common carriers and have no control over content. We believe that there may be benefits to consumers from these joint marketing ventures. We are concerned, however, that such arrangements may provide competitors access to information, or have other anticompetitive effects, that could impede vigorous competition. Therefore, commenters should address whether a licensee who enters into a joint marketing venture with one or more licensee whose geographic market area have an overlap of 10 percent of the population should have the interest of the other joint venture licensees attributed to it for purposes of the PCS aggregations limits, the cellular-PCS cost-ownership rules, or a general CMRS spectrum cap. In addition, if the Commission finds such arrangements to be attributable interests, commenters should address whether we should adopt different rules relating to designated entities.

C. Procedural Matters

A. Ex Parte Rules—Non-Restricted Proceeding

17. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 CFR §§ 1.1202, 1.1203, 1.1206(a)

B. Initial Regulatory Flexibility Analysis

18. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this *Further Notice* on small entities. The IFRA is contained in Appendix A to this *Further Notice*. The Acting Secretary shall cause a copy of this *Further Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with

Section 603(a) of the Regulatory Flexibility Act.

C. Comment Period

19. Interested persons may file comments in this proceeding on or before August 9, 1994, and reply comments on or before August 19, 1994. For filing requirements, *see generally* 47 CFR §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M Street, NW., room 644, Washington, DC 20554, and to the Deputy Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M Street, NW., room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (room 239) at the Commission's headquarters at 1919 M Street, NW., Washington, DC 20554.

D. Further Information

20. For further information regarding this Further Notice, contact Greg Rosston at (202) 418–2030 (Office of Plans and Policy) or Leila Brown at (202) 418–1300 (Common Carrier Bureau, Mobile Services Division).

Initial Regulatory Flexibility Act Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA.

A. Reason for Action

This rule making proceeding was initiated to seek comment with regard to whether management agreements and resale arrangements should be treated as attributable interests for purposes of application of the Commission's rules relating to (1) the personal communications service (PCS) spectrum aggregation cap; (2) the PCS-cellular cross-owner-ship restrictions; (3) any overall commercial mobile radio service (CMRS) spectrum aggregation cap the Commission may establish in this docket; and (4) control of a designated entity.

B. Objectives

The principal objective of the Further Notice is to promote vigorous competition in the CMRS marketplace through the development of attribution rules that prevent any CMRS licensee from gaining an unfair competitive advantage.

C. Legal Basis

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, Title VI, § 6002(b), and Sections 3(n), 4(i), 303(r), 309, 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 309, 332(c), and 332(d), as amended.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposals under consideration in the Further Notice may impose certain new reporting and recordkeeping requirements on mobile services licensees.

E. Federal Rules Which Overlap, Duplicate, or Conflict With These Rules

None.

F. Description, Potential Impact, and Number of Small Entities Involved

Many small entities could be affected by the proposals contained in the Further Notice. Dependent on the final resolution of the issues, regulations affecting the licensing, recordkeeping, and reporting obligations of numerous mobile services providers may be changed. The full extent of these changes cannot be predicted until various other issues raised in the proceeding (e.g., whether a CMRS spectrum cap will be established by the Commission) have been resolved. After evaluating the comments filed in response to the Further Notice the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

G. Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

The Further Notice solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

H. IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 13 of the Further Notice.

List of Subjects in 47 CFR Part 20, 22, and 90

Mobile radio service, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94–18110 Filed 7–22–94; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 94–74; RM–8476]

Radio Broadcasting Services; Elma, WA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Skip Marrow proposing the allotment of Channel 271A at Elma, Washington, as that community's first local aural transmission service. Channel 271A can be allotted to Elma in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at the petitioner's requested site. The coordinates for Channel 271A at Elma are North Latitude 47–00–13 and West Longitude 123–24–27. Since Elma located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

DATES: Comments must be filed on or before September 12, 1994 and reply comments on or before September 27, 1994.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Nancy A. Ory, Lenventhal, Senter & Lerman, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006–1809 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–74, adopted June 21, 1994, and released July 20, 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio Broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 94–17992 Filed 7–22–94; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 94–82, RM–8487]

Radio Broadcasting Services; Spencer, Sac City, IA; St. James, MN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Iowa Great Lakes Broadcasting Company, Inc., seeking the substitution of Channel 285C2 for Channel 285A at Spencer, IA, and the modification of Station KIGL(FM)'s license to specify operation on the higher class channel. To accommodate the allotment of Channel 285C2 at Spencer, Iowa Great Lakes Broadcasting Company, Inc., also requests the substitution of Channel 268A for Channel 284A at St. James, MN, the modification of Station KXAX's license accordingly, and the deletion of unoccupied and unapplied-for Channel 284A at Sac City, IA. Channel 285C2 can be allotted to Spencer with a site restriction of 11.2 kilometers (6.9 miles) northwest, at coordinates 43–14–32 North Latitude and 95–09–19 West Longitude, to accommodate petitioner's desired transmitter site and avoid short-spacings to Stations KLMJ, Channel 285A, Hampton, IA, KKLS–FM, Channel 284C1, Sioux Falls, SD, KARL, Channel 286C2, Tracy, MN, and KIWA–FM, Channel 287C2, Sheldon, IA. Channel 268A can be allotted to St. James, MN, at the presently licensed transmitter site of Station KXAX, at coordinates 44–03–15 North Latitude and 94–39–40 West Longitude.

DATES: Comments must be filed on or before September 12, 1964, and reply comments on or before September 27, 1994.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Leonard S. Joyce, Esq., 5335 Wisconsin Avenue, Suite 300, Washington, DC 20015 (Counsel to petitioner).

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commissioner's Notice of Proposed Rule Making, MM Docket No. 94–82, adopted July 12, 1994, and released July 20, 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 Services, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contracts are prohibited in Commission proceedings, such as this one, which involve channel allotments.

See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 94–17993 Filed 7–22–94; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Finding on a Petition To List the Fluvial Population of the Arctic Grayling as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 12-month finding for a petition to add the fluvial population of the Arctic grayling (*Thymallus arcticus*) to the List of Threatened and Endangered Wildlife and Plants. The Service finds that listing the fluvial population of the Arctic grayling is warranted but precluded by other higher priority listing actions.

DATES: The finding announced in this notice was made on July 18, 1994. Comments and information may be submitted until further notice.

ADDRESSES: Information, comments, or questions concerning this finding may be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, Montana Field Office, 100 N. Park Avenue, Suite 320, Helena, Montana 59601. The petition, 90-day finding, 12-month finding, and supporting data are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dale Harms, Assistant Field Supervisor, at the above address, telephone (406) 449–5225.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants, a finding be made within 12 months of the date of receipt of the petition on whether the petitioned action is (i) not warranted, (ii) warranted, or (iii) warranted but precluded by the efforts to revise the lists and expeditious progress is being made in listing and delisting species. Notice of the finding is to be published promptly it the Federal Register. This notice meets the latter requirement for the 12-month finding made earlier for the petition discussed below. Information contained in this notice is a summary of the information in the 12-month finding, which is the Fish and

Wildlife Service's (Service) decision document.

A petition dated October 2, 1991, was received by the Service from the Biodiversity Legal Foundation and George Wuerthner on October 9, 1991. The petition request that the "fluvial Arctic grayling" be listed as an endangered species throughout its historic range in the conterminous United States. Additionally, the petitioners requested that critical habitat be designated. The petitioners stated that the decline of the Fluvial Arctic grayling is a result of many factors. The primary causes cited by the petitioners were habitat degradation as a result of the effects of domestic livestock grazing and stream diversions for irrigation, competition with nonnative trout species, and past overharvesting by anglers. Additionally, the petition stated that much of the annual recruitment is lost in irrigation ditches.

Notice of a 90-day finding published in the January 19, 1993, **Federal Register** (58 FR 4975) found that the petitioners provided substantial information indicating that listing the fluvial population of the Arctic grayling of the upper Missouri River, in Montana and northwestern Wyoming, may be warranted. The notice also indicated that the Fluvial Arctic grayling population in Michigan is extinct, thus there was not substantial information to indicate that listing that population may be warranted. Concurrent with publishing notice of the 90-day finding in the **Federal Register**, the Service initiated a status review.

All Arctic grayling in North America belong to a single species, *Thymallus arcticus* (family Salmonidae). Within North America, Arctic grayling are distributed throughout Alaska and across Canada to the Hudson Bay. Additionally, two geographically isolated populations of Arctic grayling occurred outside of Canada and Alaska in the contiguous United States, apparently as glacial relicts (Vincent 1962). One of these populations was found in Michigan and the other in the drainage of the upper Missouri River in Montana and extreme northwestern Wyoming (Scott and Crossman 1973). The upper Missouri River drainage population was the subject of the Service's finding.

The validity of subspecific distinctions for Arctic grayling has not been proven (Scott and Crossman 1973). A status review was first initiated for the "Montana Arctic grayling" (*T. a. montanus*), as the fluvial Arctic grayling of the upper Missouri River is sometimes known, by a notice of review published December 30, 1982 (47 FR 58454). However, this subspecific designation is not widely accepted (Kaya 1990).

The native Arctic grayling populations of the upper Missouri River were predominantly fluvial (Vincent 1962). Fluvial fishes are those that are permanently stream-dwelling. Adfluvial (also described as lacustrine) fish are those that spend most of their lives in lakes except that they spawn in streams. The only indigenous adfluvial Arctic grayling in the upper Missouri River basin are thought to be those in Red Rock Lakes and, perhaps, Elk Lake (Vincent 1962, Kaya 1990).

Because fluvial Arctic grayling are adapted to life-long residency in stream environments, they are believed to be behaviorally distinct from adfluvial grayling. The adfluvial Arctic grayling was not under consideration in the Service's finding as it is believed to be a distinct population from the fluvial Arctic grayling.

Historically, in the upper Missouri River drainage the fluvial Arctic grayling was widely but irregularly distributed and locally abundant above the Great Falls in Montana. Varley and Schullery (1983) estimate that Arctic grayling of the upper Missouri River drainage presently occur in 8 percent or less of their historic range. Kaya (1992) estimates that the remaining upper Missouri distribution of fluvial Arctic grayling in 80 to 130 km (50 to 80 miles) of the upper Big Hole River may represent 4 to 5 percent of the historic range of fluvial Arctic grayling in Montana. Kaya (1992) arrived at this estimate by using available information to conclude that, historically, grayling may have inhabited approximately 2,000 km (1,250 miles) of streams in the upper Missouri River basin until early in this century.

The only confirmed, self-sustaining remnant of the indigenous upper Missouri River fluvial Arctic grayling population exists in the Big Hole River and the lower reaches of its tributaries in Beaverhead, Deer Lodge, and Silver Bow Counties in Montana (Liknes and Gould 1987, Shepard and Oswald 1989, Kaya 1990, Kaya 1992). Fluvial Arctic grayling are concentrated in the upper Big Hole River above the Divide dam, although they have been documented down to the mouth (Liknes and Gould 1987, Shepard and Oswald 1989). The numbers of grayling in the Big Hole River have been in decline; recent estimates for a section of the Big Hole with the highest grayling densities were 69 grayling per km (111 per mile) in 1983, decreasing to 14 per km (22 per mile) in 1989. The population appears to have stabilized in the past 3 years at approximately 20 grayling per km (32 per mile) (Kaya 1990; Byorth 1991, 1993).

An additional remnant of the fluvial Arctic grayling population of the upper Missouri River drainage may occur in and around Ennis Reservoir on the Madison River in Madison County, Montana. Until the Service receives conclusive information to the contrary, the Arctic grayling of Ennis Reservoir/Madison River will be considered a remnant of the upper Missouri River fluvial Arctic grayling population.

A factor complicating identification of the upper Missouri River fluvial Arctic grayling population is the extensive hatchery propagation and transplantation of Arctic grayling stocks that has occurred in lakes and rivers throughout Montana and elsewhere (Lee et al. 1980, Everett 1986). The Service does not regard the introduced, lake-dwelling graying to be part of the indigenous upper Missouri River fluvial Arctic grayling population.

Introduced Arctic grayling that display partially fluvial characteristics reside in Sunnyslope Irrigation Canal in Teton County, Montana. The Service does not consider the Sunnyslope Canal Arctic grayling to be a remnant of the native upper Missouri River fluvial Arctic grayling population.

Summary of Factors Affecting the Species

The following information is a summary and discussion of the five factors or listing criteria as set forth in Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 et seq.) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act and their applicability to the current status of the fluvial population of the Arctic grayling.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

A substantial portion of the historic range of the fluvial Arctic grayling has been altered by the extensive construction of dams and reservoirs that have created barriers obstructing migrations to spawning, wintering or feeding areas; inundating grayling habitat; and altering the hydrology of river systems (Vincent 1962, Kaya 1990). In the upper Missouri River drainage, the dominant land use has become agriculture-related (Vincent 1962). The major impact from these activities on Arctic grayling habitat is by the diversion of water for irrigation, which reduces available instream habitat for grayling. This results in stranding of incubating eggs or young

fish, thus increasing predation on young because they are concentrated in the remaining water, reducing food availability, increasing water temperatures (Kaya 1990), decreasing survival of young grayling (Shepard and Oswald 1989), and increasing mortality of trapped fish when diversions are shut down (Shepard and Oswald 1989, Streu 1990). Increased sedimentation from agricultural run-off is also a problem (Vincent 1962, Montana Department of Fish, Wildlife and Parks 1989, Shepard and Oswald 1989).

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Since Arctic grayling are easily caught by anglers, historical exploitation likely contributed to past declines or local extirpations of the grayling population in the upper Missouri River drainage (Vincent 1962, Kaya 1990). A commercial fishery for Arctic grayling existed on the upper Missouri River (Vincent 1962). Catch-and-release fishing regulations are currently in effect on the Big Hole in order to reduce mortality from recreational fishing (Montana Department of Fish, Wildlife and Parks 1989).

C. Disease or Predation

Although data has been inconclusive, Arctic grayling interactions, including competition and predation, with nonnative trout species are thought to be factors contributing to the decline of Arctic grayling (Vincent 1962, Kaya 1990, 1992).

D. The Inadequacy of Existing Regulatory Mechanisms

Most of the Big Hole River is managed to produce abundant, large, nonnative trout (Montana Department of Fish, Wildlife and Parks 1989). Other than catch and release regulations, grayling are a management priority only in the one reach in which they are concentrated.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Vincent (1962) suggested that a gradual climatic change could have been a factor in the decline of Arctic grayling populations. Since the latter part of the 1980's, drought conditions have been prevalent throughout the upper Missouri River drainage. During this same period, densities of Arctic grayling and other fishes in the Big Hole River have declined (Oswald 1990; Byorth 1991; C. Hunter, Montana Department of Fish, Wildlife and Parks, *in litt.*, 1992). Drought exacerbates the impacts of others factors affecting Arctic grayling. Decreased fish population densities appear to be a natural response to low water flows which restrict the amount of fish habitat that is available, particularly during critical spawning and rearing periods (C. Hunter, *in litt.*, 1992).

Finding

The Act requires the Service to make determinations regarding listing solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account those efforts being made by States and others to protect the species. Additionally, the Act allows the Service to list distinct population segments of vertebrate fish and wildlife as threatened or endangered. The fluvial form of the Arctic grayling in the upper Missouri River drainage is geographically isolated from other fluvial grayling populations and is behaviorally distinct from adfluvial grayling. For these reasons, the Service believes the fluvial form of the Arctic grayling in the upper Missouri River drainage is a distinct population segment.

As discussed above, the fluvial Arctic grayling faces threats primarily from a reduction in historical range, decrease in available habitat as a result of dewatering within streams, potential competition or predation by nonnative fish, and habitat degradation. The Service finds that listing of the fluvial population of the Arctic grayling is warranted but precluded by work on other species having a higher priority for listing.

Section 4(b) of the Act states that petitioned actions may be found to be warranted but precluded by other listing actions when it is found that the Service is making expeditious progress in revising the lists. Expeditious progress in listing endangered and threatened species is being made and is reported annually in the **Federal Register**. Furthermore, on September 21, 1983, (48 FR 43098), the Service published a system for prioritizing species for listing. This system considers 3 factors in assigning species numerical listing priorities on a scale of 1 to 12 (with number 1 as the highest priority). The three factors are magnitude of threat, immediacy of threat, and taxonomic distinctiveness. Earlier the service had assigned a listing priority of 3 to the fluvial Arctic grayling because the Service considered the magnitude of threat to be high, the immediacy of threat to be imminent, and the taxonomic distinctiveness to be a vertebrate population. The Service is now changing the magnitude of threat to moderate, primarily as a result of the cooperative efforts that have been initiated among private organizations and individuals, universities, and State and Federal Agencies to restore the fluvial Arctic grayling population in the upper Missouri River drainage (C. Hunter, *in litt.*, 1993). Changing the magnitude of threat to moderate results in a change of the listing priority from 3 to 9. The cooperative efforts include, but are not limited to, the efforts discussed below.

The Service is a member of the Workgroup (Workgroup) and a party to a Memorandum of Understanding entered into in 1991 with Federal, State, and private entities whose purpose is to conserve and restore fluvial Arctic grayling. The Workgroup is near completion of a final restoration plan for the fluvial Arctic grayling of the upper Missouri River.

The Montana Department of Fish, Wildlife and Parks and the U.S. Forest Service have begun working with landowners to reduce water and habitat-related threats to the population. Since 1992, irrigators in the Big Hole have voluntarily reduced their water withdrawals in order to sustain flows in the river system. Many water users have modified their diversions to reduce the incidence of grayling becoming entrapped in ditches.

The Montana Department of Fish, Wildlife and Parks has intensified its annual monitoring of the Big Hole River grayling population since 1991. Recent habitat improvement projects have taken place on the Big Hole with the cooperation and assistance of private landowners. In 1992, a channel of the Big Hole River was reopened, restoring substantial historical grayling habitat. Fishing regulations have been introduced to protect grayling from harvest. Results from a hooking mortality study conducted in 1992 and 1993 indicate that mortality of released grayling is low. Field research, begun in 1993, is underway to clarify the threat of nonnative fish to fluvial grayling.

In order to better understand grayling habitat requirements, the U.S. Geological Survey collected physical, chemical, and biological measurements in segments of the Big Hole River in 1993. The results are now being finalized. The Service's Fish Technology Center (Center) in Bozeman, Montana, completed a study in 1993 to identify water temperatures that may be limiting for grayling.

Since 1989, the Center has managed and maintained fluvial grayling broodstock. Protocols have been established for the development and use

of a genetic reserve of Big Hole River grayling. The development of this genetic reserve is an integral component in fluvial grayling restoration because this stock will be used for the reestablishment of grayling in other drainages and will provide a "safety net" in case of a catastrophic loss of fluvial grayling in the Big Hole River.

In 1992, sites within the upper Missouri River drainage were evaluated to identify those with the best potential for successful fluvial grayling reestablishment. Progeny of Arctic grayling from the Big Hole River were reintroduced into three rivers within their historic range and additional reintroductions are planned to reestablish viable stocks.

After reviewing the petition, accompanying documents, research findings, and literature cited; the Service concludes that the petition requesting that the fluvial population of the Arctic grayling be listed as an endangered species is warranted but precluded by other higher priority listing actions. After arriving at the warranted but precluded finding, the Service recommended that the fluvial Arctic grayling be given a listing priority of 9 because the magnitude of threats have been moderated as a result of ongoing cooperative conservation actions. The petitioners also requested that critical habitat be designated. In the future if the warranted but precluded finding for the fluvial population of Arctic grayling in the upper Missouri River drainage is changed to warranted, then the designation of critical habitat would be addressed in the subsequent proposed rule.

The Service's 12-month finding contains more detailed information regarding the above decisions. A copy may be obtained from the Montana Field Office (see ADDRESSES section).

References Cited

A complete list of references cited in this rule is available upon request from the Montana Field Office (see ADDRESSES section).

Author

This notice was prepared by Lori H. Nordstrom (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Dated: July 18,1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–18048 Filed 7–22–94; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 59, No. 141
Monday, July 25, 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

Animal and Plant Health Inspection Service

[Docket No. 94–071–1]

Availability of Environmental Assessment and Finding of No Significant Impact

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment and a finding of no significant impact for the shipment of an unlicensed veterinary biological product for field testing. A risk analysis, which forms the basis for the environmental assessment, has led us to conclude that shipment of the unlicensed veterinary biological product for field testing will not have a significant impact on the quality of the human environment. Based on our finding of no significant impact, we have determined that an environmental impact statement need not be prepared.

ADDRESSES: Copies of the environmental assessment and finding of no significant impact may be obtained by writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the docket number of this notice when requesting copies. Copies of the environmental assessment and finding of no significant impact (as well as the risk analysis with confidential business information removed) are also available for public inspection 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 those documents are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Jeanette Greenberg, Veterinary Biologics, BBEP, APHIS, USDA, room 571, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; telephone (301) 436–5390; fax (301) 436–8669.

SUPPLEMENTARY INFORMATION: A veterinary biological product regulated under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*) must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. In order to ship an unlicensed product for the purpose of conducting a proposed field test, a person must receive authorization from the Animal and Plant Health Inspection Service (APHIS).

In determining whether to authorize shipment for field testing of the unlicensed veterinary biological product referenced in this notice, APHIS conducted a risk analysis to assess the product's potential effects on the safety of animals, public health, and the environment. Based on that risk analysis, APHIS has prepared an environmental assessment. APHIS has concluded that shipment of the unlicensed veterinary biological product for field testing will not significantly affect the quality of the human environment. Based on this finding of no significant impact, we have determined that there is no need to prepare an environmental impact statement.

An environmental assessment and finding of no significant impact have been prepared for the shipment of the following unlicensed veterinary biological product for field testing:

Requester(s)	Product	Field test location(s)
Miles, Inc., Agriculture Division, Animal Health Products.	*Toxoplasma Gondii* Vaccine, Modified Live Protozoan.	Veterinary hospitals throughout the United States.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), (3) USDA Regulations Implementing NEPA (7 CFR part 1b), and (4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Done in Washington, DC, this 19th day of July 1994.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–18033 Filed 7–22–94; 8:45 am]

BILLING CODE 3410–34–P

[Docket No. 94–073–1]

Availability of Environmental Assessment and Finding of No Significant Impact

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment and finding of no significant impact for the issuance of a veterinary biological product license. A risk analysis, which forms the basis for the environmental assessment, has led us to conclude that issuance of this license will not have a significant impact on the quality of the human environment. Based on our finding of no significant impact, we have determined that an environmental impact statement need not be prepared.

ADDRESSES: Copies of the environmental assessment and finding of no significant impact may be obtained by writing to the person listed under **FOR FURTHER**

INFORMATION CONTACT. Please refer to the docket number of this notice when requesting copies. Copies of the environmental assessment and finding of no significant impact (as well as the risk analysis with confidential business information removed) are also available for public inspection 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 those documents are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Jeanette Greenberg, Veterinary Biologics, BBEP, APHIS, USDA, room 571, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; telephone (301) 436–5390; fax (301) 436–8669.

SUPPLEMENTARY INFORMATION: A veterinary biological product regulated under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*) must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued.

In determining whether to issue a license for the veterinary biological product referenced in this notice, the Animal and Plant Health Inspection Service (APHIS) conducted a risk analysis to assess the product's potential effect on the safety of animals, public health, and the environment. Based on that risk analysis, APHIS has prepared an environmental assessment. APHIS has concluded that issuance of a veterinary biological product license for the veterinary biological product referenced in this notice will not significantly affect the quality of the human environment. Based on the finding of no significant impact, we have determined that there is no need to prepare an environmental impact statement.

An environmental assessment and finding of no significant impact have been prepared for issuance of a veterinary biological product license for the following veterinary biological product: Newcastle Disease-Fowlpox Vaccine, Live Fowlpox Vector; Code 17C1.R0; to be issued to SyntroVet Incorporated, Establishment License No. 314.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), (3) USDA Regulations Implementing NEPA (7 CFR part 1b), and (4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Done in Washington, DC, this 19th day of July 1994.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–18034 Filed 7–22–94; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration, Commerce

Export Trade Certificate of Review

ACTION: Notice of application for an amendment to an export trade certificate of review.

SUMMARY: The Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, has received an application for an amendment to an Export Trade Certificate of Review. This notice summarizes the proposed amendment and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: W. Dawn Busby, Director, Office of Export Trading Company Affairs, International Trade Administration, 202–482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination of whether the Certificate should be amended. An original and five (5) copies should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1800H, Washington, D.C. 20230.

Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 89–2A010."

OETCA has received the following application for an amendment to Export Trade Certificate of Review No. 89–00010, which was issued on May 10, 1991 (56 FR 23284, May 21, 1991).

Summary of Application

Applicant: Air-Conditioning & Refrigeration Institute ("ARI"), 4301 N. Fairfax Drive, Suite 425, Arlington, Virginia 22203, Contact: Renee S. Hancher, Director of International Trade, Telephone: (703) 524–8800

Application No.: 89–2A010

Date Deemed Submitted: July 13, 1994

Request For Amended Conduct: ARI seeks to amend its Certificate to—

1. add the following companies as "Members" within the meaning of section 325.2(1) of the Regulations (15 C.F.R. 325.2 (1)): American Thermaflo; Cryogel; Danfoss Automatic Controls; Doucette Industries, Inc.; Galileo Vacuum Systems, Inc.; Herrmidifier Company, Inc.; Hoshizaki America, Inc.; MDI Major Diversities, Inc.; Manchester Tank and Equipment Company; Uniflow Manufacturing Company; and Witt;

2. delete the following company as a "Member" of the Certificate: Hupp Industries, Inc.;

3. change the listing of the company name of the following current "Members" as follows: change Airmax, Inc. to AIRMAX; ATOCHEM North America to Elf Atochem North America; Barber-Colman Company to Siebe Environmental Controls; Climate Master to Climate Master, Inc., A Subsidiary of LSB Industries; Crystal Tips, Inc. to Crystal Tips Ice Systems; Eaton Corporation, Appliance Controls Division to Eaton Corporation, Automotive and Appliance Control Operations; Florida Heat Pump Manufacturing, Division of Harrow Products, Inc. to FHP Manufacturing Company, A Harrow Products Company; Johnson Controls, Inc. to Johnson Controls, Inc., Systems Products Division; Mammoth, A Nortek Company to Mammoth, Inc.; Ranco to Ranco North America; Servend International, Inc. to SerVend International, Inc.; and SnyderGeneral Corporation to AAF/McQuay Inc; and

4. add as new products to be covered as Export Trade under the Certificate within the meaning of section 325.2j of

the Regulations (15 C.F.R. 325.2j); 1) non-ducted unitary air-conditioning equipment, and 2) containers used for the distribution, storage or recovery of refrigerants and container accessories such as valves and pressure relief devices.

Dated: July 19, 1994.

Friedrich R. Crupe,

Deputy Director, Office of Export Trading Company Affairs.

[FR Doc. 94–17971 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–DR–P

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews; Notice of Decision of Panel

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of panel.

SUMMARY: On July 13, 1994 the binational Panel issued its decision in the review of the final determination made by the Canadian International Trade Tribunal respecting Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America. The Secretariat assigned File No. CDA–93–1904–09 to this matter.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, D.C. 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1989, the Government of the United States and the Government of Canada established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). The Rules were published in the **Federal Register** on December 30, 1988 (53 FR 53212). The Rules were amended by Amendments to the Rules of Procedure for Article 1904 Binational Panel Reviews, published in the **Federal Register** on December 27, 1989 (54 FR 53165). A consolidated version of the amended Rules was published in the **Federal Register** on June 15, 1992 (57 FR 26698). The Rules were further amended and published in the **Federal Register** on February 8, 1994 (59 FR 5892). The panel review in this matter was conducted in accordance with the Rules, as amended.

PANEL DECISION: In the July 13, 1994 decision, the binational panel affirmed the investigating authority's final determination.

Dated: July 18, 1994.

James R. Holbein,

U.S. Secretary NAFTA Secretariat.

[FR Doc. 94–17972 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–GT–M

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews; Notice of Decision of Panel

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of panel.

SUMMARY: By a decision dated July 6, 1994, the Binational Panel reviewing the final affirmative material injury determination made by the U.S. International Trade Commission respecting Certain Softwood Lumber Products from Canada (Secretariat File No. USA–92–1904–02) affirmed in part and remanded in part the determination to the Commission for further action. A copy of the complete panel decision is available from the Binational Secretariat.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumpting and countervailing duty cases involving imports from the other country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1989, the Government of the United States and the Government of Canada established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). The Rules were published in the **Federal Register** on December 30, 1988 (53 FR 53212). The Rules were amended by Amendments to the Rules of Procedure for Article 1904 Binational Panel Reviews, published in the **Federal Register** on December 27, 1989 (54 FR 53165). A consolidated version of the amended Rules was published in the **Federal Register** on June 15, 1992 (57 FR 26698). The Rules were further amended and published in the **Federal Register** on February 8, 1994 (59 FR 5892). The panel review in this matter was conducted in accordance with the Rules.

PANEL DECISION: On July 6, 1994, the Binational Panel issued its third decision in this review. The Panel affirmed in part and remanded in part the final injury determination and instructed the Commission to provide its determination on remand within 30 days of the decision (by August 5, 1994).

Dated: July 18, 1994.

James R. Holbein,

United States Secretary NAFTA Secretariat.

[FR Doc. 94–17973 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–GT–M

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award's Judges Panel

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that there will be a closed meeting of the Judges Panel of the Malcolm Baldrige National Quality Award on Wednesday, August 10, 1994. The Judges Panel is composed of nine members prominent in the field of quality management and appointed by the Secretary of Commerce. The purpose of this meeting is to review the 1994 Award applications and to select applications to be considered in the site visit stage of the evaluation. The applications under review contain trade secrets and proprietary commercial information submitted to the Government in confidence.

DATES: The meeting will convene August 10, 1994, at 8:30 a.m. and adjourn at 4:00 p.m. on August 10, 1994. The entire meeting will be closed.

ADDRESS: The meeting will be held in Administration Building at the National Institute of Standards and Technology, Gaithersburg, Maryland 20899.

FOR FURTHER INFORMATION CONTACT: Dr. Curt W. Reimann, Director for Quality Programs, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2036.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on March 4, 1994, that the meeting of the Judges Panel of the Malcolm Baldrige National Quality Award will be closed pursuant to Section 10(d) of the Federal Advisory Committee Act (5 U.S.C. app. 2, section 10(d)) that the portions of this meeting which involve examination of records and discussion of matters mentioned in (5) above may be closed to the public in accordance with section 552b(c)(4) of Title 5, United States Code, since those portions of the meeting are likely to disclose trade secrets and commercial or financial information obtained from a person and are privileged or confidential.

Dated: July 19, 1994.

Raymond G. Kammer,

Deputy Director.

[FR Doc. 94–18006 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–13–M

National Oceanic and Atmospheric Administration

[I.D. 070794D]

Marine Mammals

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

ACTION: Issuance of scientific research permit no. 928 (P351E)

SUMMARY: Notice is hereby given that Ms. Olga von Ziegesar, North Gulf Oceanic Society, P.O. Box 15244, Homer, AK 99603, has been issued a permit to take (harass) humpback whales (*Megaptera novaeangliae*), for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment, in the following office(s):

Permits Division, Office of Protected Resources, NMFS, East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

Director, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668 (907/586–7221).

SUPPLEMENTARY INFORMATION: On May 9, 1994, notice was published in the **Federal Register** (59 FR 23830) that the above-named individual had submitted a request for a scientific research permit to take by potential harassment, annually over a 5-year period, up to 100 humpback whales (*Megaptera novaeangliae*) during photo-identification studies. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR part 222). Issuance of this Permit as required by the ESA of 1973 was based on a finding that such Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which is the subject of this permit; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: July 18, 1994.

Herbert W. Kaufman,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–17950 Filed 7–22–94; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to the Office of Management and Budget (OMB) for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title and Applicable Form: Service Agreement for the National Security Education Program; DD Form X247

Type of Request: New Collection

Number of Respondents: 200

Responses Per Respondent: 1

Annual Responses: 200

Average Burden Per Response: 30 minutes

Annual Burden Hours: 100

Needs and Uses: The information collected hereby, will be used by the National Security Education Program Office, or designated administrative agents, to verify that applicable scholarship and fellowship recipients are fulfilling the service obligations mandated by Public Law 102–183, "The David L. Boren National Security Education Act of 1991."

Affected Public: Individuals or households

Frequency: Annually

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Mr. Edward C. Springer

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William P. Pearce.

Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: July 19, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–17938 Filed 7–22–94; 8:45 am]

BILLING CODE 5000–04–M

Office of the Secretary

Defense Advisory Committee on Military Personnel Testing; Meeting

ACTION: Notice.

Pursuant to Public Law 92–463, notice is hereby given that a meeting of the Defense Advisory Committee on Military Personnel Testing is scheduled to be held from 8:30 a.m. to 4:30 p.m. on September 22, 1994, and from 8:30 a.m. to 4:30 p.m. on September 23, 1994. The meeting will be held at The Colonial Inn, 910 Prospect Street, La Jolla, California. The purpose of the meeting is to review planned changes and progress in developing paper-and-pencil and computerized enlistment tests and Department of Defense's Student Testing Program. Persons desiring to make oral presentations or submit written statements for consideration at the Committee meeting must contact Dr. Jane M. Arabian, Assistant Director, Accession Policy, Office of the Under Secretary of Defense (Personnel and Readiness), Room 2B271, The Pentagon, Washington, DC

20301–4000, telephone (703) 697–9271, no later than August 29, 1994.

Dated: July 19, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–17939 Filed 7–22–94; 8:45 am]

BILLING CODE 5000–04–M

Department of Defense Wage Committee; Notice of Closed Meetings

Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that a closed meeting of the Department of Defense Wage Committee will be held on August 2, 1994; August 9, 1994; August 16, 1994; August 23, 1994; and August 30, 1994, at 10:00 a.m. in Room 800, Hoffman Building #1, Alexandria, Virginia.

Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close the meeting to the public because the matters considered are related to internal rules and practices of the Department of Defense and the detailed wage data considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

Dated: July 20, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–18011 Filed 7–22–94; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF ENERGY

Nevada Solar Enterprise Zone Task Force to the Advisory Committee on Demonstration and Commercial Applications of Renewable Energy and Energy Efficiency Technologies

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770), notice is hereby given of the following meeting:

DATES: Saturday, July 30, 1994: 9:00 a.m.–4:30 p.m.

ADDRESSES: Las Vegas Convention and Visitor Authority, 3150 Paradise Road, Las Vegas, NV 89109.

FOR FURTHER INFORMATION CONTACT: Robert Annan, Director, Office of Solar Energy Conversion, EE–13, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 586–1720.

SUPPLEMENTARY INFORMATION: The Nevada Solar Enterprise Zone Task Force to the Advisory Committee on Demonstration and Commercial Application of Renewable Energy and Energy Efficiency Technologies advises the Department of Energy on making the best use of the solar resource in southern Nevada. The Task Force will seek public input and focus attention on significant issues, develop solutions to problems, organize public and private support for implementing a solar enterprise zone, and incorporate appropriate Task Force findings and results into a final report with recommendations for implementing a solar enterprise zone.

Tentative Agenda

Saturday, July 30, 1994

9:00 am–9:30 am—Introductions
9:30 am–10:00 am—Overview of Potential Solar Resource in Southern Nevada
10:00 am–12:00 pm—Presentation on Results of Letters of Interest by NREL
12:00 pm–1:00 pm—Lunch Break
1:00 pm–3:00 pm—Interested Parties and General Public Input
3:00 pm–4:00 pm—Discussion and Definition of Outstanding Issues
4:00 pm–4:30 pm—Detailed Follow on Task Planning and Schedule
—Agenda and Tentative Meeting Schedules for Next Meeting
—Directions to Support Staff to Begin Drafting Report Outline, Continue Necessary Analyses
—Divide Responsibility for Investigation Critical Issues Among Task Force Members
4:30 pm—Adjourn.

Public Participation: The meeting is open to the public. Written statements may be filed with the Subcommittee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Robert H. Annan at the address or telephone number listed above. Requests must be received five (5) days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. Depending on the number of requests, comments may be limited to five minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days in advance of the meeting due to certain programmatic issues which had to be resolved prior to publication in the **Federal Register**.

Minutes: Minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue SW., Washington, D.C. 20585 between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Copies of the minutes will also be available by request.

Issued at Washington, DC on July 20, 1994.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 94–18031 Filed 7–22–94; 8:45 am]

BILLING CODE 6450–01–P

Bonneville Power Administration

Availability of the Non-Federal Participation Capacity Ownership Contracts and Section 9(c) Policy Record of Decision

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of Record of Decision (ROD) on Non-Federal Participation Capacity Ownership Contracts and Section 9(c) Policy.

SUMMARY: Today's notice announces the availability of the ROD for Non-Federal Participation Capacity Ownership Contracts and Section 9(c) Policy.

Capacity Ownership allows non-Federal utilities to purchase up to 725 megawatts (MW) of contract rights of use BPA's share of alternating current (AC) Intertie capacity, which was increased upon completion of the Third AC Intertie transmission project. The Capacity Ownership contracts establish the terms and conditions for use of the non-Federal parties' share of the Pacific Northwest-Pacific Southwest AC Intertie.

The Non-Federal Participation, Northwest Power Act, Section 9(c) Policy (Non-Federal Participation Section 9(c) Policy) establishes the guidelines for BPA determinations of whether the export of a regional resources will result in an increase in the electric requirements of any of BPA's customers in the Pacific Northwest, and whether the resource could be conserved or otherwise

retained in the Pacific Northwest for service to load in the Pacific Northwest. The guidelines will pertain to Non-Federal Participation determinations related to initial exports by non-Federal parties of up to 725 MW of regional resources over their Capacity Ownership share; and subsequent related determinations whenever Pacific Northwest resources are exported whether by such non-Federal parties or by third parties over a New Owner's Capacity Ownership share.

ADDRESSES: If you would like a copy of the Non-Federal Participation Capacity Ownership Contracts and Section 9(c) ROD, please call our document request line, toll-free 800–622–4520, and ask for the Non-Federal Participation Capacity Ownership Contracts and Section 9(c) Policy ROD.

FOR FURTHER INFORMATION CONTACT: Ms. Cathy Ehli, Public Utilities Specialist, Bonneville Power Administration-PMT, P.O. Box 3621, Portland, Oregon 97208–3621, telephone 503–230–5173; or the Public Involvement office voice/TTY 503–230–3478 in Portland, toll-free 800–622–4519 for the rest of the United States. Fax number 503–230–3752.

Issued in Portland, Oregon, on July 13, 1994.

John S. Robertson,

Deputy Administrator.

[FR Doc. 94–18032 7–22–94; 8:45 am]

BILLING CODE 6450–01–P–M

Federal Energy Regulatory Commission

[Docket No. EL94–75–000, et al.]

Cleveland Electric Illuminating Co., et al.; Electric Rate and Corporate Regulation Filings

July 18, 1994.

Take notice that the following filings have been made with the Commission:

1. Cleveland Electric Illuminating Company v. The City of Cleveland, Ohio

[Docket No. EL94–75–000]

Take notice that on July 13, 1994 Cleveland Electric Illuminating Company tendered for filing a document entitled "Complaint of the Cleveland Electric Illuminating Company and Petition for Emergency Order Requiring Compliance with FPC Opinion No. 644 and Interconnection Agreement against the City of Cleveland, Ohio.

Comment date: August 17, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. Old Dominion Electric Cooperative

[Docket No. EL94–77–000]

Take notice that on July 11, 1994, Old Dominion Electric Cooperative (Old Dominion), pursuant to the Federal Power Act and Rule 207 of the Commission's Rules of Practice and Procedure, filed a petition for a limited-term waiver of the Commission's policy regarding nuclear decommissioning trust fund investments until such time as the rulemaking proposed in Docket No. RM94–14–000, Nuclear Plant Decommissioning Trust Fund Guidelines; Notice of Proposed Rulemaking, is made final or is otherwise resolved.

Comment date: August 3, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Delmarva Power & Light Co.

[Docket No. EL94–78–000]

Take notice that on July 13, 1994, Delmarva Power & Light Company tendered for filing a "Petition for A Declaratory Order Regarding the Notice Provisions Applicable to Its Municipal Customers For Reducing Or Terminating Requirements Service.

Comment date: August 3, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Florida Power & Light Co.

[Docket No. ER93–465–008]

Take notice that on July 13, 1994, Florida Power & Light Company (FPL) tendered a compliance-filing in accordance with the Commission's June 3, 1994 Letter Order in Docket Nos. ER93–465–000, *et al.* approving the Stipulation and Agreement between FPL and Seminole Electric Cooperative, Inc. (Seminole).

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Arizona Public Service Co.

[Docket No. ER93–680–000]

Take notice that on July 1, 1994, Arizona Public Service Company tendered for filing an amendment in this docket.

A copy of this filing has been served on the Navajo Tribal Utility Authority and the Arizona Corporation Commission.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. Florida Power Corporation

[Docket No. ER94–961–000]

Take notice that on July 13, 1994, Florida Power Corporation, at the request of Staff, filed a supplement to its May 9, 1994 compliance filing in the above named docket with respect to Qualifying Facility fuel costs. The supplements answers questions asked by Staff.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Entergy Services, Inc.

[Docket No. ER94–1127–000]

Take notice that on July 1, 1994, Entergy Services, Inc. (Entergy Services), as agent for Mississippi Power & Light Company (MP&L), tendered for filing a revised Service Schedule LF to the Interconnection Agreement between South Mississippi Electric Power Association (SMEPA) and MP&L, dated July 18, 1979, as amended Entergy Services requests waiver of the notice requirements of the Federal Power Act and the Commission's regulations to permit the service to become effective as of June 1, 1994. To the extent necessary, Entergy Services also requests waiver of the requirements of § 35.13 of the Commission's regulations.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. Tampa Electric Company

[Docket No. ER94–1196–000]

Take notice that on July 8, 1994, Tampa Electric Company (Tampa Electric) supplemented its prior filing in this docket concerning its agreements to provide qualifying facility transmission service for Mulberry Phosphates, Inc. (Mulberry), Cargill Fertilizer, Inc. (Cargill), and Auburndale Power Partners, Limited Partnership (Auburndale).

Tampa Electric continues to propose an effective date of May 1, 1994, and therefore requests waiver of the Commission's notice requirement.

Copies of the supplemental filing have been served on Mulberry, Cargill, Auburndale, and the Florida Public Service Commission.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

9. PacifiCorp

[Docket No. ER94–1361–000]

Take notice that on June 27, 1994, PacifiCorp, tendered for filing, in accordance with § 35.13(a)(2) of the Commission's Rules and Regulations, First Revised Sheet No. 12 and Original Sheet No. 13 to PacifiCorp's FERC Electric Tariff, First Revised Volume No. 3 (Tariff) and Service Agreements with the following customers:

Lassen Municipal Utility District

City of Redding
AES Power Inc.
Ashton Energy Corporation
Catex Vitol Electric Inc.
Chicago Energy Exchange
Citizens Energy Corporation
Citizens Power & Light Corporation
CRSS Power Marketing, Inc.
Direct Electric Inc.
Eastern Power Distribution, Inc.
Eclipse Energy Inc.
Electric Clearinghouse, Inc.
Enron Power Marketing, Inc.
Equitable Resources Marketing Company
Heartland Energy Services, Inc.
Howell Power Systems, Inc.
InterCoast Power Marketing Company
LG&E Power Marketing Inc.
Louis Dreyfus Electric Power Inc.
MG Electric Power, Inc.
National Electric Associates (L.P.)
NorAm Energy Services, Inc.
North American Energy Conservation, Inc.
PowerNet G.P.
Rainbow Energy Marketing Corporation
Torco Energy Marketing, Inc.
Vesta Energy Company
Wholesale Power Services, Inc.

The Service Agreements provide for the sale of short-term firm power and energy and non-firm energy for resale in accordance with the Tariff. Only the Service Agreement with Lassen Municipal Utility District has been executed. All of the other Service Agreements are being filed unexecuted in anticipation of future requests for service under the Tariff. PacifiCorp's filing herein is provided to add the above customers to the Tariff.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

10. Consolidated Edison Company of New York, Inc.

[Docket No. ER94-1419-000]

Take notice that on July 11, 1994, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing an amendment of the filing of Supplements to the following Rate Schedules:

Rate schedule No.	Supplement No.	Person receiving service
55	12	Philadelphia Electric Company (PECO).
56	12	Public Service Electric and Gas Company (Public Service).
57	12	Northeast Utilities (NU).
62	13	Orange & Rockland Utilities, Inc. (O&R).
69	9	NU.
70	7	Niagara Mohawk Power Corporation (Mohawk) and Pennsylvania Power & Light Company (PP&L).
71	7	New England Power Co. (NEP).
74	11	PP&L.
75	11	GPU Service Corporation (GPU).
78	16	Power Authority of the State of New York (the Power Authority).
82	8	Baltimore Gas & Electric.
83	8	Atlantic City Electric Company (Atlantic).
84	8	Connecticut Municipal Electric Energy Cooperative (CMEEC).
88	7	Boston Edison Company (BE).
95	5	Long Island Lighting Company (LILCO).
103	4	United Illuminating Company (UL).
118	2	Potomac Electric Power (Potomac).
119	1	O&R.
120	1	O&R.
121	1	O&R.

Con Edison states that copies of this filing have been served by mail upon PECO, Public Service, NU, O&R, Mohawk, PP&L, NEP, GPU, the Power Authority, BG&E, Atlantic, CMEEC, BE, LILCO, Potomac and UL.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

11. Maine Electric Power Co.

[Docket No. ER94-1431-000]

Take notice that on July 5, 1994, Maine Electric Power Company (MEPCO), tendered for filing an Operating Committee Agreement pertaining to underlying transactions among MEPCO, the New Brunswick Electric Power Commission, Central Maine Power Company, Bangor Hydro-Electric Company and/or the New England Power Pool. In its submittal, MEPCO requests that the Commission disclaim jurisdiction over the Agreement and, in the alternative, if the Commission determines that it has jurisdiction, that the Agreement be accepted for filing.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

12. Indianapolis Power & Light Company

[Docket No. ER94-1433-000]

Take notice that on July 6, 1994, Indianapolis Power & Light Company (IPL), tendered for filing proposed changes to its Rate Schedule FERC No. 23 and PSI Energy Rate Schedule FERC No. 247. The proposed changes would increase revenues from jurisdictional sales and service by approximately $250,000 based on the twelve-month period ending December 31, 1993.

The rate schedule supplements consist of the First Amendment to the Interconnection Agreement between IPL and PSI Energy, Inc., dated May 1, 1992, which sets forth the rates, charges, terms and conditions for wholesale electric service to PSI Energy at the Carmel Tap Point. The First Amendment changes the price and character of the service IPL provides PSI Energy to that of firm network service and non-firm service from the temporary point-to-point service provided previously. The First Amendment also revises responsibility for controlling, *e.g.*, scheduling and regulating, the service provided and for installing assigned facilities.

The only customer affected by this filing is PSI.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

13. The Washington Water Power Co.

[Docket No. ER94-1435-000]

Take notice that on July 6, 1994, The Washington Water Power Company (WWP), tendered for filing with the Federal Energy Regulatory Commission, pursuant to 18 CFR 35, an Energy and Capacity Exchange Agreement between The Washington Water Power Company (WWP) and Bonneville Power Administration. WWP requests that the Commission accept the Agreement for

filing, effective July 6, 1994, and grant waiver of the prior notice requirement pursuant to § 35.11 of the Commission's regulations.

A copy of the filing was served upon Bonneville Power Administration.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

14. Pennsylvania Electric Co.

[Docket No. ER94-1436-000]

Take notice that on July 6, 1994, Pennsylvania Electric Company (Penelec), tendered for filing a revised Exhibit to a service agreement with West Penn Power Company under Penelec's FPC Electric Tariff, Original Volume No. 1.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

15. Tucson Electric Power Co.

[Docket No. ER94-1437-000]

Take notice that on July 6, 1994, Tucson Electric Power Company (Tucson), tendered for filing a Coordination Tariff (Tariff). Under the Tariff Tucson offers to provide certain coordination services to eligible entities, namely Economy Energy Service, Non-Firm Energy Service, and Firm System Capacity/Energy Sale or Exchange Service.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

16. Pacific Gas and Electric Co.

[Docket No. ER94-1438-000]

Take notice that on July 7, 1994, Pacific Gas and Electric Company (PG&E), tendered a notice of cancellation and withdrawal of the Transmission Rate Schedule for the California-Oregon Transmission Project (COTP) transmission service provided to Transmission Agency of Northern California (TANC) by PG&E (CTS), Rate Schedule FERC No. 145.

In Opinion No. 389, issued May 26, 1994 (67 FERC ¶ 61,239), the Commission affirmed the Initial Decision that ordered PG&E to file within 45 days a cancellation and withdrawal of the CTS, PG&E Rate Schedule FERC No. 145, as filed in FERC Docket No. ER92-596-000. See 60 FERC ¶ 61,321.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

17. Entergy Services, Inc.

[Docket No. ER94-1440-000]

Take notice that on July 7, 1994, Entergy Services, Inc. (Entergy Services), on behalf of Arkansas Power & Light Company, Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc. (collectively, the Entergy Operating Companies), tendered for filing the Sixth Transmission Service Agreement (Sixth TSA) between Entergy Services and Entergy Power, Inc. (Entergy Power). The Sixth TSA sets out the terms and conditions of non-firm transmission service under the Entergy Operating Companies' Transmission Service Tariff for sales by Entergy Power to Associated Electric Cooperative, Inc.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

18. Alabama Power Co.

[Docket No. ER94-1441-000]

Take notice that on July 8, 1994, Alabama Power Company (the Company) tendered for filing the following two contracts between it and the Alabama Municipal Electric Authority (AMEA): (i) Amended and Restated Agreement for Partial Requirements Service and Complementary Services (the Amended PR Agreement); and (ii) Agreement for Transmission and other Complementary Services (the TCS Agreement). The Amended PR Agreement revises the existing partial requirements arrangement between the parties to broaden the types of power supply arrangements that AMEA may obtain. In addition, the cost allocation and rate design methodology for partial requirements service has been revised so that the rates will not have to be redesigned in the event AMEA elects to enter into such other arrangements. The revised rates are revenue neutral when compared to the rates under the existing PR Agreement. The TCS Agreement makes available to AMEA other transmission and complementary services that are, or may be, required in conjunction with resource purchases by AMEA or with other transactions in which AMEA may desire to engage from time to time. The rates, terms, and conditions applicable to these services are set forth in exhibits appended to the TCS Agreement, many of which utilize formula rate methodologies and procedures. The Company submitted informational schedules and workpapers in support of these charges.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

19. San Diego Gas & Electric Co.

[Docket No. ER94-1449-000]

Take notice that on July 13, 1994 San Diego Gas & Electric Company (SDG&E) tendered for filing an Interchange Agreement (Agreement) between SDG&E and Electric Clearinghouse, Inc. (ECI).

SDG&E requests that the Commission allow the Agreement to become effective on the 15th of September, 1994 or at the earliest possible date.

Copies of this filing were served upon the Public Utilities Commission of the State of California and ECI.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

20. Coastal Electric Services Co.

[Docket No. ER94-1450-000]

Take notice that on July 13, 1994 Coastal Electric Services Company (CESC) tendered for filing pursuant to Rule 205, 18 CFR 385.205, a petition for waivers and blanket approvals under various regulations of the Commission and for an order accepting its FERC Electric Rate Schedule No. 1 to be effective September 12, 1994.

CESC intends to engage in electric power and energy transactions as a marketer and a broker. In transactions where CESC sells electric energy, it proposes to make such sales on rates, terms and conditions to be mutually agreed to with the purchasing party. CESC is not in the business of generating, transmitting, or distributing electric power.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

21. Kansas City Power & Light Co.

[Docket No. ER94-1451-000]

Take notice that on July 13, 1994, Kansas City Power & Light Company (KCPL) tendered for filing a Service Agreement signed June 30, 1994, between KCPL and the Kansas Municipal Energy Agency (KMEA), to become effective as of October 1, 1994. This Agreement provides for the rates and charges for Non-Firm Transmission Service between KCPL and KMEA.

In its filing, KCPL states that the rates included in the above-mentioned Service Agreement are KCPL's rates and charges which are under review by the Commission in Docket No. ER94-1045-000 and which are subject to refund pursuant to the Commission's order in that docket.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

22. New England Power Co.

[Docket No. ER94-1452-000]

Take notice that New England Power Company (NEP) on July 13, 1994, tendered for filing a revised service agreement or non-firm transmission service to Fitchburg Gas & Electric under NEP's FERC Electric Tariff, Original Volume No. 3.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

23. Florida Power & Light Co.

[Docket No. TX93-4-003]

Take notice that on July 11, 1994, Florida Power & Light Company (FP&L) tendered for filing copies of the Network Integration Service Agreement between FP&L and the Florida Municipal Power Agency (the NIS Agreement) and the Network Operating Agreement between Florida Power & Light Company and the Florida Municipal Power Agency (the Operating Agreement) pursuant to the Commission's order issued on May 11, 1994 in Docket No. TX94-3-000.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94-17963 Filed 7-22-94; 8:45 am]

BILLING CODE 6717-01-P

[Docket No. EC94-20-000, et al.]

PacifiCorp, et al.; Electric Rate and Corporate Regulation Filings

July 15, 1994.

Take notice that the following filings have been made with the Commission:

1. PacifiCorp

[Docket No. EC94-20-000]

Take notice that PacifiCorp on July 7, 1994, tendered for filing an application seeking an order authorizing PacifiCorp to acquire from Warm Springs Power Enterprises (Warm Springs) certain transmission facilities located in Jefferson County, Oregon.

PacifiCorp requests that the Commission accept this application for filing, to be effective forty-five (45) days after the date of filing.

Copies of this filing were supplied to Warm Springs and the Public Utility Commission of Oregon.

Comment date: July 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. Southeastern Power Administration

[Docket No. EF94-3021-000]

Take notice that on June 30, 1994, The Secretary of the Department of Energy confirmed and approved, on an interim basis effective midnight July 1, 1994, Rate Schedules CBR-1-C, CSI-2-C, CEK-1-C, CC-1-D, CM-1-C, CK-1-C and CTV-1-C for power from Southeastern Power Administration's (Southeastern) Cumberland Basin Projects. The approval extends through June 30, 1999.

The Deputy Secretary states that the Commission, by order issued September 26, 1989, in Docket No. EF89-3021-000, confirmed and approved Rate Schedules CBR-1-B, CSI-1-B, CEK-1-B, CC-1-C, CM-1-B, CK-1-B and CTV-1-B.

Southeastern proposes in the instant filing to replace these Rate Schedules.

Comment date: August 2, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Electricidad De Cortes S. De R.L.

[Docket No. EG94-80-000]

Electricidad De Cortes S. De R.L. ("ELCOSA") (c/o Lee M. Goodwin, Reid & Priest, 701 Pennsylvania Avenue, N.W., Washington, D.C. 20004) filed with the Federal Energy Regulatory Commission an application on July 8, 1994 for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's Regulations.

ELCOSA is a Honduras company formed to own an electric generating facility located on in Puerto Cortes, Honduras.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

4. PSI Argentina, Inc.

[Docket No. EG94-81-000]

On July 8, 1994, PSI Argentina, Inc. ("Applicant"), 100 East Main Street, Plainfield, Indiana 46868, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Applicant, an Indiana corporation, is wholly-owned by PSI Resources, Inc., an exempt public utility holding company within the meaning of Section 3(a)(1) of the Public Utility Holding Company Act of 1935. Applicant is currently indirectly engaged in owning the Costanera Facility, a 1260 MW (gross) generating facility located in Buenos Aires, Argentina, which has been determined to be an eligible facility, and selling electric energy at wholesale. Applicant also intends to indirectly own or operate, or both own and operate, the generating and transmission facilities currently owned by Empresa de Generacion Electrica de Lima, S.A., a nationally owned Peruvian corporation. These facilities consist of five hydroelectric generating facilities and one oil-fired generating facility having a combined total installed capacity of 692.6 MW and approximately 576 Km of transmission lines, which operate as radial lines to interconnect and deliver energy from the generating units to the national grid in Peru.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

5. CMS Generation Cebu Limited Duration

[Docket No. EG94-82-000]

On July 12, 1994, CMS Generation Cebu Limited Duration Company, 330 Town Center Drive, Suite 1000, Dearborn, Michigan 48126, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

CMS Generation Cebu Limited Duration Company is a Cayman Islands limited duration company. CMS Generation Cebu Limited Duration Company is an affiliate of CMS Generation Co., a Michigan corporation, which in turn is a wholly-owned subsidiary of CMS Enterprises Company, a Michigan corporation. CMS Enterprises Company is a wholly-owned

subsidiary of CMS Energy Corporation, also a Michigan corporation.

CMS Generation Cebu Limited Duration Company will acquire an interest in Toledo Power Co., a Philippine partnership which will own and operate two power plants with a combined maximum capacity of 140 MW. The plants will be located in Toledo City on the Island of Cebu in the Philippines and the power generated by the plants will be sold to the National Power Corporation and to Cebu Electric Cooperative III. Coal and fuel oil will be burned by the plants.

Comment date: August 4, 1994, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

6. Pacific Gas and Electric Company

[Docket No. ER92-595-000]

Pacific Gas and Electric Company

[Docket No. ER92-596-000]

Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company

[Docket No. ER92-626-005]

Take notice that on June 27, 1994, Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) (collectively, the "Companies"), tendered for filing revisions to the "Coordinated Operations Agreement between Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Participants in the California-Oregon Transmission Project" (COA) in order to comply with the Federal Energy Regulatory Commission's (Commission) May 26, 1994 Opinion Affirming in Part and Vacating in Part Initial Decision in *Pacific Gas and Electric Co.*, 67 FERC ¶61,239 (1994).

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Pacific Gas and Electric Company

[Docket No. ER92-595-003]

Take notice that on June 27, 1994, Pacific Gas and Electric Company (PG&E) tendered a compliance filing in the form of a revised Rate Schedule for the Interconnection of the California-Oregon Transmission Project and the PG&E Electric System (CIRS), PG&E Rate Schedule FERC No. 144. The CIRS provides for the initial and continuing interconnection of PG&E's electric system with the California-Oregon Transmission Project, a 500 kV facility extending from the California-Oregon border to central California.

In Opinion No. 389, issued May 26, 1994 (67 FERC ¶61,239), the Commission ordered PG&E to file a CIRS revised in accordance with the terms of that opinion. The principal modifications to the CIRS are: (1) Deletion of provisions addressing adverse impacts of interconnected operations; (2) removal of certain entities as parties to the rate schedule; (3) deletion of most provisions dealing with initial interconnection, which has occurred; and (4) modification of arrangements for transmission curtailments due to minimum load conditions.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. CRSS Power Marketing, Inc.

[Docket No. ER94-142-002]

Take notice that CRSS Power Marketing, Inc. on July 12, 1994, tendered its quarterly informational filing pursuant to the above-captioned docket. Comments on the filing should be filed with the Commission no later than July 29, 1994.

9. Central Maine Power Company

[Docket No. ER94-1153-000]

Take notice that on July 1, 1994, Central Maine Power Company (CMP), tendered for filing a Second Amended Transmission Service Agreement between CMP and Maine Public Service Company, Inc. (MPS), dated as of April 18, 1994 (Second Amended Agreement). CMP will provide MPS with non-firm transmission service over the CMP transmission system for the purpose of transmitting Maine Yankee and/or MPS system non-firm energy in accordance with the rates, terms and conditions of the Second Amended Agreement.

Comment date: July 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

10. Florida Power Corporation

[Docket No. ER94-1227-000]

Take notice that on July 11, 1994, Florida Power Corporation tendered for filing a Settlement Agreement and an Explanatory Statement with the Cities of Florida.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice.

11. Duke Power Company

[Docket No. ER94-1429-000]

Take notice that on July 5, 1994, Duke Power Company (Duke) filed an Interchange Contract (Contract) between Oglethorpe Power Corporation (Oglethorpe) and Duke Power Company. The Contract provides for interconnected operations between the two systems as well as transactions involving Emergency Assistance, Short Term Power, and Economy Interchange.

Comment date: July 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

12. Rochester Gas and Electric Corporation

[Docket No. ER94-1279-000]

Take notice that on July 5, 1994, Rochester Gas and Electric Corporation tendered for filing an amendment to its May 19, 1994 filing in the above-referenced docket.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice.

13. PacifiCorp

[Docket No. ER94-1412-000]

Take notice that on PacifiCorp July 12, 1994, tendered for filing an amendment to its June 28, 1994 First Amendment to Transmission Service and Operating Agreement between Utah Associated Municipal Power Systems (UAMPS) and PacifiCorp.

PacifiCorp request that a waiver of prior notice be granted and that an effective date of July 1, 1994 be assigned to the filing.

Copies of this amended filing were supplied to UAMPS, the Utah Public Service Commission and the Public Utility Commission of Oregon.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice.

14. Pacific Gas and Electric Company

[Docket No. ER94-1430-000]

Take notice that on July 5, 1994, Pacific Gas and Electric Company (PG&E) tendered for filing: (1) An agreement dated June 27, 1994, between PG&E and the Sacramento Municipal Utility District (SMUD), Modesto Irrigation District (MID) and City of Santa Clara (Santa Clara) entitled "Superseding Agreement for the Coldwater Creek Geothermal Power Plant Between Pacific Gas and Electric Company and CCPA No. 1 Member Utilities" (CCPA Transmission Agreement); (2) an agreement dated June 27, 1994, between PG&E and SMUD entitled "Superseding Agreement for Coldwater Creek Geothermal Power Plant Backbone Transmission Service Between Pacific Gas and Electric Company and Sacramento Municipal Utility District" (SMUD Backbone Agreement); (3) an agreement dated June

27, 1994, between PG&E and SMUD entitled "Superseding Agreement for SMUDGEO 1 Interconnection and Transmission Service Between Pacific Gas and Electric Company and Sacramento Municipal Utility District" (SMUDGEO 1 Agreement); and (4) proposed changes in rates, effective July 1, 1994, developed using a rate mechanism previously agreed to by the parties for Rate Schedules FERC Nos. 82, 88, 91, 125 and 138 between PG&E and SMUD.

The purpose of the superseding agreements is to provide for the reduction of firm transmission service for power generated at the Coldwater Creek Geothermal Power Plant and the SMUDGEO 1.

Copies of the filing have been served upon SMUD, Modesto Irrigation District, Santa Clara, CCPA and the California Public Utilities Commission.

Comment date: August 1, 1994, in accordance with Standard Paragraph E at the end of this notice.

15. Jeb Corporation

[Docket No. ER94–1432–000]

Take notice that on July 1, 1994 JEB Corporation (JEB) tendered for filing pursuant to Rule 205, 18 CFR 385.205, a petition for waivers and blanket approvals under various regulations of the Commission and for an order accepting its FERC Electric Rate Schedule No. 1.

JEB intends to engage in electric power and energy transactions as a marketer and a broker. In transactions where JEB sells electric energy it proposes to make such sales on rates, terms, and conditions to be mutually agreed to with the purchasing party. JEB is not in the business of generating, transmitting, or distributing electric power.

Comment date: July 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

16. PSI Energy, Inc.

[Docket No. ER94–1434–000]

Take notice that PSI Energy, Inc. on July 6, 1994, tendered for filing an Interchange Agreement, dated June 1, 1994, between PSI and Enron Power Marketing, Inc. (Enron).

The Interchange Agreement provides for the following service between PSI and Enron:

1. Exhibit A—Power Sales by Enron
2. Exhibit B—Power Sales by PSI

Copies of the filing were served on Enron Power Marketing, Inc., Texas Public Utility Commission and the Indiana Utility Regulatory Commission.

Comment date: July 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

17. Carolina Power & Light Company

[Docket No. ER94–1444–000]

Take notice that on July 13, 1994, Carolina Power & Light Company tendered for filing Exhibit A to the Power Supply and Coordination Agreement between CP&L and Public Works Commission of the City of Fayetteville.

Comment date: July 29, 1994, in accordance with Standard Paragraph E at the end of this notice.

18. Reading Municipal Light Department

[Docket No. TX94–6–000]

Take notice that on July 5, 1994, Reading Municipal Light Department (RMLD) filed with the Federal Energy Regulatory Commission an application requesting that the Commission order Bangor Hydroelectric Company; Boston Edison Company; Town of Braintree Electric Light Department; Central Maine Power Company; Commonwealth Energy System; The Connecticut Light and Power Company; Eastern Utilities Associates; Fitchburg Gas & Electric Light Company; City of Holyoke Gas & Electric Department; Holyoke Water Power Company; New England Electric System; Public Service Company of New Hampshire; Taunton Municipal Lighting Plant; United Illuminating Company; Vermont Electric Power Company; and Western Massachusetts Electric Company (collectively, the "PTF Owners") to provide transmission services pursuant to Section 211 of the Federal Power Act, a request for waiver an alternative petition for declaratory relief (the "Application").

The transmission service sought by RMLD in the Application is:

1. Pool-Wide network transmission service, of precisely the same kind and character as is presently available under § 13.2(b) of the NEPOOL Agreement;

2. Over transmission facilities rated 69 kV or above, previously or hereafter constituting Pool Transmission Facilities (PTF) within the definition presently contained in Section 13.1 of the NEPOOL Agreement;

3. At a pool-wide rate established in accordance with the methodology set forth in §§ 13.4, 13.5 and 13.9 of the NEPOOL Agreement;

4. To be used for the transfer of an ownership interest or output entitlement of RMLD in a generating unit having a gross rating of 25 MW or higher, as to which the appropriate committee operating under the NEPOOL Agreement has not unreasonably withheld such designation as may be necessary to permit RMLD to acquire an ownership interest or output entitlement consistent with the requirements of Mass. Gen. Laws. ch. 164A; and

5. With Economy Flow, Scheduled Outage, Unscheduled Outage, Deficiency service and other hour-to-hour service provided by NEPEX under the terms of the NEPOOL Agreement, as referenced in § 13.2(a).

The initiation and termination dates for the service requested, and the total amount of transmission service requested, are not presently determinable with precision. The service sought will not become effective unless the proposed Thirtieth Amendment to the NEPOOL Agreement, currently pending before the Commission in Docket No. ER93–985–000, becomes effective. If the Thirtieth Amendment becomes effective, RMLD expects: (1) To require the availability of the service requested in the Application within approximately five years; (2) that the exact initiation and termination dates of the service will depend on the nature of the ownership interest or output entitlement that RMLD acquires in the generating unit or units described in item 4 above; and (3) that the total amount of transmission capacity requested will be within the range historically required by RMLD under Section 13.2(b) of the NEPOOL Agreement.

Comment date: August 3, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17964 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–P

[Project Nos. 2390–003, 2395–003, 2421–003, 2473–002, 2475–006, and 2640–010 Flambeau River, WI

Northern States Power Co., et al.; Intention to Prepare an Environmental Impact Statement and Conduct Public Scoping Meetings

July 19, 1994.

The Federal Energy Regulatory Commission (FERC) has received applications for six new licenses for the continued operation of the Big Falls Water Power Project No. 2390; the Pixley Project No. 2395, the Lower Hydro Project No. 2421, the Crowley Project No. 2473, the Thornapple Project No. 2475, and the Upper Hydro Project No. 2640. The projects are located on the Flambeau River. The projects are located in Rusk, Price, and Ashland Counties, Wisconsin.

The FERC staff has determined that licensing these projects would constitute a major federal action significantly affecting the quality of the human environment. Therefore, the staff intends to prepare an environmental impact statement (EIS) on the hydroelectric projects in accordance with the National Environmental Policy Act. The staff's EIS will objectively consider both sites Specific and cumulative environmental effects of the projects and reasonable alternatives, and will include an economic, financial and engineering analysis.

A draft EIS will be issued and circulated for review by all interested parties. All comments filed on the draft EIS will be analyzed by the staff and considered in a final EIS. The staff's conclusions and recommendations will then be presented for the consideration of the Commission in reaching its final licensing decisions.

Scoping Meetings

FERC staff will conduct two scoping meetings. The evening scoping meeting is primarily for public input while the day-time meeting will focus on resource agency and non-governmental organization (NGO) concerns. All interested individuals, organizations, and agencies are invited to attend and assist the staff in identifying the scope of environmental issues that should be analyzed in the EIS.

To help focus discussion, a preliminary scoping document outlining subject areas to be addressed at the meeting will be distributed by mail to interested parties on the FERC mailing list. Copies of the preliminary scoping document will also be available at the scoping meetings.

The public scoping meeting which will be conducted by staff will be held at 7:00 p.m. on August 16, 1994, at the Park Falls Public Library, 410 Division Street, Park Falls, Wisconsin. The agency meeting will be held at 9:00 a.m. on August 17, 1994, at the Wisconsin Department of Natural Resources Office at 875 South 4th Avenue, Park Falls, Wisconsin.

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the planned EIS; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue, (3) encourage statements from experts and the public on issues that should be analyzed in the EIS, including viewpoints in opposition to, or in support of, the staff's preliminary views, (4) determine the relative depth of analysis for issues to be addressed in the EIS, and (5) identify resource issues that are not important and do not require detailed analysis.

Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the Flambeau River Projects under consideration. Individuals presenting statements at the meetings will be asked to sign in before the meeting starts and to clearly identify themselves for the record.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meetings and to assist the staff in defining and clarifying the issues to be addressed in the EIS.

Participants wishing to make oral comments in the public meeting are asked to keep them to five minutes to allow everyone the opportunity to speak.

Persons choosing not to speak at the meetings, but who have views on the issues, may submit written statements for inclusion in the public record at the meeting. In addition, written scoping comments may be filed with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426. All correspondence should clearly show one or more of the following captions on the first page: Big Falls Project No. 2390–003; Pixley Project No. 2395–003; Lower Project No. 2421–003; Crowley Project No. 2473–002; Thornapple Project No. 2475–006; and, Upper Project No. 2640–010.

All those that are formally recognized by the Commission as intervenors in the Flambeau Projects' proceedings are asked to refrain from engaging the staff in discussions of the merits of the projects outside of any announced meetings.

Further, parties are reminded of the Commission's Rules of practice and Procedure, which require parties filing documents with the commission, to serve a copy of the document on each person whose name is on the official service list, including agents of the applicants.

For further information, please contact Julie Bernt at (202) 219–2814.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17965 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–323–000]

Algonquin Gas Transmission Company; Proposed Changes in FERC Gas Tariff

July 19, 1994.

Take notice that on July 14, 1994, Algonquin Gas Transmission Company (Algonquin) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following tariff sheets:

Twelfth Revised Sheet No. 20A
Original Sheet No. 99B

The proposed effective date of Twelfth Revised Sheet No. 20A and Original Sheet No. 99B is August 1, 1994.

Algonquin states that the purpose of this filing is to provide for the recovery of transition costs to be paid by Algonquin to CNG Transmission Corporation (CNG) pursuant to CNG's second direct bill of Account Nos. 186 and 191 transition costs filed on June 30, 1994, in Docket No. RP94–300–000.

Algonquin requests that the Commission waive Section 154.22 of its regulations and grant any other waiver that may be necessary to permit this application to take effect as requested.

Algonquin states that copies of this tariff filing were mailed to all customers of Algonquin and interested state commissions.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington,

D.C. 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before July 26, 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.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17966 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–271–001]

East Tennessee Natural Gas Co.; Notice of Compliance Filing

July 19, 1994.

Take notice that on July 15, 1994, East Tennessee Natural Gas Company (East Tennessee) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, First Revised Sheet No. 161, in compliance with the Commission's June 30, 1994 letter order in this docket. East Tennessee requests an effective date of November 1, 1993.

On June 1, 1994, East Tennessee filed a report covering the costs and revenues recorded in Account 191 during the six-month period following implementation of the direct billing mechanism as provided in Section 23 of the General Terms and Conditions of East Tennessee's FERC Gas Tariff, Second Revised Volume No. 1. In addition, inasmuch as the amounts contained in that filing were subject to further adjustments as a result of certain issues and proceedings with regard to Tennessee's implementation of restructured services, East Tennessee requested waiver of the filing limitation in Section 23 of the General Terms and Conditions to capture trailing costs to the six-month period.

By Letter Order dated June 30, 1994, the Commission accepted East Tennessee's filing as well as its request for waiver of the filing limitation. The letter order required East Tennessee to file to reflect trailing costs in Account No. 191 within 60 days of the date Tennessee files its final report and also required East Tennessee to file a revised tariff sheet within 15 days of the date of the letter order to reflect this condition. East Tennessee states First Revised Sheet No. 161 reflects the required language revision.

East Tennessee states that copies of the filing have been mailed to all affected customers and state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Section 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before July 26, 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 the filing are on file and available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17967 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP94–119–000, et al.]

Texas Gas Transmission Corp.; Notice of Informal Settlement Conference

July 19, 1994.

Take notice that an informal settlement conference will be convened in the above-captioned proceeding at 10:00 a.m. on July 26, 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.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17970 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 7745–003 California]

Jerry Kaufman; Surrender of Exemption

July 19, 1994.

Take notice that Jerry Kaufman, exemptee for the Garden Bar Power Plant Project No. 7745–003 on Camp Far West Ditch, near Lincoln, Placer County, California, requested that his exemption from licensing be terminated. The exemption was issued on March 30, 1984. The exemptee states that no construction has been done on this project. Mr. Kaufman intends to remove the power plant; the turbines are old and the cost of putting the plant back into operation is too prohibitive. The liability of having the plant sit is also unacceptable.

The exemptee filed the request on November 17, 1993, and the exemption shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, or holiday as described in 18 CFR 385.007, in which case the exemption shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided under 18 CFR Part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17968 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–322–000]

Mid Louisiana Gas Co.; Proposed Changes In FERC Gas Tariff

July 19, 1994.

Take notice that on July 13, 1994, Mid Louisiana Gas Company (Mid Louisiana) filed with the Commission in the above-referenced proceeding to decrease rates and to request waiver of certain of the Commission's regulations, all as more fully set forth in its application on file with the Commission and available for public inspection.

Mid Louisiana states that the requested rate reductions would apply to the commodity portion of the rates applicable to firm and interruptible transportation service provided by Mid Louisiana pursuant to Rate Schedules FTS and ITS, respectively. Such reduced rates would be applicable to service on a lateral line designated as the T–32 Lateral and would be for the purpose of encouraging the development of a market hub. For purposes of those rate reductions, Mid Louisiana has tendered the following revised tariff sheets to its FERC Gas Tariff, Third Revised Volume No. 1:

Third Revised Sheet No. 4
Third Revised Sheet No. 4A
First Revised Sheet No. 23
First Revised Sheet No. 24
First Revised Sheet No. 28
Original Sheet No. 28A
First Revised Sheet No. 81
First Revised Sheet No. 155
First Revised Sheet No. 156

Mid Louisiana also requests that the Commission grant waiver of the 30-day

notice requirement set forth in § 154.22 of the Commission's regulations and to permit the proposed rates to become effective on August 1, 1994. Mid Louisiana further requests that if its filing is suspended, such suspension be for one day. Mid Louisiana also requests waiver of all other regulations that may otherwise be applicable so as to permit the proposed rate reductions to become effective August 1, 1994.

Any person desiring to be heard or to protest said application should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with §§ 385.214 and 385.3211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before July 26, 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 application are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 94–17969 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER94–1168–000]

Vesta Energy Alternatives Company; Notice of Issuance of Order

July 20, 1994.

On April 19, 1994 and June 1, 1994, Vesta Energy Alternatives Company (Vesta) submitted for filing a rate schedule under which Vesta will engage in wholesale electric power and energy transactions as a marketer. Vesta also requested waiver of various Commission regulations. In particular, Vesta requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Vesta.

On July 8, 1994, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under 18 CFR Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Vesta should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, Vesta is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object with the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Vesta's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 8, 1994.

Copies of the full text of the order are available from the Commission's Public Reference Branch, Room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18018 Filed 7–22–94; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5020–5]

Acid Rain Program: Notice of Final Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of permits.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is issuing, as a direct final action, 5-year Phase I Acid Rain Permits to 12 utility plants in accordance with the Acid Rain Program regulations (40 CFR part 72).

DATES: The permits will become final on September 6, 1994, except those permits on which EPA receives significant adverse comment by August 24, 1994. If EPA receives significant adverse comment on a permit, EPA will withdraw the direct final issuance of that permit and simultaneously repropose the permit. Such reproposal will provide an opportunity for public comment and requests for a public hearing.

ADDRESSES: *Administrative Records.* The administrative record for the permits, except information protected as confidential, may be viewed during normal operating hours at these locations:

For plants in Illinois and Indiana: EPA Region 5, Ralph H. Metcalfe Federal Bldg., 77 West Jackson Blvd., Chicago, IL 60604.

For plants in Missouri: EPA Region 7, 726 Minnesota Ave., Kansas City, KS 66101.

Comments. Send comments to the following addresses:

For plants in Illinois and Indiana: EPA Region 5 (A–18J), Air and Radiation Division, Attn: David Kee, Director (address above).

For plants in Missouri: EPA Region 7, Air and Toxics Division, Attn: Jon Knodel (address above).

Submit comments in duplicate and identify the permit to which the comments apply, the commenter's name, address, and telephone number, and the commenter's interest in the matter and affiliation, if any, to the owners and operators of all units in the permit. In the comment, include objections to the permit and the legal, factual, or other basis for the objections. This information will be used by EPA to determine if the comment is a significant adverse comment.

FOR FURTHER INFORMATION CONTACT: The following persons for more information about a permit listed in this notice:

For plants in Illinois, Cecilia Mijares, (312) 886–0968; in Indiana, Genevieve Nearmyer, (312) 353–4761, EPA Region 5.

For plants in Missouri, Jon Knodel, (913) 551–7622, EPA Region 7.

SUPPLEMENTARY INFORMATION: Title IV of the Clean Air Act directs EPA to establish a program to reduce the adverse effects of acidic deposition by promulgating rules and issuing permits to emission sources subject to the program. On January 11, 1993, EPA promulgated final rules implementing the program. Subsequently, several parties filed petitions for review of the rules with the U.S. Court of Appeals for the District of Columbia Circuit. On November 18, 1993, EPA published a notice of proposed revisions to rules regarding Phase I substitution and reduced utilization plans [sections 404 (b) and (c) and 408(c)(1)(B) of the Act]. On May 4, 1994, EPA and other parties signed a settlement agreement addressing the substitution and reduced utilization issues.

In today's action, EPA is issuing permits that are consistent with the May 4, 1994 settlement. Except as noted below, EPA approves for 1995–1999 all

compliance options for which EPA deferred action for 1996–1999 in the draft permits. In addition, except as noted below, the numbers of substitution and compensating unit allowances allocated to each unit for 1995–1999 are identical to the numbers of allowances allocated to each unit for 1995 in the draft permits. The additional allowances discussed below, according to the settlement, are a one-time allocation and entail a simultaneous deduction of an equal number of allowances in a future year. Upon activation of conditionally-approved plans, substitution or compensating unit allowances are allocated for the remaining years the plan is in effect. EPA issues the following permits:

Hutsonville in Illinois: 9,661 substitution allowances for each year and 368 additional allowances to unit 05; 9,837 substitution allowances for each year and 936 additional allowances to unit 06.

Elmer W Stout in Indiana.

Tanners Creek in Indiana.

Hawthorn in Missouri: 6,927 substitution allowances for each year and 37,614 additional allowances to unit 5.

James River in Missouri: 2,536 substitution allowances for each year and 2,532 additional allowances to unit 3; 4,304 substitution allowances for each year and 5,048 additional allowances to unit 4; no change for unit 5.

Labadie in Missouri.

Meramec in Missouri.

Montrose in Missouri.

Rush Island in Missouri.

Sioux in Missouri.

Southwest in Missouri: 3,906 substitution allowances for each year and 32 additional allowances to unit 1.

Thomas Hill in Missouri.

Dated: July 19, 1994.

Renee Marie Rico,

Acting Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–18047 Filed 7–22–94; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5020–4]

Acid Rain Program: Final Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of permit modifications.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is approving 5-year Acid Rain nitrogen oxides compliance plans, according to the Acid Rain Program regulations (40 CFR part 76), for the following 9 utility plants: Milton L Kapp and Riverside in Iowa; Quindaro in Kansas; and James River, Hawthorn, Labadie, Montrose, Thomas Hill, and Southwest in Missouri.

FOR FURTHER INFORMATION CONTACT: Jon Knodel, (913) 551–7622, EPA Region 7, Air and Toxics Division, 726 Minnesota Ave., Kansas City, KS 66101.

Dated: July 19, 1994.

Renee Marie Rico,

Acting Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 94–18046 Filed 7–22–94; 8:45 am]

BILLING CODE 6560–50–P

[OPPTS–140223; FRL–4898–1]

Relocation of ABT Associates TSCA CBI Storage Site and Extension of Contract Expiration Date

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's contractor, ABT Associates (ABT), of Cambridge, Massachusetts and Bethesda, Maryland; and ABT's subcontractor, Eastern Research Group, Inc. (ERG), of Lexington, Massachusetts, is relocating its TSCA CBI storage site. In addition, this notice extends the expiration date for access to TSCA confidential business information (CBI) to September 30, 1997.

DATES: Access at the new storage site to the confidential data submitted to EPA will occur no sooner than August 4, 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: In a previous notice published in the **Federal Register** of December 29, 1992 (57 FR 61903), ABT and its subcontractor Eastern Research Group, Inc. (ERG) were authorized for access under contract number 68–D2–0175 to CBI submitted to EPA under TSCA. EPA is issuing this notice to announce that ABT is relocating its TSCA CBI storage site from 4800 Montgomery Lane, Bethesda, MD to 4330 East-West Highway, Bethesda, MD. The EPA TSCA Security Staff will perform the required inspection of ABT's new facility, and ensure that the facility is in compliance with the *TSCA Confidential Business Information Security Manual.* This notice also extends the expiration date of the contract. The contract was originally scheduled to expire on September 30, 1996; the new expiration date is September 30, 1997.

List of Subjects

Environmental protection, Access to confidential business information.

Dated: July 15, 1994.

George A. Bonina,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 94–18041 Filed 7–22–94; 8:45 am]

BILLING CODE 6560–50–F

[FRL–5020–3]

Committee Meetings of the Grand Canyon Visibility Transport Commission

AGENCY: Environmental Protection Agency.

ACTION: Notice of meetings.

SUMMARY: The United States Environmental Protection Agency (U.S. EPA) is announcing a series of meetings of the committees of the Grand Canyon Visibility Transport Commission (Commission). The Commission was established by the U.S. EPA on November 13, 1991 (see 56 FR 57522, November 12, 1991). All meetings are open to the public. These meetings are not subject to provisions of the Federal Advisory Committee Act, Public Law 92–463, as amended.

DATES: The meetings will be held as follows:

Modeling Committee—August 1 through August 4, 1994 from 8:30 am–5:00 pm daily.

Alternatives Assessment Committee—August 8 through August 10, 1994, beginning at 1:00 pm on August 8 and ending at 1:00 pm on August 10.

Operations Committee—August 10, 1994 beginning at 2:00 pm.

Emissions Committee—August 22 through August 23, 1994, beginning at 1:00 pm, August 22 and ending at 3:00 pm August 23.

ADDRESSES: The Modeling Committee meeting will be held at Cooper Mountain, Colorado. Workshop sessions will be in the Village Square Conference Center, Center Village.

The Alternatives Assessment Committee meeting will be held at 600 17th Street, Suite 1800, North Tower, Denver, Colorado.

The Operations Committee meeting will be held at 600 17th Street, Suite 1705, South Tower, Denver, Colorado.

The Emissions Committee meeting will be held at the Radison Hotel Midtown, W. 401 Claredon Avenue, Phoenix, Arizona.

FOR FURTHER INFORMATION CONTACT: Mr. John T. Leary, Project Manager for the Grand Canyon Visibility Transport Commission, Western Governors' Association, 600 17th Street, Suite 1705, South Tower, Denver, Colorado 80202; telephone number (303) 623-9378; facsimile machine number (303) 534-7309.

SUPPLEMENTARY INFORMATION: The purpose of the Modeling Committee workshop will be to evaluate modeling techniques and assumptions being incorporated in models being used to support Commission decision making. Validation of model outputs against monitored data will be reviewed. A draft guidance document on model interpretation will be prepared as part of the workshop.

The purpose of the Alternatives Assessment Committee meeting will be to interview finalists for a contract(s) to assess alternative emission management options for the Commission and to recommend a contractor(s) for the assessment.

The Operations Committee will meet in order to review recommendations from the Alternatives Assessment Committee for hiring a contractor(s) to assess alternative emission management options, and to resolve any issues evolving from the Alternatives Assessment Committee's review of contractors.

The Emissions Committee will be meeting to take final action on the Commission's 1990 base emissions inventory.

Dated: July 11, 1994.

Felicia Marcus,

Regional Administrator, U.S. Environmental Protection Agency, Region 9.

[FR Doc. 94-18043 Filed 7-22-94; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-1033-DR]

Georgia; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Georgia, (FEMA-1033-DR), dated July 7, 1994, and related determinations.

EFFECTIVE DATE: July 14, 1994.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Georgia dated July 7, 1994, is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 7, 1994:

Quitman County for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Richard W. Krimm,

Associate Director, Response and Recovery Directorate.

[FR Doc. 94-18020 Filed 7-22-94; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-1033-DR]

Georgia; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Georgia, (FEMA-1033-DR), dated July 7, 1994, and related determinations.

EFFECTIVE DATE: July 19, 1994.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Georgia dated July 7, 1994, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 7, 1994:

Jasper and Newton Counties for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Richard W. Krimm,

Associate Director, Response and Recovery Directorate.

[FR Doc. 94-18021 Filed 7-22-94; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-1032-DR]

North Dakota; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of North Dakota (FEMA-1032-DR), dated July 1, 1994, and related determinations.

EFFECTIVE DATE: July 19, 1994.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of North Dakota dated July 1, 1994, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 1, 1994:

Eddy, Kidder, Pierce, Rolette, Sargent, and Sheridan Counties for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Richard W. Krimm,

Associate Director, Response and Recovery Directorate.

[FR Doc. 94-18019 Filed 7-22-94; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-1031-DR]

South Dakota; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of South Dakota, (FEMA-1031-DR), dated June 21, 1994, and related determinations.

EFFECTIVE DATE: July 19, 1994.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of South Dakota dated June 21, 1994, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 21, 1994.

Campbell, Deuel, Potter, Sully, and Ziebach Counties for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Richard W. Krimm,

Associate Director, Response and Recovery Directorate.

[FR Doc. 94–18022 Filed 7–22–94; 8:45 am]

BILLING CODE 6718–02–M

FEDERAL RESERVE SYSTEM

MBT Bancorp; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 15, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. MBT Bancorp, West Harrison, Indiana; to engage *de novo* through its subsidiary Whitewater Agency, Inc., West Harrison, Indiana, in full service insurance agency in Dearborn County, Indiana, pursuant to § 225.25(b)(8)(iii) of the Board's Regulation Y. The geographic scopes for these activities are West Harrison, Indiana; Aurora, Indiana; and Bright, Indiana, in Dearborn County, Indiana.

Board of Governors of the Federal Reserve System, July 19, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18013 Filed 7-22-94; 8:45 am]

BILLING CODE 6210-01-F

Merchants Capital Corporation, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than August 18, 1994.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Merchants Capital Corporation, Vicksburg, Mississippi; to acquire 100 percent of the voting shares of Merchants Bank, Vicksburg, Mississippi, a *de novo* bank.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. GreatBanc, Inc., Aurora, Illinois; to acquire 100 percent of the voting shares of Greatbank, Algonquin, Illinois, a *de novo* bank.

2. Village Investment Company, Libertyville, Iowa; to become a bank holding company by acquiring 100 percent of the voting shares of Libertyville Savings Bank, Libertyville, Iowa.

C. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Jefferson Bancshares, Inc., Pine Bluff, Arkansas; to become a bank holding company by acquiring 100 percent of the voting shares of Pine Bluff National Bank, Pine Buff, Arkansas.

D. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Heritage Texas Group, Inc., ESOP, Pittsburg, Texas; Heritage Texas Group, Inc., Pittsburg, Texas, and Heritage Delaware Corporation, Dover, Delaware; to become bank holding companies by acquiring 100 percent of the voting shares of Pittsburg National Bank, Pittsburg, Texas.

Board of Governors of the Federal Reserve System, July 19, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18014 Filed 7-22-94; 8:45 am]

BILLING CODE 6210-01-F

Redman Financial, Inc.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company has also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 18, 1994.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Redman Financial, Inc., Simpson, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of Farmers State Bank, Simpson, Kansas.

In connection with this application, Applicant has also applied to engage *de novo* in the sale of general insurance pursuant to § 225.(b)(8)(iii)(A) of the Board's Regulation Y. The geographic scope for this activity is a 10 mile radius of Simpson, Kansas.

Board of Governors of the Federal Reserve System, July 19, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18015 Filed 7-22-94; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Statement of Organization, Functions, and Delegations of Authority; Administrative and Program Delegations of Authorities

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Health Care Financing Administration (HCFA), (**Federal Register**, Vol. 59, No. 60, pp. 14645–14647, dated Tuesday, March 29, 1994) is amended to reflect a change to the functional statements for the Management Planning and Analysis Staff and the Division of Staffing and Employee Services, within the Office of Human Resources, Office of Financial and Human Resources, Associate Administrator for Operations and Resource Management.

The Specific Amendments to Part F Are as Follows:

• Section F.20.D.3.a. (Functions) Management Planning and Analysis Staff is amended by deleting both the administrative and program delegations of authorities and the management studies from the current functional statement and replacing it with the new functional statement which read as follows:

a. Management Planning and Analysis Staff (FLA–1)

• Provides Agency-wide services, policy, direction, and coordination with respect to HCFA's management analysis, planning, and control programs including: work planning, productivity improvement, internal controls, Office of Inspector General audit resolutions' functions, advisory and assistance services certification, contracting of commercial and industrial activities, the administrative issuances system, memoranda of understanding and interagency agreements, paperwork reduction, and information collection budget programs.

• Advises the OFHR Director in management analysis activities.

• Provides services, policy direction, and coordination regarding the HCFA paperwork reduction activities.

• Section F.20.D.3.a.(3) (Functions) Division of Staffing and Employees Services is amended by adding the program delegations of authority and the management studies functions to the functional statement and replacing it with the new functional statement which read as follows:

(3) Division of Staffing and Employee Services (FLA23)

• Provides service to all central office HCFA components in the areas of recruitment, in-service staffing, selective placement, and pre-employment investigations, and personnel security clearances for all types of appointments and all occupational classes and levels of work (except Senior Executive Service, Schedule C, and related appointments).

• Provides advice, guidance, and consultation to HCFA supervisory and management officials on such issues as optimal staffing mixes, recruitment sources, and qualification factors.

• Interprets regulations, guides, directives, and bulletins related to staffing and personnel services.

• Establishes and maintains the employment data base for routine and special reports and statistical studies related to the employee population.

• Plans and controls the central system for all personnel and payroll employee transaction processes, (except U.S. Savings Bonds), serves as the official custodian for all personnel folder clearances, confidential reports, employment agreements and other related areas.

• Plans, administers, and evaluates HCFA-wide employee benefits, health, and wellness program activities.

• Provides general employee counseling on such matters as retirement, life insurance, health plans, workers' compensation claims, and unemployment compensation claims.

• Serves as the central HCFA reference point for inquiries, guidance, and interpretation on employee benefits, health, and wellness matters.

• Processes insurance claims and annuity applications for retirees and survivors of deceased employees. Processes the full range of employee benefit and payroll transaction documents, with the exception of U.S. Savings Bonds.

• Directs programs for occupational health services, employee health enhancement, physical fitness, and blood assurance programs. Plans and administers the Agency's contract for the Employee Assistance Program.

• Directs and administers HCFA's child care initiative. Directs the Agency's Voluntary Leave Transfer and Video Display Terminal Eye Care Programs.

• Under direction of the HCFA Deputy Ethics Officer, plans and administers the entire ethics program for both central and regional offices. Reviews financial disclosure reports prior to departmental submittal and coordinates outside activity requests and approvals.

• Directs and coordinates all Agency medical determinations related to employability issues, such as fitness for duty and reasonable accommodation.

• Develops, reviews, analyzes, and maintains existing or proposed Agency-wide program delegations of authority.

• Conducts special studies and analyses concerning Agency-wide and

cross cutting OFHR issues and other broad based administrative issues.

Dated: July 1, 1994.

Steven A. Pelovitz,

Associate Administrator for Operations and Resource Management.

[FR Doc. 94-18005 Filed 7-22-94; 8:45 am]

BILLING CODE 4120-01-P

Health Resources and Services Administration

Program Announcement and Grant Orientation Conferences for the Health Careers Opportunity Program

The Health Resources and Services Administration (HRSA) announces that applications for fiscal year (FY) 1995 Health Careers Opportunity Program (HCOP) grants will be accepted under the authority of Section 740 of the Public Health Service Act, as amended by Pub. L. 102-408, dated October 13, 1992.

Section 740 authorizes the Secretary to make grants to and enter into contracts with schools of allopathic medicine, osteopathic medicine, public health, dentistry, veterinary medicine, optometry, pharmacy, allied health, chiropractic and podiatric medicine and public and nonprofit private schools which offer graduate programs in clinical psychology and other public or private nonprofit health or educational entities to carry out programs which assist individuals from disadvantaged backgrounds to enter and graduate from such schools. The assistance authorized by the section may be used to: (1) Identify, recruit, and select individuals from disadvantaged backgrounds for education and training in a health profession; (2) provide for a period prior to the entry of such individuals into the regular course of education of such a school, preliminary education designed to assist them to complete successfully such regular course of education at such a school or referring such individuals to institutions providing such preliminary education; (3) facilitate the entry and retention of such individuals in health and allied health professions schools; and (4) provide counseling and advice on financial aid to assist such individuals to complete successfully their education at such schools.

The Administration's FY 1995 budget request for this program is $30.7 million. The statute requires that, of the amount appropriated for any fiscal year, 20 percent ($6.1 million) must be obligated for stipends to disadvantaged individuals of exceptional financial need who are students at schools of allopathic medicine, osteopathic medicine, or dentistry. Of the remaining balance, $20.8 million will be used to continue support of 107 multi-year projects previously approved and funded. It is estimated that $3.7 million will be available to fund approximately 22 competing projects averaging $168,000 each.

In addition, the statute requires that, of the amounts appropriated for any fiscal year, 10 percent must be obligated to community-based programs and 70 percent must be obligated for grants or contracts to institutions of higher education. Not more than 5 percent of such funds may be obligated for grants and contracts having the primary purpose of informing individuals about the existence and general nature of health careers.

The legislative authority for this program was extended through FY 1994. This program announcement is subject to the extension of this authority and to the appropriation of funds. Applicants are advised that this application announcement is a contingency action being taken to assure that should the authority be extended and funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the program as well as to provide for an even distribution of funds throughout the fiscal year.

Previous Funding Experience

Previous funding experience information is provided to assist potential applicants to make better informed decisions regarding submission of an application for this program. In FY 1994, HRSA reviewed 200 applications for HCOP Grants. Of those applications, 88 percent were approved and 12 percent were disapproved. Thirty-five projects, or 20 percent of the approved applications, were funded. In FY 1993, HRSA reviewed 248 applications for HCOP Grants. Of those applications, 86 percent were approved and 14 percent were disapproved. Seventy-two projects, or 35 percent of the approved applications, were funded.

To receive support, applicants must meet the requirements of the program regulations which are located at 42 CFR part 57, subpart S. The period of Federal support will not exceed 3 years.

National Health Objectives for the Year 2000

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national activity for setting priority areas. The Health Careers Opportunity Program is related to the priority area of Educational and Community-Based programs. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017-001-00474-0) or Healthy People 2000 (Summary Report; Stock No. 017-001-00473-1) through the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402-9325 (Telephone 202-783-3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Smoke-Free Workplace

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Review Criteria

The review of applications will take into consideration the following criteria:

(a) The degree to which the proposed project adequately provides for the requirements in the program regulations;

(b) The number and types of individuals who can be expected to benefit from the project;

(c) The administrative and management ability of the applicant to carry out the proposed project in a cost effective manner;

(d) The adequacy of the staff and faculty;

(e) The soundness of the budget; and

(f) The potential of the project to continue without further support under this program.

In addition, the following factor will be applied in determining the funding of applications:

A funding priority is defined as the favorable adjustment of aggregate review scores when applications meet specified objective criteria.

The following funding priorities will be used in the distribution of grant awards in FY 1995.

Statutory Funding Priority

Public Law 102-408 requires the Secretary to give priority in funding to the following schools:

1. A school which previously received an HCOP grant and increased its first-

year enrollment of individuals from disadvantaged backgrounds by at least 20 percent over that enrollment in the base year 1987 (for which the applicant must supply data) by the end of 3 years from the date of the award of the HCOP grant; and

2. A school which had not previously received an HCOP grant that increased its first-year enrollment of individuals from disadvantaged backgrounds by at least 20 percent over that enrollment in the base year 1987 (for which the applicant must supply data) over any period of time (3 consecutive years).

Established Funding Priority

The following funding priority was established in fiscal year 1990 after public comment at 55 FR 11264, dated March 27, 1990, and is being continued in FY 1995, with the exception that wording related to alternative means of documenting enrollment in terms of increases and retention rates for disadvantaged students has been deleted. Progress in these areas is considered as a part of the merit review process for this program and applicants will be informed of relevant benchmarks in application materials.

A funding priority will be given to HCOP applications from health professions schools that have a disadvantaged student enrollment of 35 percent or more. Traditionally, disadvantaged students have been disproportionally underrepresented in the health profession schools and the health professions. A funding priority will also be given to schools of allied health offering baccalaureate or higher level programs in physical therapy, physician assisting, respiratory therapy, medical technology or occupational therapy that have a disadvantaged student enrollment of 35 percent or more among those programs.

The applicant must indicate on the upper right-hand corner of the face page of the application the funding priority for which the applicant wishes consideration. However, the final determination of the category of funding priority will be based on a staff assessment of the contents of the proposal. An applicant may only be given credit for one funding priority. Applicants which do not request consideration of a funding priority will be reviewed and given full consideration for funding in the peer review process.

In addition, consideration will be given to an equitable geographic distribution of projects, and the assurance that a combination of all funded projects represents a reasonable proportion of the health professions specified in the legislation.

Definitions

As used in this notice:

"Community-based Program" means a program with organizational headquarters located in and which primarily serves: a Metropolitan Statistical Area, as designated by the Office of Management and Budget; a Bureau of Economic Analysis, U.S. Department of Commerce designated nonmetropolitan economic area or a county; or Indian tribe(s) as defined in 42 CFR 36.102(c), i.e., an Indian tribe, band, nation, rancheria, Pueblo, colony or community, including an Alaska Native Village or regional or village corporation.

"Health professions schools" means schools of allopathic medicine, dentistry, osteopathic medicine, pharmacy, optometry, podiatric medicine, veterinary medicine, public health, chiropractic, or graduate programs in clinical psychology and health administration, as defined in sections 799 (1)(A) and (1)(B) of the Public Health Service Act and as accredited in section 799(1)(E) of the Act.

"Individual from a disadvantaged background" means an individual who: (a) Comes from an environment that has inhibited the individual from obtaining the knowledge, skills and abilities required to enroll in and graduate from a health professions school or from a program providing education or training in an allied health profession or; (b) comes from a family with an annual income below a level based on low-income thresholds according to family size, published by the U.S. Bureau of the Census, adjusted annually for changes in the Consumer Price Index and adjusted by the Secretary for use in all health professions programs, 42 CFR 57.1804(b)(2).

The following income figures determine what constitutes a low-income family for purposes of these Health Careers Opportunity Program grants for fiscal year 1995:

Size of parents' family [1]	Income level [2]
1	$ 9,700
2	12,600
3	15,000
4	19,200
5	22,600
6 or more	25,400

[1] Includes only dependents listed on Federal income tax forms.

[2] Adjusted gross income for calendar year 1993, rounded to nearest $100.

The term "school of allied health" means a public or nonprofit private college, junior college, or university or hospital-based educational entity that:

(a) provides, or can provide, programs of education to enable individuals to become allied health professionals or to provide additional training for allied health professionals;

(b) provides training for not less than a total of 20 persons in the allied health curricula (except that this subparagraph shall not apply to any hospital-based educational entity);

(c) includes or is affiliated with a teaching hospital; and

(d) is accredited by a recognized body or bodies approved for such purposes by the Secretary of Education or which provides to the Secretary satisfactory assurance by such accrediting body or bodies that reasonable progress is being made toward accreditation.

Additional Information

Requests for grant application materials and questions regarding grants policy and business management issues should be directed to: Ms. Diane Murray, Grants Management Specialist (D18), Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–6857, Fax: (301) 443–6343.

Completed applications should be returned to the Grants Management Office at the above address.

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

The application deadline date is October 21, 1994. Applications will be considered to be "on time" if they are either:

(1) Received on or before the established deadline date, or

(2) Sent on or before the established deadline and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications not accepted for processing will be returned to the applicant.

Grant Orientation Conferences

Program information for the Health Careers Opportunity Program will also

be provided through two program technical assistance conferences. Technical assistance will be provided on the program content, policies, procedures and application preparation.

The two conferences are scheduled for September 8–9 and 12–13, 1994, and will be held in the: Holiday Inn Crowne Plaza, 1750 Rockville Pike, Rockville, Maryland 20852, Telephone: (301) 468-1100, (800) 638–5963.

Attendees must make their own lodging arrangements. Expenses incurred by the attendees will not be supported by the Federal Government.

Participation in the technical assistance meetings does not assure approval and funding of applications submitted for competitive review. To obtain specific information regarding the conferences and programmatic aspects of this grant program, direct inquiries to: Mario A. Manecci, M.P.H., Chief, Health Careers Opportunity Program, Program Coordination Branch, Division of Disadvantaged Assistance, Bureau of Health Professions, HRSA, Parklawn Building, Room 8A–09, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443–4493, Fax: (301) 443–5242.

This program is listed at 93.822 in the Catalog of Federal Domestic Assistance. It 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: July 6, 1994.

Ciro V. Sumaya,

Administrator.

[FR Doc. 94–18052 Filed 7–22–94; 8:45 am]

BILLING CODE 4160–15–P

RIN 0905-ZA63

Special Project Grants; Maternal and Child Health (MCH) Services; MCH Community Integrated Service Systems (CISS) Set-Aside Program

AGENCY: Health Resources and Services Administration, PHS.

ACTION: Notice of availability of funds.

SUMMARY: The Health Resources and Services Administration (HRSA), in collaboration with the Administration for Children, Youth and Families (ACYF), announces the availability of fiscal year 1994 funds for Maternal and Child Health (MCH) Community Integrated Service Systems (CISS) Set-Aside Program grants authorized under section 502(b)(1)(A) of Title V of the Social Security Act, to support development and expansion of successful community integrated service strategies. Funding for new CISS projects is Congressionally focused on development of home visiting programs which carry out the intent of the "Home Visiting Services for At-Risk Families" Program, as authorized by Title V of the ADAMHA Reorganization Act (P.L. 102–321). Funds were appropriated under Public Law 103–112. $2.5 million will be available to support 50 new CISS projects of $50,000 per grant for a one year budget period. Awards will be for one year, beginning October 1, 1994.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives and goals of Healthy People 2000, a PHS-led national activity for setting priority areas. The MCH CISS program addresses the Healthy People 2000 objectives related to improving maternal, infant, child and adolescent health by developing comprehensive, coordinated, culturally-competent and family centered services at the community level which address health and related needs for all pregnant women, infants, children, and their families. Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report: Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office Washington, DC 20402–9325 (telephone: 202–783–3238).

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

ADDRESSES: Grant applications for the MCH CISS Set-Aside Program (PHS form #5161–1, approved under OMB #0937–0189) must be obtained from and submitted to: Chief, Grants Management Branch, Maternal and Child Health Bureau, Room 18–12, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–1440. Potential applicants should specifically request the application kit with guidance materials for CISS Home Visiting grant projects.

DATES: The application deadline date is June 30, 1994. An advance notice of application deadline was published on May 10, 1994 at 59 FR 24174. Applications will have met the deadline if they are either: (1) Received on or before the deadline date, or (2) postmarked on or before the deadline date and received in time for orderly processing. Applicants should request a legibly dated receipt from a commercial carrier or the U.S. Postal Service, or obtain a legibly dated U.S. Postal Service postmark. Private metered postmarks will not be accepted as proof of timely mailing. Late applications or those sent to an address other than specified in the **ADDRESS** section will be returned to the applicant.

FOR FURTHER INFORMATION CONTACT: Requests for technical or programmatic information should be directed to David Heppel, M.D., Director, Division of Maternal, Infant, Child, and Adolescent Health, Maternal and Child Health Bureau, Room 18–A–39, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, telephone 301–443–2250. Requests for information concerning business management issues should be directed to: John Gallicchio, Grants Management Officer (GMO), at the address listed in the **ADDRESS** section.

SUPPLEMENTARY INFORMATION:

Program Background and Objectives

At the request of Congress, new fiscal year (FY) 1994 CISS funds will focus on the home visiting approach described in section 501(a)(3) of the Social Security Act and will begin to implement the intent of the "Home Visiting Services for At-Risk Families" program, authorized by Title V of the ADAMHA Reorganization Act. The purpose of the latter program is to increase the frequency of early prenatal care, improve birth outcomes, increase health and related social services to at-risk families, and to reduce the incidence of child abuse and neglect. To optimize the CISS funds devoted to at-risk home visiting and to amplify the impact of the Family Preservation and Support Services initiative, HRSA and ACYF are collaborating to promote State efforts to develop comprehensive systems of services—including home visiting—that meet both the health and welfare needs of families.

Inter-Agency Coordination

These CISS/Home Visiting for At-Risk Families (HVAF) grants are intended to be a coordinated initiative with the Administration for Children, Youth and Families (ACYF) Family Preservation and Family Support (FP/FS) Services program, as authorized under Title IV–B of the Social Security Act. The CISS/HVAF grants will complement FP/FS planning activities to promote development of comprehensive systems

of services which meet both the health and social service needs of families.

The ACYF will participate with the HRSA in developing the program guidance for the CISS/HVAF initiative, monitoring the CISS home visiting awards made during FY 1994, and providing ongoing technical assistance and consultation to the HRSA regarding the required collaboration and linkages between a CISS/HVAF applicant and the relevant State Title IV–B Child Welfare agency. Grants funded under this program are expected to exemplify full, effective collaboration between Title IV–B and Title V agencies.

Purpose

Funds are available in FY 1994 to support planning activities that aim to integrate community systems of care for vulnerable children and their families. Such an integrated system would include at-risk pregnant women, as well as their children and families as target populations; pay particular attention to the increased resources needed by children with special health care needs and their families; emphasize primary prevention and family support activities; and where appropriate use a system of home visiting as a significant component of any community system of care.

All CISS/HVAF activities are intended to be conducted within the context of overall State efforts to develop comprehensive community based systems of services and to focus on unmet needs and service gaps identified in the State's MCH Block Grant plan and FP/FS planning process. (Project elements relating to collaboration with ACYF-sponsored programs are described more fully in the program guidance included in the application packet.)

Funding Category

At the request of Congress, the sole funding category for new CISS projects in FY 1994 is the home visiting strategy described in section 501(a)(3), i.e., case management services provided in the home.

Special Concerns

MCH CISS Set-Aside Program grantees are expected to participate in community-wide, comprehensive planning activities that coordinate primary care, public health and child welfare activities; to place emphasis on rural communities and metropolitan areas with high rates of infant mortality and low birth weights, especially among minority populations; and, to coordinate with the 15 communities in the Nation which have received grants from the HRSA under the Healthy Start initiative. Healthy Start communities include: Aberdeen Area Indian Nations, NE/ND/SD; Baltimore MD; Birmingham, AL; Boston, MA; Chicago, IL; Cleveland, OH; Detroit, MI; Lake County, IN; New Orleans, LA; New York, NY; Oakland, CA; Philadelphia, PA; Pittsburgh, PA; PeeDee Region, SC; and, Washington, DC.

In its administration of the MCH Services Block Grant, the MCHB places special emphasis on improving service delivery to women and children from culturally identifiable populations who have been disproportionately affected by barriers to care. This means that FY 1994 MCH CISS/HVAF projects are expected to involve members of ethno-culturally distinct groups in planning activities, unless there are compelling programmatic or other justifications for not doing so.

Projects funded under the MCH CISS Set-Aside Program are selected and administered under the same procedures and practices as are currently in effect for the MCH Special Projects of Regional and National Significance (SPRANS) set-aside activities. The regulation implementing the MCH SPRANS Set-Aside Program was published in the March 5, 1986, issue of the **Federal Register** at 51 FR 7726 (42 CFR Part 51a).

Availability of Funds

$2.5 million is available under the MCH CISS Set-Aside Program to support approximately 50 HVAF projects, not exceeding $50,000 per award for a one year budget period. Awards will be made for project periods of one year. Applicants are advised that support for implementation of planning components developed under this program will not be available through the MCH CISS Set-Aside Program after FY 1994.

Eligible Applicants

Eligibility for funding is limited to a single application from each State. State Maternal and Child Health (MCH) and Child Welfare (CW) agencies must either act as co-applicants or collaborate in the identification of the applicant. Each CISS/HVAF grant award in FY 1994 is contingent upon a funded Family Preservation and Support Services program. Well defined roles for the State MCH and Title IV–B agencies are essential to ensure maximum collaboration and coordination across the MCH–CW service systems. Projects must promote community/State partnerships.

Project Review and Funding

The Department will review applications as competing applications and will fund those which, in the Department's view, are consistent with the statutory purpose of the CISS set aside program; focus on coordination and collaboration across the MCH–CW service systems; pay particular attention to involvement of women and persons from culturally distinct populations; and, address the achievement of applicable Healthy People 2000 objectives in communities with demonstrated need.

Final funding decisions for CISS/HVAF grants are the responsibility of the Director, MCHB, and will be carried out in consultation with the Commissioner, ACYF.

Review Criteria

Review panels composed mainly of nonfederal members will evaluate applications for awards. Staff from MCHB and ACYF will also serve on review panels. The following review criteria will be used to review and evaluate CISS/HVAF applications:

—Documentation of joint involvement of State MCH and State Child Welfare agencies in the development of the application and their intent to work together in developing the health component of the Five-Year FP/FS State Plan including a time-framed strategy to ensure completion of required tasks.

—Extent of existing and planned collaborative activities to be conducted in conjunction with any MCH systems initiatives including the MCH Block Grant, MCH State Systems Development Initiative (SSDI), Community Integrated Service Systems (CISS) or related Special Projects of Regional and National Significance (SPRANS) and the assurance of mechanisms to promote collaboration between MCH and CW in developing the State's MCH Services Block Grant application.

—Extent to which CISS/HVAF applicants will build on existing and planned collaborative initiatives with other agencies (health, education, mental health, justice) to link and coordinate services for children and families at the community level.

—The quality and feasibility of the project plan or methodology and its relation to the project's goals and objectives.

—Level of proposed community input and involvement in design of the plan.

—Use of requested grant funds to carry out proposed health planning activities.

Public Health System Reporting Requirements

This program is subject to the Public Health System Reporting Requirements (approved under OMB No. 0937–0195). Under these requirements, the community-based nongovernmental applicant must prepare and submit a Public Health System Impact Statement (PHSIS). The PHSIS is intended to provide information to State and local health officials to keep them apprised of proposed health services grant applications submitted by community-based nongovernmental organizations within their jurisdictions.

Community-based nongovernmental applicants are required to submit the following information to the head of the appropriate State and local health agencies in the area(s) to be impacted no later than the Federal application receipt due date:

(a) A copy of the face page of the application (SF 424).

(b) A summary of the project (PHSIS), not to exceed one page, which provides:

(1) A description of the population to be served.

(2) A summary of the services to be provided.

(3) A description of the coordination planned with the appropriate State and local health agencies.

Executive Order 12372

The Maternal and Child Health Services Block Grant program has been determined to be a program which is not subject to the provisions of Executive Order 12372 concerning intergovernmental review of Federal programs.

The OMB Catalog of Federal Domestic Assistance number is 93.110.

Dated: July 20, 1994.

Ciro V. Sumaya,

Administrator.

[FR Doc. 94–18049 Filed 7–22–94; 8:45 am]

BILLING CODE 4160–15–P

Program Announcement for Grant Programs Funded Under Title VIII of the Public Health Service Act for Fiscal Year 1995

The Health Resources and Services Administration (HRSA) announces that applications will be accepted for fiscal year (FY) 1995 Grants funded under the authority of title VIII of the Public Health Service Act, as amended by the Nurse Education and Practice Improvement Amendments of 1992, title II of Public Law 102-408, Health Professions Education Extension Amendments of 1992, dated October 13, 1992. These grant programs include Nursing Special Projects (section 820), Advanced Nurse Education Programs (section 821), Nurse Practitioner and Nurse-Midwifery Programs (section 822), Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds (section 827), Professional Nurse Traineeships (section 830), and Grants for Nurse Anesthetists (section 831).

This program announcement is subject to reauthorization of this legislative authority and to the appropriation of funds. The Administration's budget request for FY 1995 includes funding for each of these programs. Applicants are advised that this program announcement is a contingency action being taken to assure that should authority and funds become available for this purpose, awards can be made in a timely fashion consistent with the needs of the program as well as to provide for even distribution of funds throughout the fiscal year. Please see Table 1 for specific budget estimates for each of the grant programs.

National Health Objectives for the Year 2000

The Public Health Service urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of *Healthy People 2000* (Full Report; Stock No. 017–001–00474–0) or *Healthy People 2000* (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402–9325 (Telephone 202–783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service education programs and programs which provide comprehensive primary care services to the underserved.

Smoke-Free Workplace

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Other Considerations

In addition, funding factors may be applied in determining funding of approved applications. Please see specific information regarding each of the grant programs listed later in this notice. Definitions of three types of funding factors are listed below.

A funding preference is defined as the funding of a specific category or group of approved applications ahead of other categories or groups of approved applications in a discretionary program, or favorable adjustment of the formula which determines the grant award in a formula grant program.

A funding priority is defined as the favorable adjustment of aggregate review scores of individual approved applications when applications meet specified criteria in a discretionary program, or favorable adjustment of the formula which determines the grant award in a formula grant program.

Special consideration is defined as the enhancement of priority scores by merit reviewers based on the extent to which applications address special areas of concern in a discretionary program, or favorable adjustment of the formula which determines the grant award in a formula grant program.

It is not required that applicants request consideration for a funding factor. Applications which do not request consideration for funding factors will be reviewed and given full consideration for funding.

Statutory General Preference

Grant programs which are subject to the statutory general preference include Advanced Nurse Education, Nurse Practitioner and Nurse-Midwifery Programs, Professional Nurse Traineeships and Grants for Nurse Anesthetists. As provided in section 860(e)(1) of the PHS Act, statutory preference will be given to any qualified applicant that—

(A) Has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) During the 2-year period preceding the fiscal year for which such an award is sought, has achieved a significant increase in the rate of placing graduates in such settings.

This statutory preference will only be applied to applications that rank above the 20th percentile of proposals recommended for approval by the peer review group.

Specific information concerning the implementation of this statutory preference for each of these grant programs is included later in this notice. Additional general information regarding the implementation of this statutory preference has been published in the **Federal Register** at 59 FR 15741, dated 4/4/94.

Information Requirements Provision

Grant programs which are subject to the information requirements provision include Advanced Nurse Education, Nurse Practitioner and Nurse-Midwifery Programs, Professional Nurse Traineeships and Grants for Nurse Anesthetists. Under section 860(e)(2) of the Act, the Secretary may make an award under certain title VIII grant programs only if the applicant for the award submits to the Secretary the following required information:

1. A description of rotations or preceptorships for students, or clinical training programs for residents, that have the principal focus of providing health care to medically underserved communities.

2. The number of faculty on admissions committees who have a clinical practice in community-based ambulatory settings in medically underserved communities.

3. With respect to individuals who are from disadvantaged backgrounds or from medically underserved communities, the number of such individuals who are recruited for academic programs of the applicant, the number of such individuals who are admitted to such programs, and the number of such individuals who graduate from such programs.

4. If applicable, the number of recent graduates who have chosen careers in primary health care.

5. The number of recent graduates whose practices are serving medically underserved communities.

6. A description of whether and to what extent the applicant is able to operate without Federal assistance under this title.

Additional details concerning the implementation of this information requirement have been published in the **Federal Register** at 58 FR 43642, dated August 17, 1993, and will be provided in the application materials.

Application Requests

Application forms will be sent only to FY 1994 applicants and those who request kits. Requests for application materials and questions regarding grants policy and business management issues should be directed to Grants Management Branch, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857. Completed applications should be returned to the Grants Management Branch at the above address. Please see Table 1 for specific names and phone numbers for each grant program.

If additional programmatic information is needed, please contact the Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9–36, 5600 Fishers Lane, Rockville, Maryland 20857. Please see Table 1 for specific names and phone numbers for each grant program.

Application Forms

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for these grant programs have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB Clearance Number is 0915–0060.

Deadline Dates

The deadline dates for receipt of applications for each of these grant programs are shown in Table 1. Applications will be considered to be "on time" if they are either:

(1) *Received on or before* the established deadline date, or

(2) *Sent on or before* the established deadline date and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications not accepted for processing will be returned to the applicant.

PHS title VIII section number/program title/CFDA number/program regulations	Anticipated budget			Number of new awards anticipated	Grants management contact/phone number (FAX: 443–6343)	Programmatic contact/phone number (FAX: 443–8586)	Deadline date for competing applications
	Total in president's budget	Estimate for continuations	Estimate for competing projects				
820—Nursing Special Projects—93.359—42 CFR part 57, subpart T.	9,860,000	7,200,000	2,660,000	18	Ms. Sandra Bryant .. (301) 443–6915	Ms. Elaine Cohen .... (301) 443–6193	12/01/94
*821—Advanced Nurse Education—93.299—42 CFR part 57, subpart Z.	11,616,000	6,200,000	5,416,000	28	Ms. Donna Nash ..... (301) 443–6960	Dr. Thomas P. Phillips. (301) 443–6333	10/01/94
*822—Nurse Practitioner/Nurse-Midwifery—93.298—42 CFR part 57, subpart Y.	16,063,000	11,400,000	4,663,000	16	Ms. Donna Nash ..... (301) 443–6960	Dr. Thomas P. Phillips. (301) 443–6333	12/15/94
827—Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds—93.178—No Program Regulations.	3,693,000	2,743,000	950,000	5	Ms. Sandra Bryant .. (301) 443–6915	Ms. Helen Lotsikas .. (301) 443–5763	11/01/94
*830—Professional Nurse Traineeships—93.358—No Program Regulations.	14,669,000	-0-	14,669,000	229	Ms. Sandra Bryant .. (301) 443–6915	Ms. Donna English .. (301) 443–5763	12/01/94
*831—Nurse Anesthetist Programs—93.124, 93.916, 93.907—42 CFR part 57, subpart F (Traineeships).	2,583,000	1,600,000	983,000	76	Ms. Jacquelyn Whitaker. (301) 443–6857	Ms. Donna English .. (301) 443–5763	02/01/95

Table 1: * The Administration's revised budget request for FY 1995 includes a single line item of $44,931,000 for these programs.

The purpose, eligibility, review criteria, and funding factors for each of the six grant programs funded under title VIII are listed below.

Nursing Special Projects

Purpose: Section 820(a) of the PHS Act authorizes the Secretary to make grants for the purpose of assisting schools in increasing the number of students enrolled in programs of professional nursing.

Section 820(b) of the PHS Act authorizes the Secretary to make grants for the establishment or expansion of nursing practice arrangements in noninstitutional settings to demonstrate methods to improve access to primary health care in medically underserved communities.

Section 820(c) of the PHS Act authorizes the Secretary to make grants for the purpose of providing continuing education for nurses serving in medically underserved communities.

Section 820(d) of the PHS Act authorizes the Secretary to make grants for the purpose of providing fellowships to individuals who are employed by nursing facilities or home health agencies as nursing paraprofessionals.

The request for initial support may not exceed five years for applications submitted under sections 820(a) and 820(b). The request for initial support may not exceed three years for applications submitted under sections 820(c) and 820(d).

This program is governed by regulations at 42 CFR part 57, subpart T to the extent to which these regulations are not inconsistent with the amended statute. The purposes, eligibility and statutory funding preferences have been changed by the Nurse Practice Improvement Amendments of 1992. Reference to the purposes, eligibility and statutory funding preferences in the regulations are superseded by the law. The current purposes, eligibility and statutory funding preference are identified in this notice.

Eligibility: Eligible applicants for projects under section 820(a) are public and nonprofit private schools of nursing with programs of education in professional nursing. To receive support under 820(a) the school must agree to make available non-Federal contributions in an amount that is at least 10 percent of the project costs for the first fiscal year, at least 25 percent of the project costs for the second fiscal year, at least 50 percent of the project costs for the third fiscal year, and at least 75 percent of the project costs for the fourth or fifth fiscal years.

Eligible applicants for projects under section 820(b) are public and nonprofit private schools of nursing. To receive support under 820(b) the program proposed must be operated and staffed by the faculty and students of the school and must be designed to provide at least 25 percent of the students of the school with a structured clinical experience in primary health care.

Eligible applicants for projects under section 820(c) are public and nonprofit private entities.

Eligible applicants for projects under section 820(d) are public and nonprofit private entities that operate accredited programs of education in professional nursing, or State-board approved programs of practical or vocational nursing. To receive support under 820(d), the applicant must agree that, in providing fellowships, preference will be given to eligible individuals who: (A) Are economically disadvantaged individuals, particularly such individuals who are members of a minority group that is underrepresented among registered nurses; or (B) are employed by a nursing facility that will assist in paying the costs or expenses. The applicant must also agree that the fellowships provided will pay all or part of the costs of: (A) The tuition, books, and fees of the program of nursing with respect to which the fellowship is provided; and (B) reasonable living expenses of the individual during the period for which the fellowship is provided.

Review Criteria: The review of applications will take into consideration the following criteria:

1. The national or special local need which the particular project proposes to serve;
2. The potential effectiveness of the proposed project in carrying out such purposes;
3. The administrative and managerial capability of the applicant to carry out the proposed project;
4. The adequacy of the facilities and resources available to the applicant to carry out the proposed project;
5. The qualifications of the project director and proposed staff;
6. The reasonableness of the proposed budget in relation to the proposed project; and
7. The potential of the project to continue on a self-sustaining basis after the period of grant support.

Funding Factors

Statutory Funding Preferences: In making awards of grants under section 820(a), preference will be given to any qualified school that provides students of the school with clinical training in the provision of primary health care in publicly-funded: (A) Urban or rural outpatient facilities, home health agencies, or public health agencies; or (B) rural hospitals.

In making awards of grants under section 820(d), preference will be given to any qualified applicant operating an accredited program of education in professional nursing that provides for the rapid transition to status as a professional nurse from status as a nursing paraprofessional.

Established Funding Priorities: The following funding priorities were established in FY 1993 after public comment (58 FR 35020, dated 6/30/93) and the Administration is extending these funding priorities in FY 1995. A priority will be given to schools that offer generic baccalaureate programs. A priority will also be given to schools that offer both generic baccalaureate nursing programs and RN completion programs. These priorities apply to applications for grants under section 820(a).

A funding priority will be given to programs which demonstrate either substantial progress over the last 3 years or a significant experience of 10 or more years in enrolling and graduating trainees from those minority or low-income populations identified as at-risk of poor health outcomes. This priority applies to applications for grants under sections 820(a), 820(b), and 820(d).

Finally, a funding priority will be given to applications for continuing education programs for nurses from medically underserved communities to increase their knowledge and skills in care of persons who are HIV positive or who have AIDS. This priority applies to applications for grants under section 820(c).

Advanced Nurse Education Programs

Purpose: Section 821 of the Public Health Service Act, as implemented by 42 CFR part 57, subpart Z, authorizes assistance to meet the costs of projects to: (1) Plan, develop and operate new programs, or (2) significantly expand existing programs leading to advanced degrees that prepare nurses to serve as nurse educators or public health nurses, or in other clinical nurse specialties determined by the Secretary to require advanced education. The period of Federal support should not exceed 3 years.

Eligibility: To be eligible to receive a grant, a school must be a public or nonprofit private collegiate school of nursing and be located in a state.

Review Criteria: The review of applications will take into consideration the following criteria:

(1) The need for the proposed project including, with respect to projects to

provide education in professional nursing specialties determined by the Secretary to require advanced education:

(a) The current or anticipated national and/or regional need for professional nurses educated in the specialty; and

(b) The relative number of programs offering advanced education in the specialty;

(2) The need for nurses in the specialty in which education is to be provided in the State in which the education program is located.

(3) The potential effectiveness of the proposed project in carrying out the educational purposes of section 821 of the Act and 42 CFR part 57, subpart Z;

(4) The capability of the applicant to carry out the proposed project;

(5) The soundness of the fiscal plan for assuring effective utilization of grant funds;

(6) The potential of the project to continue on a self-sustaining basis after the period of grant support; and

(7) The degree to which the applicant proposes to attract, retain and graduate minority and financially needy students.

Funding Factors

Statutory General Preference: As provided in section 860(e)(1) of the PHS Act, preference will be given to any qualified applicant that—

(A) Has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) During the 2-year period preceding the fiscal year for which such an award is sought, has achieved a significant increase in the rate of placing graduates in such settings.

This preference will only be applied to applications that rank above the 20th percentile of proposals recommended for approval by the peer review group.

Minimum Percentages for "High Rate" and "Significant Increase in the Rate": "High rate" is defined as a minimum of 30 percent of graduates in academic year 1992–93 or academic year 1993–94, whichever is greater, who spend at least 50 percent of their worktime in clinical practice in the specified settings. Public health nurse graduates can be counted if they identify a primary work affiliation at one of the qualified work sites. Graduates who are providing care in a medically underserved community as a part of a fellowship or other educational experience can be counted.

"Significant increase in the rate" means that, between academic years 1992–93 and 1993–94, the rate of placing graduates in the specified settings has increased by a minimum of 50 percent and that not less than 15 percent of graduates from the most recent year are working in these settings.

Established Funding Priorities: The following funding priority was established in FY 1989 after public comment (54 FR 11570, dated March 21, 1989) and the Secretary is extending this priority in FY 1995.

A funding priority will be given to applications which develop, expand or implement courses concerning ambulatory, home health care and/or inpatient case management services for individuals with HIV disease.

The following funding priority was established in FY 1993 after public comment (58 FR 32710, dated June 11, 1993) and the Administration is extending this funding priority in FY 1995. In determining the order of funding of approved applications a funding priority will be given to applicant institutions which demonstrate either substantial progress over the last three years or a significant experience of ten or more years in enrolling and graduating trainees from those minority or low-income populations identified as at risk of poor health outcomes.

Nurse Practitioner and Nurse-Midwifery Programs

Purpose: Section 822 of the Public Health Service Act, as amended, authorizes grants to meet the costs of projects to:

(1) Plan, develop and operate new programs; or

(2) Maintain or significantly expand existing programs for the training of nurse practitioners and/or nurse-midwives who will, upon completion of their studies, be qualified to effectively provide primary health care, including primary health care in homes and in ambulatory care facilities, long-term care facilities and other health care institutions.

The period of Federal support should not exceed 3 years.

Eligibility: Eligible applicants are public and nonprofit private schools of nursing or other public and nonprofit private entities. Eligible applicants must be located in a State.

Review Criteria: The review of applications will take into consideration the following criteria:

1. The degree to which the project plan adequately provides for meeting the requirements set forth in Section 57.2405 of the program regulations and the Appendix;

2. The potential effectiveness of the proposed project in carrying out the education purposes of section 822 of the Act and 42 CFR part 57, subpart Y;

3. The capability of the applicant to carry out the proposed project;

4. The soundness of the fiscal plan for assuring effective utilization of grant funds; and

5. The potential of the project to continue on a self-sustaining basis after the project period.

Funding Factors

Statutory Program Specific Preference: Preference will be given to any qualified applicant that agrees to expend the award to plan, develop, and operate new programs or to significantly expand existing programs.

Statutory General Preference: As provided in section 860(e)(1) of the PHS Act, preference will be given to any qualified applicant that—

(A) Has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) During the 2-year period preceding the fiscal year for which such an award is sought, has achieved a significant increase in the rate of placing graduates in such settings.

This preference will only be applied to applications that rank above the 20th percentile of proposals recommended for approval by the peer review group.

Minimum Percentages for "High Rate" and "Significant Increase in the Rate:" "High rate" is defined as a minimum of 30 percent of graduates in academic year 1992–93 or academic year 1993–94, whichever is greater, who spend at least 50 percent of their worktime in clinical practice in the specified settings. Graduates who are providing care in a medically underserved community as a part of a fellowship or other educational experience can be counted.

"Significant increase in the rate" means that, between academic years 1992–93 and 1993–94, the rate of placing graduates in the specified settings has increased by a minimum of 50 percent and that not less than 15 percent of graduates from the most recent year are working in these settings.

Statutory Special Considerations: Special consideration will be given to qualified applicants that agree to expend the award to train individuals as nurse practitioners and nurse-midwives who will practice in health professional shortage areas designated under section 332.

Established Funding Priority: The following funding priority was established in FY 1993 after public comment (58 FR 5009, dated 1/19/93)

and the Administration is extending this funding priority in FY 1995.

Funding priority will be given to applicant institutions which demonstrate either substantial progress over the last three years or a significant experience of ten or more years in enrolling and graduating trainees from those minority or low-income populations identified as at risk of poor health outcomes.

Nursing Education Opportunities for Individuals From Disadvantaged Backgrounds

Purpose: Section 827 of the Public Health Service Act authorizes grants to increase opportunities for individuals from disadvantaged backgrounds to pursue a nursing education. Students who may have an associate degree in nursing would be eligible to receive funding under this section if they are financially, educationally or culturally disadvantaged.

For purposes of Grants for Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds, "an individual from a disadvantaged background" is one who: (1) comes from an environment that has inhibited the individual from obtaining the knowledge, skills, and abilities required to enroll in and graduate from a school of nursing; or (2) comes from a family with an annual income below a level based on low-income thresholds according to family size published by the U.S. Bureau of Census, adjusted annually for changes in the Consumer Price Index, and multiplied by a factor to be determined by the Secretary for adaptation to this program (42 CFR 57.2904).

The following income figures determine what constitutes a low income family for purposes of Grants for Nursing Education Opportunities for Individuals from Disadvantaged Backgrounds for FY 1995.

Size of parents' family [1]	Income level [2]
1	$9,700
2	12,600
3	15,000
4	19,200
5	22,600
6 or more	25,400

[1] Includes only dependents listed on Federal income tax forms.

[2] Adjusted gross income for calendar year 1993, rounded to $100.

Grants may be awarded to eligible applicants to meet the costs of special projects to increase nursing education opportunities for individuals from disadvantaged backgrounds:

1. By identifying, recruiting and selecting such individuals;
2. By facilitating the entry of such individuals into schools of nursing;
3. By providing counseling or other services designed to assist such individuals to complete successfully their nursing education;
4. By providing, for a period prior to the entry of such individuals into the regular course of education at a school of nursing, preliminary education designed to assist them to complete successfully such regular course of education;
5. By paying such stipends as the Secretary may determine for such individuals for any period of nursing education;
6. By publicizing, especially to licensed vocational or practical nurses, existing sources of financial aid available to persons enrolled in schools of nursing or who are undertaking training necessary to qualify them to enroll in such schools; and
7. By providing training, information or advice to the faculty of such schools with respect to encouraging such individuals to complete the programs of nursing education in which the individuals are enrolled. The period of federal support should not exceed 3 years.

Eligibility: Public and nonprofit private schools of nursing and other public or nonprofit private entities are eligible for grant support.

Review Criteria: The review of applications will take into consideration the following criteria:

1. The national or special local need which the particular project proposes to serve;
2. The potential effectiveness of the proposed project in carrying out such purposes;
3. The administrative and managerial capability of the applicant to carry out the proposed project;
4. The adequacy of the facilities and resources available to the applicant to carry out the proposed project;
5. The qualifications of the project director and proposed staff;
6. The reasonableness of the proposed budget in relation to the proposed project; and
7. The potential of the project to continue on a self-sustaining basis after the period of grant support.

Professional Nurse Traineeships

Purpose: Section 830 of the Public Health Service Act authorizes the Secretary to award grants to meet the cost of traineeships for individuals in advanced-degree programs in order to educate the individuals to serve in and prepare for practice as nurse practitioners, nurse midwives, nurse educators, public health nurses, or in other clinical nursing specialties determined by the Secretary to require advanced education. Federal support must be requested annually.

Eligibility: Eligible applicants are public or private nonprofit entities which provide: (1) Advanced-degree programs to educate individuals as nurse practitioners, nurse-midwives, nurse educators, public health nurses or as other clinical nursing specialists; or (2) nurse-midwifery certificate programs that conform to guidelines established by the Secretary under section 822(b).

Applicants must agree that: (a) In providing traineeships, the applicant will give preference to individuals who are residents of health professional shortage areas designated under section 332 of the Act;

(b) The applicant will not provide a traineeship to an individual enrolled in a master's of nursing program unless the individual has completed basic nursing preparation, as determined by the applicant; and

(c) Traineeships provided with the grant will pay all or part of the costs of the tuition, books, and fees of the program of nursing with respect to which the traineeship is provided and reasonable living expenses of the individual during the period for which the traineeship is provided.

Funding Factors

Statutory Preference: In making awards of grants under this section, preference will be given to any qualified applicant that—

(A) Has a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) During the 2-year period preceding the fiscal year for which such an award is sought, has achieved a significant increase in the rate of placing graduates in such settings.

Minimum Percentages for "High Rate" and "Significant Increase in the Rate:" "High rate" is defined as a minimum of 20 percent of graduates in academic years 1991–92, 1992–93 or 1993–94 who spend at least 50 percent of their worktime in clinical practice in the specified settings. Public health nurse graduates can be counted if they identify a primary work affiliation at one of the qualified work sites. Graduates who are providing care in a medically underserved community as a part of a fellowship or other educational experience can be counted.

"Significant increase in the rate" means that, between academic years

1992–93 and 1993–94, the rate of placing graduates in the specified settings has increased by a minimum of 50 percent and that not less than 15 percent of graduates from the most recent year are working in these settings.

Statutory Special Consideration: Special consideration will be given to applications for traineeship programs for nurse practitioner and nurse midwife programs which conform to guidelines established by the Secretary under section 822(b)(2) of the PHS Act. A copy of these guidelines will be included with the application materials for this program.

Established Funding Priority: The following funding priority was established in FY 1993 after public comment (58 FR 32712, dated 6/11/93) and the Administration is extending this funding priority in FY 1995. A funding priority will be given to programs which demonstrate either substantial progress over the last three years or a significant experience of ten or more years in enrolling and graduating students from those minority populations identified as at-risk of poor health outcomes.

Grants for Nurse Anesthetists

Purpose: Section 831 of the Public Health Service Act authorizes the Secretary to award grants to: (1) Cover the costs of traineeships for licensed registered nurses to become nurse anesthetists (traineeships); (2) cover the costs of projects to develop and operate, maintain or expand programs for the education of nurse anesthetists (education programs); and (3) provide financial assistance to certified registered nurse anesthetists (CRNA) who are faculty members in accredited programs to enable such nurse anesthetists to obtain advanced education relevant to their teaching functions (faculty fellowships). To receive support for traineeships, programs must meet the requirements of regulations as set forth in 42 CFR 57, subpart F. For education program grants, the period of Federal support may not exceed 3 years. For traineeship or faculty fellowship grants, applicants must compete for Federal support annually.

Eligibility: Eligible applicants for Grants for Nurse Anesthetists are public or private nonprofit institutions which provide registered nurses with full-time nurse anesthetist training and are accredited by an entity or entities designated by the Secretary of Education.

Review Criteria: Applications for traineeship grants will be reviewed and award amounts will be calculated by staff in the Division of Nursing and in the Grants Management Branch of the Bureau of Health Professions based on the formula set forth in 42 CFR 57, subpart F.

The review of applications for education program grants will take into consideration the following criteria:

1. The national or special local need which the particular project proposes to serve with special emphasis on meeting shortages in underserved areas;
2. The potential effectiveness and impact of the proposed project including its potential contribution to nursing;
3. The administrative and managerial capability of the applicant to carry out the proposed project;
4. The appropriateness of the plan, including the timetable for carrying out the activities of the proposed project and achieving and measuring the project's stated objectives;
5. The capability of the applicant to carry out the proposed project;
6. The reasonableness of the budget for the proposed project, including the justification of the grant funds requested; and
7. The potential of the nurse anesthetist program to continue on a self-sustaining basis after the period of grant support.

Applications for faculty fellowships will be reviewed and award amounts will be calculated by staff in the Division of Nursing and in the Grants Management Branch of the Bureau of Health Professions. The review of applications for faculty fellowships will take into consideration the following criteria which were established in 1990 (55 FR 36325, 9/5/90):

1. The eligibility of applicants;
2. The eligibility of faculty; and
3. The extent to which an applicant meets the funding preferences.

The following criteria for fellows were established in FY 1993 after public comment (58 FR 40658, 7/29/93), and will be extended in fiscal year 1995.

To be eligible for fellowship support an individual must be:

1. A United States citizen, noncitizen national, or foreign national who possesses a visa permitting permanent residence in the United States;
2. A certified registered nurse anesthetist with current licensure to practice, and with teaching responsibilities in an accredited nurse anesthetist education program;
3. Enrolled or accepted for enrollment in a formal program of study which leads to a master's or doctoral degree;
4. Proposed for a fellowship in the applicant institutions' grant proposal; and
5. A faculty member employed by, or affiliated with, the applicant institution during the period of approved fellowship support.

The following policy on payment of stipends for faculty fellowships was established in fiscal year 1990 after public comment (55 FR 36325, dated 9/5/90) and is being extended in fiscal year 1995. A faculty member may be paid a stipend for living costs if attending an educational institution as a full-time student; no stipend would be available for a faculty member who is enrolled in part-time study or who is employed on a full-time basis. This policy is designed to target stipend assistance to the individuals who are most in need of such aid.

Funding Factors

Statutory Funding Preference: Section 860(e) of the PHS Act, as amended by the Nurse Education and Practice Improvement Amendments of 1992, title II of the Health Professions Education Extension Amendments of 1992, Public Law 102–408, enacted on October 13, 1992, provides for the following statutory preference for this program of Grants for Nurse Anesthetists, as well as for certain other programs under titles VII and VIII of the PHS Act.

Statutory preference will be given to qualified applicants that:

(A) Have a high rate for placing graduates in practice settings having the principal focus of serving residents of medically underserved communities; or

(B) Have achieved, during the 2-year period preceding the fiscal year for which such an award is sought, a significant increase in the rate of placing graduates in such settings.

For grants for faculty fellowships, qualified applicants will meet the general statutory funding preference if a minimum of 50% of the nurse anesthetist faculty are teaching in medically underserved communities.

Minimum Percentages for "High Rate" and "Significant Increase in the Rate" for Traineeship and Education Program Grants: "High rate" is defined as a minimum of 20 percent of graduates in academic years 1991–92, 1992–93 or 1993–94 who spend at least 50 percent of their worktime in clinical practice in the specified setting. Graduates who are providing care in a medically underserved community as a part of a fellowship or other educational experience can be counted.

"Significant increase in the rate" means that, between academic years 1992–93 and 1993–94, the rate of placing graduates in the specified settings has increased by a minimum of 50 percent and that not less than 15

percent of graduates from the most recent year are working in these settings.

Established Funding Priority for Traineeship and Education Program Grants: The following funding priority was established in FY 1993 after public comment (58 FR 42079, dated 8/6/93 and 58 FR 40657, dated 7/29/93) and the Administration is extending this funding priority in FY 1995. A funding priority will be given to programs which demonstrate either substantial progress over the last 3 years or a significant experience of 10 or more years in enrolling and graduating students from those minority populations identified as at-risk of poor health outcomes.

Established Funding Preference for Faculty Fellowship Grants: The following funding preference was established in fiscal year 1990 after public comment (55 FR 36325, dated 9/5/90). A revised version is being extended in fiscal year 1995. A funding preference will be given first to faculty who will be completing degree requirements before or by the end of the funded budget year, second to faculty who are full-time students, and third to faculty who are part-time students.

These title VIII grant programs are not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). Also, these grant programs are not subject to the Public Health System Reporting Requirements.

Dated: July 19, 1994.

James A. Walsh,

Acting Administrator.

[FR Doc. 94–18051 Filed 7–22–94; 8:45 am]

BILLING CODE 4160–15–P

National Institutes of Health

National Heart, Lung, and Blood Institute, National Center on Sleep Disorders Research; Notice of Meeting of the Sleep Disorders Research Advisory Board

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Sleep Disorders Research Advisory Board on August 10, 1994. This meeting will be held at the National Institutes of Health, Building 31, Conference Room 10, 9000 Rockville Pike, Bethesda, Maryland 20892.

The entire meeting will be open to the public from 9:00 a.m. to adjournment, to discuss recommendations on the implementation and evaluation of the National Center on Sleep Disorders Research programs. Attendance by the public will be limited to space available.

Ms. Terry Long, Chief, Communications and Public Information Branch, National Heart, Lung, and Blood Institute, Building 31, Room 4A21, Bethesda, Maryland 20892, (301) 496–4236, will provide a summary of the meeting and a roster of the Board members.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Executive Secretary in advance of the meeting.

Dr. James P. Kiley, Executive Secretary and Acting Director, National Center on Sleep Disorders Research, NHLBI, Building 31, Room 4A11, Bethesda, Maryland 20892, (301) 496–7443, will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program No. 93.838, Lung Diseases Research, National Institutes of Health.)

Dated: July 14, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–17955 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute on Deafness and Other Communication Disorders; Notice of Meeting of an Ad Hoc Subcommittee of the National Deafness and Other Communication Disorders Advisory Council

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of an ad hoc subcommittee of the National Deafness and Other Communication Disorders Advisory Council on September 13, 1994. The meeting will be held at the National Institutes of Health, Building 31C, room 3C–05, 9000 Rockville Pike, Bethesda, Maryland.

The meeting will be open to the public for the duration of the meeting (8:30 a.m. until 3:00 p.m.) for discussion of a draft protocol for hearing aid clinical trials. Attendance by the public will be limited to space available.

Further information concerning the meeting may be obtained from Dr. Lynn E. Huerta, Executive Secretary, National Institute on Deafness and Other Communication Disorders Ad Hoc Advisory Committee on Hearing Aid Research and Development, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, Executive Plaza South, room 400C, Bethesda, Maryland 20892, 301–402–3461. Minutes of the meeting and a roster of the members may also be obtained from her office. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Dr. Huerta at least two weeks in advance of the meeting.

(Catalog of Federal Domestic Assistance Program No. 93.173 Biological Research Related to Deafness and Other Communication Disorders)

Dated: July 18, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–17957 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute on Deafness and Other Communication Disorders; Notice of Meetings of the Deafness and Other Communication Disorders Programs Advisory Committee

Pursuant to Pub. L. 92–463, notice is hereby given of meetings of the Deafness and Other Communication Disorders Programs Advisory Committee. The meetings are open to the public and will take place as telephone conference calls originating in room 400C, 8120 Executive Blvd., Rockville, MD 20852.

DATE: August 2, 1994.

TIME: 12 pm to 2 pm.

PURPOSE/AGENDA: To discuss future scientific initiatives in the areas of voice, speech and language.

DATE: August 4, 1994.

TIME: 1 pm to 3 pm.

PURPOSE/AGENDA: To discuss future scientific initiatives in the areas of smell and taste.

DATE: August 10, 1994.

TIME: 1 pm to 3 pm.

PURPOSE/AGENDA: To discuss future scientific initiatives in the areas of hearing, balance, and vestibular.

Further information concerning the meetings may be obtained from Dr. Ralph F. Naunton, Executive Secretary, DCD Programs Advisory Committee, National Institute on Deafness and Other Communication Disorders, Executive Plaza South, Room 400C, National Institutes of Health, Bethesda, Maryland 20892, 301–496–1804. Summaries of the meetings and rosters of the members may also be obtained from his office. For individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations, please contact Dr. Nauton prior to the meeting.

(Catalog of Federal Domestic Assistance Program No. 93.173 Biological Research Related to Deafness and Other Communication Disorders)

Dated: July 14, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–17956 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Meeting: National Digestive Diseases Advisory Board

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the National Digestive Diseases Advisory Board on September 26–27, 1994. On September 26, the meeting will begin at 9 a.m. and will adjourn at approximately 5 p.m. The focus of the morning portion of the meeting will be a discussion of "Future Needs in the Treatment of Viral Hepatitis". The afternoon portion will focus on biliary atresia. On September 27, the meeting will begin at 8:30 a.m. and will adjourn at approximately 4:30 p.m. The Board will discuss recommendations from the proceeding day's presentations and topics for the 1995 annual report. This meeting will be open to the public and will be held at the Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, Maryland 20814. Attendance by the public will be limited to space available. Notice of the meeting room will be posted in the hotel lobby.

For any further information, and for individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, please contact Ms. Tommie S. Tralka, Executive Director, National Digestive Diseases Advisory Board, 11426 Rockville Pike, Suite 410, Rockville, Maryland 20852, (301) 231–7537, two weeks prior to the meeting. In addition, her office will provide a membership roster of the Board and an agenda and summaries of the actual meetings.

(Catalog of Federal Domestic Assistance Program No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health.)

Dated: July 18, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–17958 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Meeting: The National Kidney and Urologic Diseases Advisory Board and the Research Subcommittee and The Health Care Issues Subcommittee

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the National Kidney and Urologic Diseases Advisory Board, National Institute of Diabetes and Digestive and Kidney Diseases, and its Subcommittees on September 12, 1994.

All meetings will be held, as listed below, at the Bethesda Marriott Hotel, 5151 Pooks Hill Road, Bethesda, Maryland, and will be open to the public, with attendance limited to space available.

For any further information, and for individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, please contact Dr. Ralph Bain, Executive Director, National Kidney and Urologic Diseases Advisory Board, 11426 Rockville Pike, Suite 410, Rockville, Maryland 20852, (301) 231–7537, two weeks prior to the meeting. In addition, his office will provide a membership roster of the Board and an agenda and summaries of the meetings.

Name of Committee: Research Subcommittee.
Date of Meeting: September 12.
Open: 8 a.m.–11 a.m.
Agenda: Discuss 1995 annual report content.

Name of Committee: Health Care Issues Subcommittee.
Date of Meeting: September 12.
Open: 8 a.m.–11 a.m.
Agenda: Discuss 1995 annual report content.

Name of Committee: National Kidney and Urologic Diseases Advisory Board.
Date of Meeting: September 12.
Open: 1 p.m.–4:30 p.m.
Agenda: Discuss topics and recommendations for the 1995 annual report.

(Catalog of Federal Domestic Assistance Program No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health.)

Dated: July 18, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–17959 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–M

Prospective Grant of Exclusive License: Biomedical Uses of Compounds of Structure X-[N(O)NO]-, (NONOates) which Spontaneously Release Nitric Oxide Into a Biological Medium

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of a partially exclusive license, limited by field of use, to practice the inventions embodied in patents listed below of this notice to Comedicus, Inc., having a place of business in Long Lake, MN. The patent rights in these inventions have been assigned to the Government of the United States of America. The patents and patent applications to be licensed are:

Title: STABILIZED NITRIC OXIDE PRIMARY AMINE COMPLEXES USEFUL AS CARDIOVASCULAR AGENTS, U.S. Patent No. 4,954,526

Title: ANTIHYPERTENSIVE COMPOUNDS OF SECONDARY AMINES-NITRIC OXIDE ADDUCTS AND USE THEREOF, U.S. Patent No. 5,039,705, U.S. Patent No. 5,208,233, and U.S. Patent Application S.N. 8/017,270

Title: ANTIHYPERTENSIVE COMPOSITIONS AND USE THEREOF, U.S. Patent No. 5,212,204

Title: COMPLEXES OF NITRIC OXIDE WITH POLYAMINES, U.S. Patent No. 5,155,137, and U.S. Patent No. 5,250,550

Title: OXYGEN SUBSTITUTED DERIVATIVES OF NUCLEOPHILE-NITRIC OXIDE ADDUCTS AS NITRIC OXIDE DONOR PRODUCTS, U.S. Patent Application S.N. 7/764,908 and U.S. Patent Application S.N. 7/950,637

Title: THERAPEUTIC INHIBITION OF PLATELET AGGREGATION BY NUCLEOPHILE-NITRIC OXIDE COMPLEXES AND DERIVATIVES THEREOF, U.S. Patent No. 5,185,376

Title: MIXED LIGAND METAL COMPLEXES OF NITRIC OXIDE NUCLEOPHILE ADDUCTS USEFUL AS CARDIOVASCULAR AGENTS, U.S. Patent Application S.N. 7/858,885

Title: POLYMER-BOUND NITRIC OXIDE/NUCLEOPHILE ADDUCT COMPOSITIONS, PHARMACEUTICAL COMPOSITIONS INCORPORATING SAME AND METHODS OF TREATING BIOLOGICAL DISORDERS USING SAME, U.S. Patent Application S.N. 7/935,565 and U.S. Patent Application S.N. 8/121,169

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 60 days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the licenses would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Nitric Oxide (NO) has been implicated as an

important bioregulatory mediator in a variety of processes including the normal physiological control of blood pressure, inhibition of platelet aggregation/adhesion, bronchodilation, neurotransmission, immunologically induced cytostasis and penile erection. National Cancer Institute scientists have discovered that compounds of the structure X-[N(O)NO]-, which will be designated as "NONOates", have the ability to sustain the release of nitric oxide into a biological medium. Various compounds of this family have been synthesized and shown to have different kinetics of NO release. Several of these compounds have been tested *in vitro* and *in vivo* in model systems and have shown potent biological effects.

Requests for a copy of these patent applications, inquiries, comments and other materials relating to the contemplated license should be directed to: Ms. Carol Lavrich, Office of Technology Transfer, National Institutes of Health, 6011 Executive Blvd., Rockville, MD 20892. Telephone: (301) 496–7735, ext. 287; Facsimile: (301) 402–0220. A signed confidentiality agreement will be required to receive copies of patent applications. Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Only written comments and/or applications for a competing license which are received by the NIH Office of Technology Transfer within sixty (60) days of this notice will be considered.

Dated: July 18, 1994.

Barbara M. McGarey,

Deputy Director, Office of Technology Transfer.

[FR Doc. 94–17960 Filed 7–22–94; 8:45 am]

BILLING CODE 4140–01–P

Substance Abuse and Mental Health Services Administration

RIN: 0905-ZA71

Substance Abuse Treatment Conference Grants

AGENCY: Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration (SAMHSA), HHS.

ACTION: Notice of Availability of Funds and Request for Applications.

SUMMARY: The Center for Substance Abuse Treatment (CSAT) is issuing this announcement for a program to support domestic conferences for the purpose of coordinating, exchanging, and disseminating information in furtherance of its mission to ensure the availability of effective treatment and recovery services for individuals who suffer from problems related to alcohol and other drugs (AOD) of abuse. This program is authorized under Section 507 of the Public Health Service Act.

Applications are invited for conferences relating to AOD abuse treatment, including conferences for the purposes of information dissemination to the services community and the general public, and development of strategies for improving substance abuse treatment. The intended audiences for this announcement are principally consumer and treatment services-oriented constituency groups, including those representing State and local government, professional associations, voluntary organizations, and self-help groups that share a mutual interest with CSAT with respect to community consensus building, leadership, and advocacy of goals relating to AOD abuse treatment.

This notice consists of three parts:

Part I covers information on the legislative authority and the applicable regulations and policies related to the Substance Abuse Treatment Conference Grants program.

Part II includes the programmatic description and activities and discusses eligibility, availability of funds, period of support and the receipt dates for applications.

Part III describes special requirements of the program, the application process, the review and award criteria and lists contacts for additional information.

Part I—Legislative Authority and Other Applicable Regulations and Policies

Grants awarded under this announcement are authorized under Section 507(b)(6) of the Public Health Service Act, as amended (42 U.S.C. 290bb).

Federal regulations at Title 45 CFR Parts 74 and 92, generic requirements concerning the administration of grants, are applicable to these awards.

Grants must be administered in accordance with the *PHS Grants Policy Statement* (Revised April 1, 1994).

The Catalog of Federal Domestic Assistance (CFDA) number for this program is 93.218.

As required by the "PHS Grants Policy Statement," grantees are responsible for submitting an original and two (2) copies of the final report to the Grants Management Office, CSAT, within 90 days of completion or termination of a grant in support of a conference.

Consistent with CSAT policy and in view of the addictive properties of nicotine and the established link between use of tobacco products and disease, the use of smoke-free conference meeting rooms is encouraged.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national public health initiative. This Program Announcement, Substance Abuse Treatment Conference Grants, is related to the priority areas of addictions as articulated in the National Drug Control Strategy (e.g., women and their children, hard core abusers, relationship between alcohol/drug abuse and violence, service needs/delivery within the criminal justice system, comorbidity or the provision of mental health services as part of addictions treatment, health care reform). Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report: Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325 (Telephone: 202–783–3238). The National Drug Control Strategy may be obtained by contacting the Drugs and Crime Clearinghouse (Telephone: 1–800–666–3332).

Part II—Programmatic Description and Activities, Eligibility and Application Receipt Date

Program Description: CSAT will provide support for up to fifty percent (to a maximum of $50,000) of the total costs of planned meetings and conferences sponsored by new or ongoing constituent organizations or coalitions in their efforts to provide treatment for drugs of abuse. In making award decisions, CSAT will give special consideration to applications that demonstrate the potential for knowledge dissemination, interface with health promotion concepts and practices, promote appropriate resource utilization and/or consensus building, and yield a product (report or document) of specific relevance to furthering of the CSAT mission of improved delivery of addiction treatment and recovery services at the State or community level.

For the purposes of this grant program, a Conference is a symposium, workshop, or any other organized and formal meeting lasting one or more days where persons assemble to exchange information and address information or strategy development needs in such areas as sharing new technologies, problem-solving, network-building or public policy deliberations. While a

conference may result in educational experiences, this is not a program to impart training. The conference program should be consistent with the CSAT mission. Under the authority of Section 507, CSAT may sponsor regional workshops on improving the quality and availability of treatment services; however, sponsors of regional workshops may invite people from other regions in the country. The conference may be conducted at more than one site, provided that each separate workshop, meeting, etc., relates directly to the central conference topic.

Conferences supported by this program are not intended to carry out research or to synthesize or disseminate research information for the non-clinical scientific research community. However, transmitting scientific information via the conference to those involved in AOD related services or in training to provide AOD services is supportable.

This program addresses the HHS Secretary's themes of fostering independence through empowering the people served, preventing future problems, and improving services to customers through modern management approaches.

Eligibility: Applications may be submitted by public and non-profit private entities. An individual is not eligible to receive grant support for a conference.

Availability of Funds: It is estimated that approximately $400,000 will be available to support approximately eight (8) awards under this program in FY 1995. Actual funding levels will depend upon the availability of appropriated funds.

Approved awards will be limited to a maximum of fifty percent of the total costs or $50,000, whichever is less.

Period of Support: Awards will be made for a maximum of 12 months. Support for only one conference, as defined above, may be requested in any single application.

Application Receipt and Review Schedule: The first receipt date for applications is October 24, 1994. Thereafter, the schedule for receipt and review of applications under this announcement will be as follows:

Receipt date	IRG review	Earliest start date
January 10	May/June	September.
May 10	September/October.	February.
September 10	January/February.	June.

Applications must be received by the above receipt date(s) to be accepted for review. An application received after the deadline may be acceptable if it carries a legible proof-of-mailing date assigned by the carrier (private metered postmarks are not acceptable as proof of timely mailing) and that date is not later than one week prior to the deadline date. If the receipt date falls on a weekend, it will be extended to Monday; if the date falls on a holiday, it will be extended to the following work day.

Consequences of Late Submission: Applications received after the specified receipt dates are subject to assignment to the next review cycle or may be returned to the applicant without review.

Part III—Special Requirements, Review/Award Criteria and Contacts for Additional Information

Intergovernmental Review (E.O. 12372): Applications submitted in response to this announcement are subject to the intergovernmental review requirements of Executive Order 12372, as implemented through DHHS regulations at 45 CFR Part 100. E.O. 12372 sets up a system for State and local government review of applications for Federal financial assistance. Applicants (other than Federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert them to the prospective application(s) and to receive any necessary instructions on the State process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC of each affected State. A current listing of SPOCs is included in the application kit. The SPOC should send any state process recommendations to the following address: Review Branch, Center for Substance Abuse Treatment, Rockwall II Building, 10th Floor, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–8923.

The due date for state process recommendations is no later than 60 days after the deadline date for the receipt of applications. CSAT does not guarantee to accommodate or explain SPOC comments that are received after the 60-day cut-off.

Public Health System Reporting Requirements: The program is not subject to the Public Health System Reporting Requirements.

Application Procedures: Grant application kits (including Form PHS 5161–1, with Standard Form 424 and complete application procedures) may be obtained from: National Clearinghouse for Alcohol & Drug Information, P.O. Box 2345, Rockville, Maryland 20847–2345, 1–800–729–6686.

Applicants must submit: (1) an original copy signed by the authorized official of the applicant organization, with the appropriate appendices; and (2) two additional, legible copies of the application and all appendices to the following address: Center for Substance Abuse Treatment Programs, Division of Research Grants, NIH, Westwood Building, room 240, 5333 Westbard Avenue, Bethesda, Maryland 20892.*

Review Process: Applications submitted in response to this announcement will be reviewed for technical merit in accordance with established PHS/SAMHSA peer review procedures for grants.

Applications that are accepted for review will be assigned to an Initial Review Group (IRG) composed primarily of non-Federal experts. Notification of the IRG's recommendation will be sent to the applicant upon completion of the review.

Review Criteria

1. Potential Significance (30%)

The extent to which the proposed conference has potential regional or national significance for the field of drug abuse treatment.

2. Approach (20%)

Clarity and justification of overall goals, objectives, and approach of the conference. Feasibility of the conference agenda/content and relevance to CSAT mission to improve the delivery of substance abuse treatment and recovery services. Extent to which proposal supports inter-agency collaboration. Adequacy of plan for conference product (proceedings, manual, report).

3. Resources and Management (20%)

Manner in which the conference is planned and organized. Presence of an administrative and organizational structure that will facilitate attainment of the proposed objective(s) of the conference. Capability/experience of the proposed conference director and other

*If an overnight carrier or express mail is used, the Zip Code is 20816.

key personnel. Participation of appropriate speakers, presenters or participants. Adequacy of previous reports of conferences (if any) produced by the applicant.

4. Budget (25%)

Cost effectiveness and reasonableness of overall project cost relative to planned activities. Appropriateness of budget breakouts and line item justifications.

5. Evaluation (5%)

Clarity/feasibility/appropriateness of proposed plan for evaluation of conference planning, content and outcome, including the production of the required conference product.

Award Decision Criteria: Applications will be considered for funding on the basis of overall technical merit of the project as determined through the review process. Other criteria will include:

1. Potential for knowledge dissemination, interface with health promotion concepts and practices, promotion of resource utilization and/or consensus building.

2. Relevance to the CSAT/SAMHSA priorities addressed by the National Drug Control Strategy (e.g., women and their children, hard core abusers, relationship between alcohol/drug abuse and violence, service needs/delivery within the criminal justice system, comorbidity or the provision of mental health services as part of addictions treatment, health care reform).

3. Programmatic balance (focus upon differing problems of drug treatment, including the issues of cultural sensitivity, HIV/AIDS, sexually transmitted diseases, and tuberculosis.

4. Innovative conferences/conferencing techniques (e.g., teleconferencing, Delphi Computer conferencing).

5. Geographic balance.

6. Availability of funds.

CONTACTS FOR ADDITIONAL INFORMATION: Questions concerning program issues may be directed to: Susanne R. Rohrer, R.N., Office of Scientific Analysis and Evaluation, Center for Substance Abuse Treatment, Rockwall II Building, 10th Floor, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–8831.

Questions regarding grants management issues may be directed to: Grants Management Office, Center for Substance Abuse Treatment, Rockwall II Building, 10th Floor, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–6533.

Dated: July 18, 1994.

Richard Kopanda,

Acting Executive Officer, SAMHSA.

[FR Doc. 94–18050 Filed 7–22–94; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. N–94–3799; FR–3752–N–01]

Notice of HUD Headquarters Review of Rating, Ranking, and Selection Under Fiscal Year 1994 Notices of Funding Availability (NOFAs) for the Section 8 Rental Certificate and Rental Voucher Programs

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, (HUD).

ACTION: Notice.

SUMMARY: This Notice announces that, for the remainder of Federal Fiscal Year 1994, HUD Headquarters may review HUD State and Area Office ratings of public housing agency (HA) applications under Notices of Funding Availability (NOFAs) for Section 8 rental voucher and certificate program and related funding, and may rerate the applications.

FOR FURTHER INFORMATION CONTACT: Gerald J. Benoit, Director, Operations Branch, Rental Assistance Division, Office of Public and Indian Housing, Department of Housing and Urban Development, room 4220, 451 Seventh Street, SW, Washington, DC 20410–8000, telephone number (202) 708–0477. Hearing or speech impaired individuals may call HUD's TDD number (202) 708–4594. (These numbers are not toll-free.).

SUPPLEMENTARY INFORMATION: This Notice announces that, for the remainder of Federal Fiscal Year 1994, HUD Headquarters may review HUD State and Area Office ratings of public housing agency (HA) applications under Notices of Funding Availability (NOFAs) for Section 8 rental voucher and certificate program and related funding, and may rerate the applications.

The HUD Headquarters review will follow the rating and selection criteria published in the NOFAs and will ensure that HUD State and Area Office ratings of HA applications are appropriate and consistent among HUD Offices.

This Notice pertains to the following Section 8 program NOFAs that have been published or that will be published during the remainder of FY 1994:

1. Section 8 Rental Voucher Set-Aside for Homeless Persons With Disabilities—published February 1, 1994.

2. HOPE for Elderly Independence Multifamily Project Demonstration in HUD Region I—published April 5, 1994.

3. Service Coordinators for the HOPE for Elderly Independence Program—published July 6, 1994.

4. NOFA for the Rental Voucher Program and Rental Certificate Program—published July 11, 1994.

5. Section 8 Set Aside for Homeless Veterans With Severe Psychiatric or Substance Abuse Disorders—published July 14, 1994.

6. Moving to Opportunity for Fair Housing Demonstration—to be published.

7. Family Unification Program—to be published.

8. Family Self-Sufficiency Program Coordinators for the Section 8 Rental Certificate and Rental Voucher Programs—to be published.

Dated: July 13, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94–18010 Filed 7–22–94; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

DEPARTMENT OF ENERGY

Bonneville Power Administration

Notice of Intent To Prepare an Environmental Impact Statement To Examine the Impacts of Artificial Production on Columbia River Fish To Facilitate Management Decisions Regarding Existing or Proposed Fish Hatchery Programs

AGENCIES: U.S. Fish and Wildlife Service, National Marine Fisheries Service, Bonneville Power Administration.

ACTION: Notice.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the Bonneville Power Administration (BPA) intend to gather information necessary for the preparation of a Programmatic Environmental Impact Statement (PEIS). The purpose of the PEIS is to assess the relative risks associated with alternative

hatchery operating scenarios and to identify opportunity for maintaining biological diversity, promoting the integrated operation of Columbia River anadromous fish hatcheries, minimizing risks to long-term fitness of stocks, fulfilling Federal treaty trust responsibilities to Native Americans, accomplishing mitigation obligations to provide for other fisheries, and protecting and recovering fish stocks listed under the Endangered Species Act.

This notice is being furnished pursuant to the Council on Environmental Quality Regulations for Implementing The Procedural Provisions of the National Environmental Policy Act (NEPA) Regulations (40 CFR 1508.22).

To satisfy Federal environmental policy requirements, the USFWS, NMFS, and BPA are conducting a joint scoping process for the preparation of the PEIS. Interested agencies, organizations, and individuals are encouraged to provide written comments of the issues which should be addressed in the PEIS.

DATES: Public meetings concerning the scope of issues to be addressed in the PEIS will be held:

August 2, 1994, at the Red Lion, 1800 Fairview, Boise, ID.

August 3, 1994, at the Red Lion-Hanford House, 802 George Washington Way, Richland, WA.

August 4, 1994, at the Red Lion, Seattle Airport, 18740 Pacific Highway South, Seattle, WA.

August 9, 1994, at the Red Lion, 400 Industry Street, Astoria, OR.

August 10, 1994, at the Red Lion-Downtown, 310 SW Lincoln, Portland, OR.

All meetings are scheduled from 7–9:30 p.m.

ADDRESS: Comments regarding the scope of the PEIS should be addressed to Sampsel Consulting Services, P.O. Box 1249, Ocean Park, WA, 98640 and should be received by September 9, 1994.

FOR FURTHER INFORMATION: Contact Roy Sampsel (Sampsel Consulting) at the above address or telephone 206/665–6051 or Brian Kinnear (Columbia Basin Fish and Wildlife Authority) at 503/326–7031.

SUPPLEMENTARY INFORMATION: USFWS, NMFS, and BPA need a better understanding of the cumulative effects of the interaction between anadromous fish produced under current fish hatchery programs and naturally spawning salmon and steelhead in the Columbia River Basin

The need for a comprehensive analysis has arisen because:

- There are approximately 90 Federally operated and/or funded anadromous fish hatcheries in the Columbia River system and more facilities are planned.
- Most of these hatcheries and facilities were designed and constructed to augment the naturally spawning salmon and steelhead runs that were severely depleted by Federally funded or licensed water development throughout the Columbia River Basin.
- The augmentation was intended to mitigate for fisheries losses experienced by non-Indian sport and commercial fisheries as well as to meet treaty trust responsibilities to Native Americans.
- Since construction, and although original objectives remain unmet, the scope of this hatchery system's obligations has been substantially expanded to meet:

(1) Protection and recovery of threatened and endangered species.

(2) Production obligations incurred under the auspices of the U.S./Canada negotiations.

(3) The court approved Columbia River Salmon and Steelhead Management Framework Plan.

- Regional human population growth has increased demands for consumptive use of salmon at a time when natural production habitat conditions such as instream flow, spawning gravels, streamside vegetation, etc. are at an all time low.
- Public pressure on Federal agencies has increased to meet all of these demands while insuring minimal risk to the genetic integrity of naturally spawning populations.

In the proposed PEIS, an array of alternatives with a range of artificial vs. natural production strategies will be evaluated pursuant to NEPA. As envisioned, this document will serve as a foundation for planning at the hatchery level and site-specific environmental analysis may be tiered off of this document.

Any proposed Federal actions evolving from this evaluation may or may not be a departure from current fish hatchery operating programs.

Dated: July 18, 1994.

For the U.S. Fish and Wildlife Service:

Michael J. Spear,

Regional Director.

Dated: July 18, 1994.

For the National Marine Fisheries Service:

J. Gary Smith,

Acting Regional Director.

Dated: July 18, 1994.

For the Bonneville Power Administration:

Randall W. Hardy,

Administrator.

(Notice: Notice of Intent to Prepare an Environmental Impact Statement to comprehensively examine the potential impacts of artificial production on Columbia River fish to facilitate management decisions regarding existing or proposed fish hatchery programs)

[FR Doc. 94–17940 Filed 7–22–94; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–964–4230–05–P; F–19525–A2 and F–19525–B2]

Alaska Native Claims Selections

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of Sec. 14(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(a), will be issued to Council Native Corporation for approximately 14,858.25 acres. The lands involved are in the vicinity of Council, Alaska, within Tps. 5 and 6 S., Rs. 25 W., Kateel River Meridian, Alaska.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in The Nome Nugget. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599 [(907) 271–5960].

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until August 24, 1994 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

Ana M. Stafford,

Land Law Examiner, Branch of Northern Adjudication.

[FR Doc. 94–17976 Filed 7–22–94; 8:45 am]

BILLING CODE 4310–JA–P

[UT-050-04-4210-05]

Proposed Plan Amendment

AGENCY: Bureau of Land Management, Interior.

ACTION: This notice of intent is to advise the public that the Bureau of Land Management (BLM) intends to consider a proposal which would require amending an existing planning document.

SUMMARY: The BLM is proposing to amend the Warm Springs Resource Management Plan, which includes BLM-administered lands in Millard County, Utah. The purpose of the amendment would be to identify certain lands as suitable for transfer to the State of Utah, through State indemnity selection, for agricultural purposes.

DATES: The comment period for this proposed plan amendment will commence with the date of publication of this notice. Comments must be submitted on or before August 24, 1994.

ADDRESSES: Comments on the proposed plan amendment should be sent to F. Rex Rowley, Bureau of Land Management, Warm Springs Resource Area Manager, 15 East 500 North, P.O. Box 778, Fillmore, Utah 84631. Existing planning documents and information are available at the above address or telephone (801) 743-6811.

SUPPLEMENTARY INFORMATION: The lands identified for transfer comprise 200 acres in Millard County described as follows: T. 21 S., R. 19 W., Sec. 29, W½SW¼, E½SE¼, SW¼SE¼, Salt Lake Meridian, Utah. The existing plan does not identify these lands for disposal. However, the State of Utah filed a State indemnity selection application, UTU-71695, to have 200 acres of Federally owned land and interest in land transferred to the State of Utah pursuant to sections 2275 and 2276 of the Revised Statutes, as amended, (43 U.S.C. 851-852). Satisfaction of indemnity selection rights and disposal of parcels for that purpose are considered as "serving the national interest" in the context of Section 102(a)(1) of the *Federal Land Policy and Management Act of 1976* (FLPMA) and in connection with land use planning. Therefore, this proposal appears to have merit and will be considered through the plan amendment process.

A.J. Meredith,

Acting State Director.

[FR Doc. 94-17951 Filed 7-22-94; 8:45 am]

BILLING CODE 4310-DQ-M

Office of Surface Mining Reclamation and Enforcement

Notice of Intent To Prepare a Supplemental Environmental Impact Statement

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

AGENCY: Notice of intent to prepare a supplemental environmental impact statement and announcement of a period during which written comments regarding the scope of the environmental impact statement (EIS) analysis will be received.

SUMMARY: Notice is hereby given that the office of Surface Mining Reclamation and Enforcement (OSM) intends to prepare a supplemental EIS to the 1990 Bureau of Land Management EIS that will update the identified impacts and analyze and new probable impacts of mining at the Proposed Fence Lake Mine, Cibola and Catron Counties, New Mexico and Apache County, Arizona. As required by the New Mexico State Program, Salt River Project (SRP) has submitted an administratively complete permit application for the proposed surface coal mine. The permit application contains life-of-mine information that the Department of the Interior will use to evaluate alternative actions in the EIS and will assist the Department in making decisions on the surface coal mining operation northwest of Quemado, New Mexico and in the State of Arizona. OSM requests that other agencies and the public submit written comments or statements to it concerning the scope of the EIS analysis.

DATES: Written comments or statements concerning the scope of the EIS will be accepted through September 15, 1994, at the location given under **ADDRESSES.**

ADDRESSES: Written comments or statements concerning the scope of the EIS should be mailed or hand delivered to Russell F. Price, Acting Assistant Director, Attn: Billie E. Clark, Jr., OSM, Western Support Center, 1999 Broadway, Suite 3320, Denver, Colorado 80202-5733.

FOR FURTHER INFORMATION CONTACT: Billie E. Clark, Jr., Chief, Federal and Indian Permitting Branch, at the Denver, Colorado, location giver under **ADDRESSES** (telephone: 303-672-5604).

SUPPLEMENTARY INFORMATION: SRP's proposed Fence Lake Mine consists of Federal, State and private coal leases situated on approximately 18,000 acres northwest of Quemado, New Mexico. The Federal Coal Leases Nos. are NMNM 78371 and NMNM 86717. The proposed mine would remove approximately 80 million tons of coal, by surface methods, over the 47 year life-of-mine. Approximately 1.8 million tons of coal would be removed per year through year 28 with about 3 million tons of coal per year being removed from year 29 through year 40. The project described in the application also includes a proposed 45-mile railroad spur that would be constructed west from the mine to supply coal to the existing Coronado Generating Station, located approximately 6 miles from St. Johns, Arizona.

OSM will prepare the supplemental EIS, which will evaluate alternative actions that the Department could take on Federal decisions related to this project. In accordance with the New Mexico State Program the New Mexico Mining and Minerals Department must take permitting actions on the proposed surface coal mining operation within the State of New Mexico. The major alternative actions thus far identified for consideration are approval of the mining plan and permit application with such conditions, if any, as would be necessary to assure it compliance with requirements of the Surface mining Control and Reclamation Act of 1977, its implementing regulations, and other Federal laws; disapproval of the mining plan and permit application; and no action. Other alternative actions may be identified based on comments received by OSM regarding the scope of the supplemental EIS analysis.

OSM is requesting that any interested party submit written comments or statements regarding the scope of the supplemental EIS. Comments/statements regarding the scope of the supplemental EIS. Comments/statements received by OSM will assist that agency in gathering information and further defining existing issues or identifying new issues or concerns that the supplemental EIS should address. Public meetings will be held in the vicinity of the proposed Fence Lake surface coal mining operation to allow presentation of oral comments and statements prior to the closing of the scoping comment period. Actual times and locations of these meetings will be announced in local newspapers at a later date.

Dated: July 20, 1994.

Brent Wahlquist,

Assistant Director, Reclamation and Regulatory Policy.

[FR Doc. 94-18023 Filed 7-22-94; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF JUSTICE

Information Collections Under Review

The Office of Management and Budget (OMB) has been sent the following collection(s) of information proposals for review under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) and the Paperwork Reduction Reauthorization Act since the last list was published. Entries are grouped into submission categories, with each entry containing the following information:

(1) the title of the form/collection;

(2) the agency form number, if any, and the applicable component of the Department sponsoring the collection;

(3) how often the form must be filled out or the information is collected;

(4) who will be asked or required to respond, as well as a brief abstract;

(5) an estimate of the total number of respondents and the amount of time estimated for an average respondent to respond;

(6) an estimate of the total public burden (in hours) associated with the collection; and,

(7) an indication as to whether Section 3504(h) of Public Law 96–511 applies.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the OMB reviewer, Mr. Jeff Hill on (202) 395–7340 and to the Department of Justice's Clearance Officer, Mr. Robert B. Briggs, on (202) 514–4319. If you anticipate commenting on a form/collection, but find that time to prepare such comments will prevent you from prompt submission, you should notify the OMB reviewer and the Department of Justice Clearance Officer of your intent as soon as possible. Written comments regarding the burden estimate or any other aspect of the collection may be submitted to Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, and to Mr. Robert B. Briggs, Department of Justice Clearance Officer, Systems Policy Staff/Information Resources Management/Justice Management Division Suite 850, WCTR, Washington, DC 20530.

Revision of a Currently Approved Collection

(1) Victims of Crime Act, Crime Victim Compensation Grant Program, Program Performance Report (Revised).

(2) OJP Form 7390/2. Office of Justice Programs.

(3) Annually.

(4) State and Local Governments. The information requested is necessary to generate and submit a statutorily required report to the President and the Congress on the effectiveness of the Victims of Crime Act, as amended, and to ensure grantees' compliance with statutory criteria. The affected public includes up to 52 states and territories administering the crime victim compensation grant program.

(5) 52 respondents a 1 hour per response.

(6) 104 annual burden hours.

(7) Not applicable under Section 3504(h) of Public Law 96–511.

Dated: July 15, 1994.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 94–17978 Filed 7–22–94; 8:45 am]

BILLING CODE 4410–18–M

Drug Enforcement Administration

[Docket No. 89–46]

James H. Brown, M.D.; Revocation of Registration

On May 26, 1989, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to James H. Brown, M.D. (Respondent), of New Orleans, Louisiana, proposing to revoke his DEA Certificate of Registration, AB3370967, and deny any pending applications for renewal of such registration. The statutory basis for the Order to Show Cause was that Dr. Brown's continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).

Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause. Following prehearing procedures, a hearing was held in New Orleans, Louisiana, on March 31 and April 1, 1993. On January 25, 1994, in her findings of fact, conclusions of law, and recommended ruling, the administrative law judge recommended that Respondent's DEA Certificate of Registration be revoked.

On February 11, 1994, Respondent filed exceptions to Judge Bittner's recommended ruling pursuant to 21 CFR 1316.66, and on February 28, 1994, the administrative law judge transmitted the record to the then-Acting Administrator. The Deputy Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The administrative law judge found that the Respondent is a psychiatrist who graduated from medical school in 1947. Respondent, as of the date of the hearing, maintained a private practice as a psychiatrist in New Orleans, Louisiana.

The administrative law judge found that in November or December 1986, an informant told DEA that Respondent issued prescriptions for controlled substances in exchange for money. Consequently, on several occasions between December 3, 1986 and February 26, 1987, the informant and an undercover police officer purchased controlled substance prescriptions from Respondent for no legitimate medical reason.

During the first visit on December 3, 1986, the informant advised the Respondent that she wanted to purchase Valium, a Schedule IV controlled substance, to use with her boyfriend. The informant did not provide the Respondent with any medical problem or condition, and paid the Respondent $80.00 in exchange for a prescription for 60 dosage units of Valium.

During the second visit on December 12, 1986, the informant told the Respondent that her boyfriend had swapped some of the Valium Respondent had prescribed for Seconal, a Schedule II controlled substance. The informant then asked for some Seconal, telling Respondent that she and her friends liked to use the drug. The Respondent issued a prescription for 30 Seconal in exchange for $80, and told the informant to destroy the pill bottle.

On January 8, 1987, an undercover police officer accompanied the informant to Respondent's office, posing as her boyfriend. The Respondent wrote both the undercover officer and the informant prescriptions for 30 Seconal in exchange for $160. The officer testified at the hearing that Respondent did not perform any physical examination on either of them, nor was there any discussion of any medical problems.

On February 10, 1987, the informant returned alone to Respondent's office. Respondent issued two prescriptions, one in the informant's name, and one in the name of the undercover officer. Each prescription was for 30 Seconal and informant paid the Respondent $160. On February 26, 1987, the undercover officer went to Respondent's office alone,and received two prescriptions for Seconal, in exchange for $160, again with one prescription in the name of the undercover officer and the other in the informant's name.

On August 3, 1987, a search warrant was executed at Respondent's office which revealed handwritten notes regarding the informant and the undercover officer in a file, and prescription bottles of various controlled substances which bore the names of other physicians. Respondent stated that the bottles were brought in by patients who no longer used those drugs, and that he dispensed them to other patients as needed. Respondent did not maintain an inventory of the drugs nor did he know the expiration dates of the medication. Respondent testified at the hearing that patients sometimes gave him medications they they had been prescribed by other physicians, and that he sometimes gave small quantities of these drugs to other patients as a trial before issuing prescriptions for the patients.

On July 30, 1987, Respondent was indicted by the grand jury of the United States District Court for the Eastern District of Louisiana on eight felony counts of violating 21 U.S.C. 841 for issuing prescriptions for controlled substances to the informant and the officer. On September 15, 1987, a superseding information was filed charging Respondent with one misdemeanor count of violating 18 U.S.C. 2 and 21 U.S.C. 844 by aiding and abetting the possession of Valium that was not dispensed in the normal course of professional practice or for a legitimate medical purpose. On September 17, 1987, Respondent pled guilty to the misdemeanor count, and the indictment was dismissed. On November 20, 1987, Respondent was placed on two years active probation, ordered to perform 250 hours of community service, fined $25,000, and ordered to pay a special assessment of $25. On March 29, 1988, the court denied Respondent's motion for reduction of sentence.

On November 12, 1987, Respondent surrendered his DEA registration with respect to Schedule II controlled substances. Respondent testified that he was initially asked to surrender his registration in all schedules, but refused, believing that he was to retain his Schedule III through V privileges as part of the plea agreement, and that when he was later issued a registration in Schedules III through V, he understood it to be pursuant to the plea agreement. The administrative law judge found that the plea agreement specified that Respondent would surrender his DEA registration in Schedule II, did not refer to Schedules III through V, and explicitly stated that "no other promise has been made or implied by or for either the [Respondent] or the [United States Attorney's Office]".

On March 5, 1993, Respondent filed a Motion to Enforce Plea Agreement in the United States District Court for the Eastern District of Louisiana, alleging that he agreed to plead guilty to a misdemeanor and to surrender his DEA registration in Schedules I and II in return for the Government's agreement to dismiss the indictment and forego forfeiture and administrative revocation proceedings. On March 10, 1993, the court denied Respondent's motion on grounds that the plea agreement was not ambiguous but, rather, silent as to Respondent's Schedule III through V privileges, and that if it had been the intention of the parties to preclude DEA from proceeding against Respondent's registration in those schedules, it could have been indicated in the plea agreement.

The administrative law judge found that on July 22, and November 18, 1988, the Louisiana State Board of Medical Examiners (Board) conducted a hearing on charges that Respondent's prescribing to the informant and the officer violated the Louisiana Medical Practice Act. On December 9, 1988, the Board issued a decision in which it found that Respondent's prescribing was for an illegitimate purpose motivated by financial gain. However, based on its finding that Respondent's activity was unlikely to recur in the future, the Board suspended Respondent's medical license for two years, stayed all but four months of the suspension and imposed terms of probation, including that Respondent not handle any controlled substances, that he obtain at least 50 hours of continuing medical education per year, and that he pay a fine of $5,000.

On December 19, 1988, Respondent filed an Application for Rehearing, which was denied by the Board on January 5, 1989. Respondent then filed a request in state court for reversal of the Board's order or a remind for further proceedings. Following an evidentiary hearing, on April 29, 1991, the court remanded the case to the Board for issuance of a new decision. On June 20, 1991, the Board issued another decision making the same findings and imposing the same sanctions as the initial decision. Respondent again appealed to the court, which stayed the Board's order. The stay was still in effect as of the date of the hearing in this matter.

Respondent admitted at the administrative hearing that he was "lax" with respect to his prescribing to the informant and the officer. Respondent also testified that the individuals paid him for their office visits, not for the prescriptions, and that the informant told him that she was nervous and had headaches. However, Respondent later acknowledged that the informant denied having headaches or tension, and that Seconal is not prescribed for headaches. Respondent testified that he believed that the informant and the undercover officer manipulated him. The Respondent further testified that the loss of his DEA registration would make it difficult to treat his patients, and to his willingness to cooperate with DEA in verifying compliance with the rules and regulations surrounding a DEA registration.

Respondent presented the testimony of several witnesses as to his professional competence and concern for his patients. Included among these witnesses was a patient of Respondent, two psychiatrists, Respondent's brother, two of his sons, as well as his daughter-in-law. The witnesses testified to Respondent's exemplary character and his exceptional abilities as a medical provider; to the devastating impact of the criminal and disciplinary proceedings upon the Respondent; and to the unlikelihood that Respondent would abuse his controlled substance privileges in the future. However, the administrative law judge accorded little weight to their testimony since the witnesses did not appear to be fully apprised of the extent of Respondent's misconduct.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4) the Deputy Administrator may revoke a registration and deny any application for such registration, if he determines that the continued registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered.

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

It is well established that these factors are to be considered in the disjunctive, i.e., the Administrator may properly rely on any one or a combination of the factors and give each factor the weight he deems appropriate. *See Henry J. Schwarz, Jr., M.D.*, Docket No. 88–42, 54 FR 16422 (1989).

In considering whether grounds exist to revoke Respondent's DEA registration, the administrative law judge found factors one through four relevant in light of the evidence regarding the prescriptions Respondent issued to the informant and undercover police officer; his transfer of controlled substances among patients; the action taken by the Board; and Respondent's subsequent conviction.

The administrative law judge found that the informant obtained Valium from the Respondent on her first visit to him, although she presented no medical condition warranting the prescription. The administrative law judge also found that on the next visit, the informant told Respondent that her boyfriend swapped some of the previously prescribed Valium for Seconal; Respondent warned the informant that she should not use the drug "just to get high"; and the informant did not indicate any medical need for controlled substances. Nonetheless, Respondent gave the informant a prescription for Seconal. In addition, Respondent issued prescriptions for Seconal for the informant and the undercover officer when they visited him together; when the informant later visited Respondent by herself; and when the officer subsequently visited Respondent by himself.

The administrative law judge found that the Respondent took no medical history and conducted no physical examinations during any of the visits, and that neither of the individuals demonstrated a medical need for the prescriptions they received. Therefore, the administrative law judge found that Respondent's prescriptions to the informant and the officer were not issued for a legitimate medical purpose.

The administrative law judge further found that although Respondent conceded that he was "lax" in his prescribing of controlled substances, he has not acknowledged that he abused the privileges he held as a DEA registrant, and that under the circumstances, little credence should be placed upon Respondent's testimony that he will be more careful in the future if permitted to retain his DEA registration in Schedules III through V. Therefore, Judge Bittner concluded that Respondent's continued registration would not be consistent with the public interest, and recommended that Respondent's DEA registration be revoked and that any pending applications be denied. The Respondent filed exceptions to the administrative law judge's recommendation incorporating the arguments in his post-hearing brief filed on July 17, 1993.

The Deputy Administrator having considered the entire record adopts the administrative law judge's findings of fact, conclusion of law, and recommended ruling in its entirety. The Deputy Administrator considered the arguments made by Respondent in his exceptions to the extent already considered by the administrative law judge in rendering her recommendation and adopted herein.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104 (59 FR 23637), hereby orders that DEA Certificate of Registration, AB3370967, issued to James H. Brown, M.D., be and it hereby is, revoked, and any pending applications be, and they hereby are, denied. This order is effective August 24, 1994.

Dated: July 15, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–17946 Filed 7–22–94; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 94–18]

Roland W. Jones III, M.D.; Revocation of Registration

On August 25, 1993, the Deputy Assistant Administrator, (then-Director), Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Roland W. Jones, III, M.D. (Respondent), of Orange, Texas. The Order to Show Cause proposed to revoke Dr. Jones' DEA Certificate of Registration, AJ1690406, and deny any pending applications for renewal of such registration. The Order to Show Cause alleged that Respondent was not currently authorized to handle controlled substances in the State of Texas and that Respondent's continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4).

The Order to Show Cause alleged that on November 9, 1990, the Texas State Board of Medical Examiners (Board) placed Respondent's license to practice medicine on ten years probation with several terms and conditions. The Board found that Respondent engaged in the intemperate use of alcohol, that he had been disciplined by a hospital, and that he failed to keep accurate records of purchases and disposals of controlled substances.

The Order to Show Cause further alleged that based upon Respondent's failure to follow the terms and conditions of the November 9, 1990 probation order, effective August 20, 1992, the Board suspended Respondent's state license to practice medicine. In addition, effective June 26, 1992, the Texas Department of Public Safety canceled Respondent's state registration to handle controlled substances. As a result, Respondent is no longer authorized by state law to handle controlled substances.

Respondent filed a request for a hearing on the issues raised by the Order to Show Cause, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. On January 24, 1994, the Government filed a motion for summary disposition, which was accompanied by a copy of the Texas Department of Public Safety Certification of Non-Registration. Respondent did not file a response to the Government's motion.

On February 28, 1994, in her opinion and recommended decision, the administrative law judge found that the Respondent did not deny that his state license to practice medicine has been suspended or that his state registration to handle controlled substances has been canceled. The administrative law judge therefore, granted the Government's motion for summary disposition and recommended that Respondent's DEA Certificate of Registration be revoked.

On March 30, 1994, The administrative law judge transmitted the record to the Administrator. The Deputy Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The Deputy Administrator adopts the opinion and recommended decision of the administrative law judge in its entirety. The Drug Enforcement Administration cannot register or maintain the registration of a practitioner who is not duly authorized to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. *See James H. Nickens, M.D.*, 57 FR 59847 (1992); *Elliott Monroe, M.D.*, 57 FR 23246 (1992); *Bobby Watts, M.D.*, 53 FR 11919 (1988).

The administrative law judge properly granted the Government's motion for summary disposition. It is well-settled that when no question of fact is involved, or when the facts are agreed upon, a plenary, adversary administrative proceeding involving evidence and cross-examination of

witnesses is not obligatory. The rationale is that Congress does not intend administrative agencies to perform meaningless tasks. *Phillip E. Kirk, M.D.*, 48 FR 32887 (1983), *aff'd sub nom Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984); *Alfred Tennyson Smurthwaite, N.D.*, 43 FR 11873 (1978); *see also, NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO*, 549 F.2d 634 (9th Cir. 1977); *United States v. Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971).

Since Respondent is not currently authorized to handle controlled substances in the State of Texas, it is not necessary to reach a conclusion regarding whether his continued registration is inconsistent with the public interest.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104 (59 FR 23637), hereby orders that DEA Certificate of Registration, AJ1690406, previously issued to Roland W. Jones, III, M.D., be, and it hereby is, revoked and that any pending applications for renewal of such registration be, and they hereby are, denied. This order is effective August 24, 1994.

Dated: July 15, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–17947 Filed 7–22–94; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 94–21]

Boitshoko P. Marang, M.D.; Revocation of Registration

On December 10, 1993, the Acting Administrator of the Drug Enforcement Administration (DEA), issued an Order to Show Cause and Immediate Suspension of Registration to Boitshoko P. Marang, M.D. (Respondent). The Order to Show Cause proposed to revoke DEA Certificate of Registration, BM1482506, and deny any pending applications for renewal of such registration. The grounds for the issuance of the Order to Show Cause were that the State of Michigan had revoked Respondent's license to practice medicine and that his continued registration would be inconsistent with the public interest. Additionally, citing his preliminary finding that Respondent's continued registration posed an imminent danger to the public health and safety, the Acting Administrator ordered the immediate suspension of Respondent's registration pending the outcome of these proceedings. 21 U.S.C. 824(d).

On December 10, 1993, the Order to Show Cause and Immediate Suspension of Registration was personally served on Respondent at the Wayne County Jail, 570 Clinton Street, Detroit, Michigan. By letter dated January 9, 1994, Respondent requested a hearing on the issues raised in the Order to Show Cause. The matter was placed on the docket of Administrative Law Judge Paul A. Tenney. On February 15, 1994, the Government filed a motion for summary disposition. A copy of the motion was forwarded to Respondent at the address he provided in his request for a hearing, the Wayne County Jail.

The envelope which contained the Government's motion for summary disposition was returned to the Government with the notation "addressee unknown." Government counsel verified that the Respondent remained an inmate in the Wayne County Jail and on March 14, 1994, again forwarded a copy of the Government's motion.

On February 16, 1994, the administrative law judge attempted to serve Respondent with an order which allowed Respondent 14 days in which to respond to the Government's motion for summary disposition. The envelope was returned, marked, "addressee unknown." On April 7, 1994, the administrative law judge forwarded a second order to Respondent, by certified mail. Respondent failed to file a response to the order.

By order dated April 25, 1994, the administrative law judge found that Respondent waived his opportunity for a hearing, and recommended that a final order be entered under 21 CFR 1301.57. Alternatively, the administrative law judge granted the Government's motion for summary disposition. Neither party filed exceptions to the administrative law judge's order and on May 23, 1994, the record was transmitted to the Deputy Administrator. The Deputy Administrator concludes that Respondent has waived his opportunity for a hearing on the issues raised in the Order to Show Cause and, pursuant to 21 CFR 1301.54(e) and 1301.57, enters this final order based upon the record as it now appears.

The Deputy Administrator finds that an administrative complaint had been filed with the Michigan Board of Medicine ("the Board") against the Respondent. After careful consideration of the documents filed in that cause, the Board concluded that the continued licensure of Respondent constitutes a threat to the public health, safety and welfare requiring emergency action. Therefore, on December 1, 1993, the Board summarily suspended Respondent's license to practice medicine. Consequently, Respondent is not currently authorized to handle controlled substances in the State of Michigan.

The DEA does not have the Statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances. See 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. *See Roy E. Hardman, M.D.*, 57 FR 49195 (1992) (noting that "Michigan law provides that a suspension of an individual's medical license shall result in the nullification of the individual's authority to handle controlled substances"); *see also, Myong S. Yi, M.D.*, 54 FR 30618 (1989); *DePietro's Pharmacy*, 54 FR 22499 (1989); *Bobby Watts, M.D.*, 53 FR 11919 (1988); and cases cited therein.

Since there is no dispute about Respondent's lack of authority to handle controlled substances in the State of Michigan, the administrative law judge properly granted the Government's motion for summary disposition. When no question of fact is involved, or when the facts are agreed upon, a plenary, adversarial administrative proceeding with the full panoply of due process rights is not obligatory. *See Philip E. Kirk, M.D.*, 48 FR 32887 (1983), *aff'd sub nom Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984); *United States v. Consolidated Mines and Smelting Company, Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971).

Having considered the facts and circumstances in this matter, the Deputy Administrator concludes that Dr. Marang's DEA Certificate of Registration should be revoked due to his lack of authorization to handle controlled substances in the State of Michigan. Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100) (b) and 0.104 [59 FR 23637], hereby orders that DEA Certificate of Registration, BM1482506, previously issued to Boitshoko P. Marang, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for the renewal of such registration, be, and they hereby are, denied. This order is effective July 25, 1994.

Dated: July 15, 1994.

Stephen H. Green,

Deputy Administrator.

[FR Doc. 94–17948 Filed 7–22–94; 8:45 am]

Billing Code 4410–09–M

[Docket No. 92–86]

Harold S. Stinson, D.O.; Grant of Restricted Registration

On August 18, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Harold S. Stinson, D.O. (Respondent), of Key Largo, Florida, proposing to deny his pending application for registration as a practitioner under 21 U.S.C. 823(f) for reason that his registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 21 U.S.C. 824(a)(4).

Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held in Miami, Florida on March 11, 1993. On January 25, 1994, in her opinion and recommended ruling, findings of fact, conclusions of law, and decision, the administrative law judge recommended that the Respondent's application for a DEA Certificate of Registration be granted, subject to certain restrictions. No exceptions were filed by either party. The Deputy Administrator has carefully considered the entire record in this matter and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of law as hereinafter set forth.

The administrative law judge found that the Respondent received his doctor of osteopathy degree from Kirksville College of Osteopathic Medicine in 1957 and following a one-year internship, went into practice with another physician in Eureka, Missouri. Five years later, Respondent established a solo practice which he maintained until about 1985, and was board certified in family practice in 1974.

On May 2, 1985, a DEA Special Agent along with local police officers, arrested an individual on an outstanding warrant following her indictment for forging prescriptions for Dilaudid, a Schedule II controlled substance. The individual later informed the Special Agent that between 1979 and 1982, she purchased Dilaudid from the Respondent approximately 50 times; that between 150 and 200 people received drugs illegally from the Respondent; and that she owed Respondent $2,000 for the drugs that she had purchased.

Following her arrest, the individual agreed to attempt to make a controlled purchase of Dilaudid from the Respondent. On June 7, 1985, the individual attempted without success to purchase Dilaudid from the Respondent. During the visit, the individual offered to pay Respondent $500 on her outstanding debt, however, Respondent indicated that he did not want to have any further dealings with the individual. Nevertheless, he agreed to meet with her at a future date, and the individual assured the Respondent that she would pay back the $2,000 debt that she owed him in installments.

On June 15, 1985, the individual met with Respondent in his car at a restaurant, where Respondent sold the individual 100 Dilaudid for $2,000. The individual also paid the Respondent an additional $1,000 as payment on her prior debt. During the meeting, Respondent admitted to the individual that after being audited with respect to his dispensing of Dilaudid, he was able to falsify his dispensing records because one of his patients failed to keep records of how much Dilaudid she received or purchased from Respondent, and therefore, Respondent could ascribe drugs to her that he in fact provided to others.

On June 17, 1985, the individual met Respondent at his office where she purchased 100 Dilaudid for $2,000, and paid the final $1,000 of her debt. During this meeting, the individual informed the Respondent of a friend from Philadelphia that could help make the Respondent's drug transactions more profitable. On August 2, 1985, the individual again met the Respondent at a restaurant where she purchased 80 Dilaudid for $2,000. The individual again mentioned her friend from Philadelphia, and Respondent agreed to contact the individual the following week.

On August 27, 1985, the individual and a DEA Special Agent, posing as her friend from Philadelphia, purchased 98 Dilaudid from the Respondent for $2,940. During the conversation, Respondent mentioned that police officers had come to his house in response to a burglary alarm and had seen a military rifle equipped with a silencer.

In September 1985 a search warrant was executed at Respondent's office, in which his records were seized, as well as, a silencer in a desk drawer. On January 23, 1986, the Respondent was indicted in the United States District Court for the Eastern District of Missouri on four counts of unlawful distribution of Dilaudid, three counts of making false statements on Federal income tax returns, and one count of unlawful possession of a firearm. Following a jury trial, Respondent was convicted of the counts pertaining to distribution of Dilaudid and possession of an illegal firearm, and was acquitted on the tax counts. On October 3, 1986, Respondent was sentenced to six years incarceration on each of the drug charges to run concurrently, and two years on the firearm charge to run consecutively, for a total of eight years. Respondent was further sentenced to serve a special parole term of five years and to pay a $40,000 fine, and two of his vehicles were forfeited. On December 9, 1986, Respondent surrendered his DEA registration.

At the hearing, Respondent presented the testimony of witnesses as to his exemplary abilities as a physician and his favorable reputation in the community. Several witnesses, and numerous written statements filed on Respondent's behalf, also spoke of his successful efforts towards rehabilitation. Included among this evidence was a letter dated September 25, 1992, from the Assistant Attorney General of the State of Florida and counsel to the Florida Board of Osteopathic Medicine (Board), advising that Respondent had complied with the terms of his probation and the Board did not oppose his application for DEA registration.

The Respondent testified regarding his accomplishments while incarcerated, including: his organizing of smoking cessation clinics for inmates; his conducting counseling and lecture sessions on health related issues for inmates, as well as, a continuing education program for incarcerated health professionals; and his becoming versed in Spanish for the purpose of becoming a medical missionary in Spanish-speaking areas. The Respondent further testified that in May 1989, he was released to a halfway house where he wrote a column on travel medicine for a hunting and fishing magazine. On October 20, 1992, the director of the halfway house wrote to DEA recommending that Respondent be granted DEA registration in light of his satisfactory rehabilitation.

Respondent also presented the testimony of an attorney specializing in post-conviction issues, who testified that he represented the Respondent at the sentencing phase of the criminal proceeding, as well as, before the Parole Commission, and that Respondent was granted parole after serving forty months of his eight-year sentence. The

witness testified that the silencer conviction resulted in imposition of a special parole term, but that he successfully sought early termination of Respondent's special parole term in light of Respondent's exemplary conduct while incarcerated. The witness further testified that the institution recommended early termination of Respondent's special parole and that the reduction of four years in a five year term was highly unusual.

Prior to, and after moving to the State of Florida in the fall of 1990, Respondent took continuing education courses, including a course in prescribing controlled substances, and on March 26 and 27, 1991, Respondent took the State's examination to practice medicine and passed. On June 22, 1991, the Board approved the Respondent for licensure subject to a two-year probation, with terms including: that if and when Respondent obtained a DEA registration, he write Schedule II controlled substances prescriptions in triplicate; that he practice only under the indirect supervision of another physician; and that the monitoring physician file semi-annual reports with the Board regarding the level of care provided by the Respondent.

In late 1991, Respondent was hired as the only full-time medical professional at a clinic in Cutler Ridge, a low income area of South Miami. The president and chief executive officer of the clinic testified at the hearing that Respondent told him about his history and lack of DEA registration, and that Respondent was very professional in treating mostly welfare patients.

The witness further testified that when the Cutler Ridge clinic building collapsed during Hurricane Andrew in August 1992, and reopened in a trailer in late September 1992, Respondent continued to see 40 to 50 patients per day despite difficult operating conditions. Another witness testified at the hearing that after the hurricane and prior to the reopening of the clinic, Respondent worked as a volunteer at the South Miami Hospital in Homestead, Florida, where he provided good medical care despite handling an increased patient load and working long hours.

The Respondent testified, as did witnesses on his behalf, that he needed a DEA registration in order to obtain hospital privileges; that the lack of a controlled substances registration would adversely impact upon Respondent's ability to care for his patients; and that Respondent's ability to accept offers of employment at various health care facilities was contingent upon his obtaining a DEA Certificate of Registration. Respondent testified that his patients that required controlled substances were required to see another physician, and that the growth of the Cutler Ridge clinic practice required more patients to be admitted to hospitals, but that he was unable to apply for hospital privileges without a DEA registration.

Respondent also testified that he did not want to ever again handle Dilaudid and that he would be in favor of such restrictions on his DEA registration as a prohibition on dispensing, requirements that he use triplicate prescriptions, and a blanket agreement to inspections at any time. Respondent attributed his misconduct to a mid-life crisis and his lack of character, and based on his rehabilitative effort as well as the support of his family, such misconduct would not be repeated.

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for registration, if he determines that granting the registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

It is well established that these factors are to be considered in the disjunctive, i.e., the Deputy Administrator may properly rely on the disjunctive, i.e., the Deputy Administrator may properly rely on any one or a combination of the factors and give each factor the weight he deems appropriate. *See Henry J. Schwarz, Jr., M.D.*, Docket No. 88–42, 54 FR 16422 (1989).

In considering whether grounds exist to deny Respondent's application for registration pursuant to 21 U.S.C. 823(f), the administrative law judge found factors one through five relevant. Factor one is relevant in light of the September 25, 1992 letter from the counsel to the Board; factor two is applicable in light of Respondent's delivery of Dilaudid to the individual; factors three and four are relevant in view of Respondent's conviction for unlawfully distributing controlled substances; and factor five is relevant based upon Respondent's conviction for unlawful possession of a silencer.

The administrative law judge further found that Respondent's practice of medicine was valuable to the community; that Respondent needs a DEA registration to fully serve his patients; and that Respondent demonstrated remorse for his past misconduct. Therefore, the administrative law judge recommended that Respondent's application for DEA registration be granted, with the following restrictions: (1) Respondent shall not dispense directly or administer any controlled substance except in a hospital setting; (2) Respondent shall use triplicate forms for all controlled substance prescriptions and shall maintain at his registered location one copy of each form and arrange for another copy to be received by the Special Agent in Charge of DEA's Miami Field Division or his designee; and (3) Respondent shall consent to inspections of his registered premises pursuant to notices of inspection as described in 21 U.S. C. 880.

The Deputy Administrator having considered the entire record adopts the administrative law judge's findings of fact, conclusions of law, and recommended ruling in its entirety. Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 28 CFR 0.1000(b) and 0.104 (59 FR 23637), hereby orders that the application for DEA registration submitted by Harold S. Stinson, D.O., be granted in Schedules II through V subject to the restrictions enumerated above. This order is effective July 25, 1994.

Dated: July 18, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–17949 Filed 7–22–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background: The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. Chapter 35), considers comments on the reporting/recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review: As

necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and/or Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions: Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Kenneth A. Mills ((202) 219–5095). Comments and questions about the items on this list should be directed to Mr. Mills, Office of Information Resources Management Policy, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OAW/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, Room 3001, Washington, DC 20503 ((202) 395–7316).

Any member of the public who wants to comment on recordkeeping/ reporting requirements which have been submitted to OMB should advise Mr. Mills of this intent at the earliest possible date.

Revision

Employment and Training Administration Guidelines for the State Employment Security Agency Program and Budget Plan for the Unemployment Insurance Program 1205–0132; ETA 8632, 8623A, 8633A, 2208A.

Form No.	Affected public	Respondents	Frequency	Average time per presponse
ETA 8623A (UI–1)	State/local govt	53	Annually	1 hour.
ETA 8632 (Narrative & CAP)	do	53	Annually	27 hours.
ETA 8632/QC (Narrative & CAP)	do	37	Annually	4 hours.
Transmittal Memo Checklist, Signature Page	do	53	Annually	1 hour.
ETA 2208A (UI–3)	do	53	Quarterly	2 hours.
2,109 total hours.				

The Program and Budget Plan (PBP) provides the basis for State Unemployment Insurance operations to request funds for the upcoming year. In the PBP, States certify intent to comply with assurances. The affected public are the 53 State Employment Security Agencies.

Revision

Bureau of Labor Statistics

U.S. Export Product Information

1220–0025

Businesses or other for-profit; Small businesses or organizations

Form No.	Respondents	Frequency	Average time per response
BLS 2894B	1,900	Annually	60 minutes.
BLS 3008	1,900	Annually	15 minutes.
BLS 3007D	4,500	Monthly, Quarterly	27 minutes.
BLS 3007E	35	Quarterly	27 minutes.
24,103 total hours.			

The International Price Program indexes, some of the nation's primary economic indicators, are used as: measures of price movements in international product prices; indicators of inflationary trends in the economy; sources of information used to determine U.S. monetary, fiscal, trade, and commercial policies. They are also used to deflate the Gross National Product.

Revision

Bureau of Labor Statistics

U.S. Import Product Information

1220–0026

Monthly, Quarterly

Form No.	Respondents	Frequency	Average time per response
BLS 3007B	1,900	Annually	60 minutes.
BLS 3008	1,900	Annually	20 minutes.
BLS 3007D	4,500	Monthly, Quarterly	32.4 minutes.
26,909 total hours.			

The International Price Program indexes, some of the nation's primary economic indicators, are used as: measures of price movements in international product prices; indicators of inflationary trends in the economy;

sources of information used to determine U.S. monetary, fiscal, trade, and commercial policies. They are also used to deflate the Gross National Product.

Revision

Employment and Training Administration
Unemployment Compensation for Former Federal Employees, Handbook No. 391
1205–0179
One-time
Individuals or households; State or local governments; Federal agencies or employees

Form No.	Respondents	Average time per response
ES 931	144,000	3 minutes.
ES 931A	33,120	3 minutes.
ES 935	144,000	5 minutes.
ES 933	2,360	3 minutes.
ES 934	15,025	3 minutes.
ES 936	7,200	3 minutes.
ES 939	75	1 hour 45 minutes.
21,745 total hours.		

Federal law (5 U.S.C. 8501–8509) provides unemployment insurance protection to former (or partially unemployed) Federal civilian employees. It is referred to, in abbreviated form, as "UCFE." The forms contained throughout the UCFE Handbook are used in connection with the provision of this benefit assistance.

Extension

Bureau of Labor Statistics
Labor Market Information (LMI) Cooperative Agreement (CA)
1220–0079; BLS LMI 1A, 1B, 2A, 2B
State or local governments

Form No.	Respondents	Frequency	Average time per response
LMI 1A, 1B	55	Annually	6 hrs., 42 mins.
LMI 2A	10	Quarterly	8 hrs., 2 mins.
LMI 2B	27	Quarterly	45 mins.
771 total hours.			

Cooperative Agreements between BLS and SESAs are entered annually in order to provide the LMI statistics. The agreements provide the basis for administrative planning, financial planning, and monitoring.

Extension

Employment Standards Administration
Establishment Information
1215–0008; WH–45 and WH–45 (Sp.)
On occasion
Businesses or other for profit; Non-profit institutions; Small businesses or organizations
5,000 respondents; 10 minutes per response; 835 total hours; 2 forms
Form WH–45, when completed by employers, is used to determine coverage of various establishments that are being considered for investigation under the FLSA.

Extension

Bureau of Labor Statistics
1220–0045; BLS 9300
State and local governments; Farms, Businesses or other for profit; Small business or organizations
280,000 respondents; 59 minutes per response; 275,000 total hours.

The Annual Survey of Occupational Injuries and Illnesses is the primary indicator of the Nation's progress in providing every working man and woman safe and healthful working conditions. Survey data are used to evaluate the effectiveness of Federal and State programs and to prioritize scarce resources. (This information collection request (ICR) includes "OSHA Records; Prenotification of Exempt Employer" recordkeeping requirements which was previously included in the ICR approved under OMB Number 1220–0029.)

Extension

Office of the American Workplace
Airline Employee Protection Program (29 CFR Part 220)
1205–0322
On occasion; semi-annually
Businesses or other for-profit
1,240 respondents; .3 average hours per response; 372 total hours.

The Airline Deregulation Act (ADA), section 43(d) requires the Secretary of Labor to establish a program to implement the first-right-of-hire provision of the ADA. This program, as outlined in 29 CFR 220 includes two specific information collection requirements: (1) an airline job vacancy list; and (2) a semi-annual report of designated employees hired. Both reports are required by the ADA.

Extension

Mine Safety and Health Administration
Record of Examinations for Hazardous Conditions
1219–0083
Each shift
Businesses and other for profit; Small businesses or organizations
2,170 respondents; 508.5 average hours per response; 1,103,445 total hours.

Requires operators of surface coal mines and surface facilities to keep records of required examinations results for hazardous conditions. Records consist of the nature and location of any hazardous condition found and the actions taken to abate the hazardous condition.

Signed at Washington, DC this 8th day of July, 1994.

Kenneth A. Mills,

Departmental Clearance Officer.

[FR Doc. 94–17975 Filed 7–22–94; 8:45 am]

BILLING CODE 4510–24–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Meeting Agenda

In accordance with the purposes of Sections 29 and 182b. of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards will hold a meeting on

August 4–5, 1994, in Conference Room T2B3, 11545 Rockville Pike, Rockville, Maryland.

Thursday, August 4, 1994

8:30 A.M.–8:45 A.M.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding conduct of the meeting and comment briefly regarding items of current interest. During this session, the Committee will discuss priorities for preparation of ACRS reports.

8:45 A.M.–10:15 A.M.: Steam Generator Tube Integrity Matters (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding a proposed Generic Letter on Voltage-Based Repair Criteria for Westinghouse Steam Generator Tubes, and an Advance Notice of Proposed Rulemaking regarding steam generator surveillance and maintenance. Representatives of the industry will participate, as appropriate.

10:30 A.M.–1:00 P.M.: DOD/DOE Naval Reactors Design (Closed)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and Department of Defense (DOD)/Department of Energy (DOE) regarding the latest nuclear plant propulsion design being installed in submarines of the Seawolf class.

This portion of the meeting will be closed to discuss classified information applicable to this matter.

2:00 P.M.–3:00 P.M.: Reactor Trip Event at Salem Unit 1 (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding the April 7, 1994 reactor trip event at the Salem Nuclear Plant, Unit 1 and the findings and recommendations of the Augmented Inspection Team (AIT) which investigated this event.

3:00 P.M.—5:15 P.M.: Selection of New ACRS Members (Open/Closed)—The Committee will discuss qualifications of candidates nominated for appointment to the ACRS.

A portion of this session will be closed to discuss matters the release of which would represent a clearly unwarranted invasion of personal privacy.

5:15 P.M.–6:45 P.M.: Preparation of ACRS Reports (Open/Closed)—The Committee will discuss proposed ACRS reports on matters considered during this meeting.

A portion of this session will be closed to discuss a proposed ACRS report on the DOD/DOE Naval Reactors Design that will involve discussion of classified information.

Friday, August 5, 1994

8:30 A.M.–8:35 A.M.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding conduct of the meeting.

8:35 A.M.–9:45 A.M.: Meeting with the Director of the NRC Office of Nuclear Reactor Regulation (NRR) (Open)—The Committee will meet with Mr. W.T. Russell, Director of NRR, to discuss items of mutual interest.

9:45 A.M.–10:30 A.M.: Report of the Planning and Procedures Subcommittee (Open/Closed)—The Committee will hear a report of the Planning and Procedures Subcommittee on matters related to the conduct of ACRS business and internal organizational and personnel matters relating to the ACRS staff members.

A portion of this session may be closed to discuss matters that relate solely to internal personnel rules and practices of this advisory Committee, and matters the release of which would represent a clearly unwarranted invasion of personal privacy.

10:45 A.M.–11:15 A.M.: Future ACRS Activities (Open)—The Committee will discuss topics proposed for consideration during future ACRS meeting.

11:15 A.M.–11:30 A.M.: Reconciliation of ACRS Comments and Recommendations (Open)—The Committee will discuss responses from the NRC Executive Director for Operations to recent ACRS comments and recommendations.

11:30 A.M.–12:30 P.M.: Strategic Planning (Open)—The Committee will discuss items of significant importance to the ACRS and Commission.

1:30 P.M.–5:00 P.M.: Preparation of ACRS Reports (Open/Closed)—The Committee will discuss proposed ACRS reports on matters considered during this meeting.

A portion of this session dealing with the ACRS report on DOD/DOE Naval Reactors design will be closed to discuss classified information.

5:00 P.M.–5:15 P.M.: Activities of the ACRS Subcommittee/Individual Members (Open)—The Committee will hear reports on the activities of ACRS Subcommittees and individual members.

5:15 P.M.—5:30 P.M.: Miscellaneous (Open)—The Committee will discuss miscellaneous matters related to the conduct of Committee activities and complete discussion of topics that were not completed during previous meetings as time and availability of information permit.

Procedures for the conduct of and participation in ACRS meetings were published in the Federal Register on September 30, 1993 (58 FR 51118). In accordance with these procedures, oral or written statements may be presented by members of the public, electronic recordings will be permitted only during the open portions of the meeting, and questions may be asked only by members of the Committee, its consultants, and staff. Persons desiring to make oral statements should notify the ACRS Executive Director, Dr. John T. Larkins, as far in advance as practicable so that appropriate arrangements can be made to allow the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting may be limited to selected portions of the meeting as determined by the Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the ACRS Executive Director prior to the meeting. In view of the possibility that the schedule for ACRS meeting may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the ACRS Executive Director if such rescheduling would result in major inconvenience.

I have determined in accordance with Subsection 10(d) P.L. 92–463 that it is necessary to close portions of this meeting noted above to discuss information that involves the internal personnel rules and practices of this advisory Committee per 5 U.S.C. 552b (c)(2); to discuss information the release of which would represent a clearly unwarranted invasion of personal privacy per 5 U.S.C. 552b(c) (6); and to discuss privileged and classified information per 5 U.S.C. 552b (c)(1).

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefore can be obtained by contacting the ACRS Executive Director, Dr. John T. Larkins (telephone 301–415–7361), between 7:30 A.M. and 4:15 P.M. EST.

Dated: July 19, 1994.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 94–17990 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–M

Detroit Edison Co.; Notice of Issuance of Amendment to Facility Operating License

[Docket No. 50–341]

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 101 to Facility Operating License No. NPF–43 issued to Detroit Edison Company (the licensee), which revised the Technical Specifications for operation of the Fermi 2 facility located in Monroe County, Michigan. The amendment is effective as of the date of issuance with full implementation within 45 days.

The amendment modified the Technical Specifications to make changes to job titles including a provision for future title changes, made changes to the onsite review organization (OSRO) membership and certain changes to the overtime controls.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on September 2, 1993 (58 FR 46664). No request for a hearing or petition for leave to intervene was filed following this notice. A requested title change to TS 6.2.2.g was withdrawn by the licensee's letter date 7, 1994 as it was no longer needed.

For further details with respect to the action see (1) the application for amendment dated May 24, 1993 and supplemented by letter dated July 7, 1994, (2) Amendment No. 1010 to License No. NPF–43 and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the local public document room located at the Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161.

Dated at Rockville, Maryland, this 18th day of July 1994.

For The Nuclear Regulatory Commission.

Timothy G. Colburn, Sr.,

Project Manager, Project Directorate III–I, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 94–17987 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–M

Detroit Edison Co.; Notice of Denial of Amendment to Facility Operating License and Opportunity for Hearing

[Docket No. 50–341]

The U.S. Nuclear Regulatory Commission (the Commission) has partially denied a request by Detroit Edison Company, (licensee) for an amendment to Facility Operating License No. NPF–43 issued to the licensee for operation of the Fermi 2 facility, located in Monroe County, Michigan. Notice of Consideration of Issuance of this amendment was published in the **Federal Register** on September 2, 1993 (58 FR 46664).

The purpose of the licensee's amendment request was to make changes to job titles, including a provision to allow for future job title changes, changes to the onsite review organization (OSRO), and changes to the overtime limit restrictions and control requirements of Section 6.0 of the Technical Specifications (TS).

The Commission has concluded that the licensee's request cannot be fully granted. Certain requested title changes and changes to the overtime limits, and a proposed change to the authority to specify the number of surveillances under a radiation work permit, are denied. The licensee was notified of the Commission's denial of the proposed change by a letter dated

By August 24, 1994, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or 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 Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 by the above date.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to John Flynn, Esq., Detroit Edison Company, 2000 Second Avenue, Detroit, Michigan 48226, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated May 24, 1993, and (2) the Commission's letter to the licensee dated July 18, 1994.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the Monroe County Public Library System, 3700 South Custer Road, Monroe, Michigan 48161. A copy of item (2) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 18 day of July 1994.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Project Director, Project Directorate III–I, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 94–17988 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–219]

GPU Nuclear Corp.; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–16 issued to GPU Nuclear Corporation (GPUN, the licensee) for operation of Oyster Creek Nuclear Generating Station located in Ocean County, New Jersey.

The proposed amendment would revise Technical Specification Section 2.3.P.(2) safety limit to raise the degraded voltage setpoint from 3671 volt to 3840 volts, and to revise the allowable setpoint range from ±1% to +20V, −40V.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By August 24, 1994, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating 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 a petition for leave to intervene. Requests for a hearing and a petition 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 and at the local public document room located at Ocean City Library, Reference Department, 101 Washington Street, Toms River, New Jersey 08753. 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 or 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 of the proceedings; (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 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 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 Services Branch, or may delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last 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) 248–5100 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to John F. Stolz: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037 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 the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated July 8, 1994, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room located at the Ocean County Library, Reference Department, 101 Washington Street, Toms River, New Jersey 08753.

Dated at Rockville, Maryland, this 15th day of July 1994.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–17986 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–M

Western Industrial X-Ray Inspection Co., Inc.; Establishment of Atomic Safety and Licensing Board

[Docket No. 030–32190–EA; ASLBP No. 94–699–09–EA]

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 F.R. 28710 (1972), and Sections 2.105, 2.700, 2.702, 2.174, 2.717 and 2.721 of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established in the following proceeding.

In the Matter of Western Industrial X-Ray Inspection Company, Inc., Evanston, Wyoming

Byproduct Material License No. 49–27356–01 EA 93–238

This Board is being established pursuant to a request for a hearing by Western Industrial X-Ray Inspection Company, Inc. (WIX), in response to an immediately effective order. This order, issued on June 16, 1994, by the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support is entitled "Order Suspending License (Effective Immediately) and Demand for Information." 59 Fed. Reg. 33027, June 27, 1994. The Order directs that the byproduct material license of WIX be suspended effective immediately.

An order designating the time and place of any hearing will be issued at a later date.

All correspondence, documents and other materials shall be filed in accordance with 10 CFR 2.701. The Board consists of the following Administrative Judges:

Peter B. Bloch, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

Dr. Jerry R. Kline, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

Dr. Charles N. Kelber, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

Issued at Rockville, Maryland, this 14th day of July 1994.

B. Paul Cotter, Jr.,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 94–17989 Filed 7–22–94; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Notice of Request for Clearance of Form RI 90-13

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request for clearance of new information collection. Form RI 90-13, The Annuitant Satisfaction Questionnaire, will be used to implement E.O. 12862. It will be sent to annuitants under the Federal Employees Retirement System to determine their level of satisfaction with OPM's service. The information obtained from the

survey will be used to identify areas where service improvements are necessary.

Approximately 10,336 RI 90-13 forms will be completed annually. We estimate it will take 30 minutes to complete this form. The total annual burden is 5,168 hours.

For copies of this proposal, contact C. Ronald Trueworthy on (703) 908-8550.

DATES: Comments on this proposal should be received on or before August 24, 1994.

ADDRESSES: Send or deliver comments to—

Daniel A. Green, Chief, FERS Division, Retirement and Insurance Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4429, Washington, DC 20415

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 3002, Washington, DC 20503

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Chief Forms Analysis & Design Section (202) 606-0623.

U.S. Office of Personnel Management.

Lorraine A. Green,

Deputy Director.

[FR Doc. 94–17941 Filed 7–22–94; 8:45 am]

BILLING CODE 6325-01-M

Notice of Request for Reclearance of Information Collection OPM Form 2809–EZ2

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request for reclearance of an information collection. OPM Form 2809–EZ22, Open Season Health Benefits Enrollment Change Form, is used by annuitants only at Open Season to elect a change in health benefits coverage.

Approximately 36,559 OPM Forms 2809–EZ2 are completed annually. Each form takes approximately 30 minutes to complete. The annual burden is 18,280 hours.

For copies of this proposal, contact C. Ronald Trueworthy on (703) 909–8550.

DATES: Comments on this proposal should be received on or before August 24, 1994.

ADDRESSES: Send or deliver comments to—

Lorraine E. Dettman, Chief, Retirement and Insurance Group, Operations Support Division, U.S. Office of Personnel Management, 1900 E Street, NW, Room 3349, Washington, DC 20415

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 3002, Washington, DC 20503

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Chief Forms Analysis & Design (202) 606–0623.

U.S. Office of Personnel Management.

Lorraine A. Green,

Deputy Director.

[FR Doc. 94–17942 Filed 7–22–94; 8:45 am]

BILLING CODE 6325-01-M

Notice of Request for Clearance of Form RI 20–63

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request for clearance of an information collection. Form RI 20–63, Decision About a Survivor Annuity for a Current Spouse, and its cover letters will be used by CSRS to provide information and a survivor benefits election opportunity to annuitants who have married after retirement.

There are approximately 3,300 respondents for the RI 20–63 and 300 for the cover letter. It is estimated to take 20 minutes to complete the form. The annual burden is 1,188 hours (1,089 for the RI 20–63 and 99 for the cover letter).

For copies of this proposal, contact C. Ronald Trueworthy, on (703) 908–8550.

DATES: Comments on this proposal should be received on or before August 24, 1994.

ADDRESSES: Send or deliver comments to—

Lorraine E. Dettman, Chief, Operations Support Division, Retirement and Insurance Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3349, Washington, DC 20415

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 3002, Washington, DC 20503

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Chief Forms Analysis & Design Section (202) 606–0623.

U.S. Office of Personnel Management

Lorraine A. Green,

Deputy Director.

[FR Doc. 94–17943 Filed 7–22–94; 8:45 am]

BILLING CODE 6325-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34388; International Series Release No. 686; File No. SR–CBOE–94–14]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 to Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Listing and Trading of Options and Full-Value and Reduced-Value Long-Term Options on the Nikkei Stock Index 300

July 15, 1994.

I. Introduction

On April 19, 1994, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to provide for the listing and trading of options and long-term options ("LEAPS") [3] based on the Nikkei Stock Index 300 ("Nikkei 300 Index" or "Index"), as well as LEAPS based on a reduced-value Index. On June 28, 1994, the Exchange filed Amendment No. 1 to the proposed rule change.[4]

[1] 15 U.S.C. § 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1993).

[3] "LEAPS" is an acronym for Long-Term Equity Anticipation Securities. LEAPS are long-term index option series that expire from 12 to 36 months from their date of issuance. *See* CBOE Rule 24.9(b)(1).

[4] In Amendment No. 1, the Exchange (1) lowered the proposed position limits for Index options and Index LEAPS to 25,000 contracts on the same side of the market, provided that no more than 15,000 contracts are in series in the nearest expiration month; (2) specified that the total capitalization of the Index, as of march 31, 1994, was US$2.25 trillion; and (3) supplied data on the average daily trading volume in the component securities for the period commencing December 1, 1993 and ending May 31, 1994. *See* Letter from Eileen Smith,

Continued

The proposed rule change was published for comment in the **Federal Register** on May 24, 1994.[5] No comments were received on the proposed rule change. This order approves the Exchange's proposal and Amendment No. 1 thereto.

II. Description of the Proposal

A. General

The CBOE proposes to trade standardized index option contracts based on the Nikkei 300 Index, an index comprised of 300 representative stocks of the first section[6] of the Tokyo Stock Exchange ("TSE").[7] The CBOE also proposes to list LEAPS on the full-value Index and LEAPS on a reduced-value Index that will be computed at one-tenth of the value of the Index. Nikkei 300 Index LEAPS will trade independently of and in addition to regular Nikkei 300 Index options traded on the Exchange; however, as discussed below, position and exercise limits of Index LEAPS and regular Index options will be aggregated.[8] The Exchange believes that options on the Index, including full-value and reduced-value Index LEAPS, will provide investors with a low-cost means of participating in the performance of the Japanese economy and hedging against the risk of investing in that economy.

B. Composition and Maintenance of the Index

The Nikkei 300 Index was designed by Nihon Keizai Shimbun, Inc. ("NKS"). The CBOE represents that Index component stocks were selected by NKS for their high market capitalizations and their high degree of liquidity, and are representative of the industrial composition of the broader Japanese equity market. On June 20, 1994, the CBOE formally executed a licensing agreement with NKS to list options on the Nikkei 300 Index.[9]

As of March 31, 1994, the total capitalization of the Index was US$2.25 trillion.[10] Market capitalizations of the individual stocks in the Index ranged from a high of US$76.5 billion to a low of US$875 million, with a median of US$3.3 billion and a mean of US$7.5 billion. In addition, the average daily trading volume of the stocks in the Index, for the six-month period ending May 31, 1994, ranged from a high of 6,279,901 shares to a low of 11,525 shares, with a median of approximately 488,000 shares and a mean of approximately 846,000 shares. The highest weighted component stock in the Index accounts for 3.41 percent of the Index. The five largest Index components account for approximately 15.14 percent of the Index's value. The lowest weighted component stock comprises 0.04 percent of the Index, and the five smallest Index components account for approximately 0.20 percent of the Index's value.

The Index is maintained by NKS. To maintain the continuity of the Index, NKS will adjust the Index divisor to reflect certain events relating to the component stocks. These events include, but are not limited to, changes in the number of shares outstanding, spin-offs, certain rights issuances, and mergers and acquisitions. The CBOE represents that NKS reviews the composition of the Index periodically.

C. Calculation of the Index

The Nikkei 300 Index is capitalization-weighted and reflects changes in the prices of the Index component securities relative to the base data of the Index (October 1, 1982). The value of the Index is calculated by multiplying the price of each component security by the number of shares outstanding of each such security, adding the products, and dividing by the current Index divisor. The Index divisor is adjusted to reflect certain events relating to the component stocks.[11] The Index had a closing value of 303.99 on June 24, 1994.

Because trading does not occur on the TSE during the CBOE's trading hours, the CBOE calculates the Index once each day based on the most recent official closing price of each Index component security as reported by the TSE. This closing value will be disseminated throughout the trading day on the CBOE.

D. Contract Specifications

The proposed options on the Nikkei 300 Index will be cash-settled, European-style options.[12] The CBOE is proposing to trade options on the Index from 8:00 a.m. to 3:15 p.m. (Chicago Time). The proposed starting time for Index options is one-half hour earlier than trading in options normally begins at the CBOE. The multiplier for the Index will be 100. Strike prices on Index options and full-value Index LEAPS will be set to bracket the Index level at $5.00 intervals. The Exchange intends to list options series with expirations in the three near-term calendar months, plus up to three additional calendar months in the March, June, September, December cycle. As described in more detail below, the Exchange also intends to list Index LEAPS, and LEAPS on a reduced-value Index, that will expire from 12 to 36 months from the date of the issuance.

Options on the Index (including full-value and reduced-value Index LEAPS) will expire on the Saturday following the third Friday of the expiration month. The last trading day in an option series normally will be the second to last business day preceding the Saturday following the third Friday of the expiration month (normally a Thursday). Trading in expiring options will cease at the close of trading on the last trading day. The exercise settlement value for all of the Index's expiring options will be calculated based upon the most recent official closing price of each of the component securities as reported by the TSE at the close of the regular Friday sessions in Japan (ordinarily at 3:00 p.m. Tokyo time). When expirations are moved in accordance with Exchange holidays, such as when the CBOE is closed on the Friday before expiration, the last trading day for expiring options will be Wednesday and the exercise settlement value of expiring Index options will be determined at the close of the regular Thursday trading sessions in Japan, even if the Japanese markets are open on Friday. If the Japanese markets will be closed on the Friday before expiration but the CBOE will not be closed, the last trading day for expiring options will be Wednesday and the exercise settlement value of expiring Index options will be determined at the close of the regular Thursday trading sessions in Japan.

E. Listing of Long-Term Options on the Full-Value or Reduced-Value Index

The Exchange may list series of LEAPS on the Nikkei 300 Index that expires from 12 to 36 months from the date of their issuance on either the full-value Index or a reduced-value Index

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Director, Product Development, CBOE, to Thomas McManus, Division of Market Regulation, Commission, dated June 28, 1994.

[5] *See* Securities Exchange Act Release No. 34077 (May 18, 1994), 59 FR 26824 (May 24, 1994).

[6] First section stocks are distinguished from second section stocks by more stringent listing standards. Telephone conversation between Eileen Smith, Director, Product Development, CBOE, and Francois Mazur, Attorney, Office of Derivatives and Equity Regulation, Division of Market Regulation, Commission (May 16, 1994).

[7] The CBOE has represented that the designations "Nikkei Stock Index 300" and "Nikkei 300" are the property of Nihon Keizai Shimbun, Inc.

[8] *See infra* Section II.F.

[9] Telephone conversation between Eileen Smith, Director, Product Development, CBOE, and Thomas McManus, Division of Market Regulation, Commission (June 28, 1994).

[10] Based on the March 31, 1994 exchange rate of Y102.75 per US$1.00.

[11] *See supra* Section II.B. The Index divisor was get to give the Index a value of 100 on its base date.

[12] A European-style option can be exercised only during a specified period before the option expires.

computed at one-tenth of the full-value index, subject to existing Exchange requirements applicable to full-value and reduced-value LEAPS.[13] The current and closing values for reduced-value Index LEAPS on the Index will be computed by dividing the value of the full-value Index by ten and rounding the resulting figure to the nearest one-hundredth. For example, a Nikkei 300 Index value of 303.99 would be 30.40 for the reduced-value Index LEAPS, and 303.94 would become 30.39. The reduced-value Index LEAPS will have a European-style exercise and will be subject to the same rules that govern trading of all of the Exchange's index options, including sales practices rules, margin requirements, and floor trading procedures. Strike price intervals for the reduced-value Index LEAPS will be no less than $2.50, instead of $5.00.[14]

F. Position and Exercise Limits, Margin Requirements, and Trading Halts

Position limits for options (including Index LEAPS) on the Nikkei 300 Index will be set at no more than 25,000 contracts on the same side of the market, provided that no more than 15,000 of such contracts are in series in the nearest expiration month.[15] Exercise limits will be set at the same level as position limits.[16] For purpose of calculating applicable position and exercise limits, positions in reduced-value options on the Index will be aggregated with each other and with positions in the full-value Index options.[17] Ten reduced-value contracts will equal one full-value contract for purposes of aggregating these positions.[18]

Exchange rules applicable to options on the Index will be identical to the rules applicable to other broad-based index options for purposes of trading rotations, halts, and suspensions,[19] and margin treatment.[20]

G. Surveillance

The Exchange will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in Index options and Index LEAPS. The Exchange currently is pursuing a market surveillance agreement with the TSE, which agreement the Exchange expects will enable it to better carry out its regulatory responsibilities with respect to the surveillance of trading in the stocks comprising the Index.[21]

III. Commission Findings and Conclusions

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5) of the Act.[22] Specifically, the Commission finds that the trading of options based on the Nikkei 300 Index will serve to protect investors, promote the public interest, and help to remove impediments to a free and open securities market by providing investors with a means to hedge exposure to market risk associated with the Japanese equity market and provide a surrogate instrument for trading in the Japanese securities market.[23] The trading of options based on the Nikkei 300 Index should provide investors with a valuable hedging vehicle that should reflect accurately the overall movement of the Japanese equity market.

In addition, the Commission believes, for the reasons discussed below, that the CBOE has adequately addressed issues related to customer protection, index design, surveillance, and market impact of Nikkei 300 Index options.

A. Index Design and Structure

The Commission finds that it is appropriate and consistent with the Act to classify the Index as a broad-based index. Specifically, the Commission believes the Index is broad-based because it reflects a substantial segment of the Japanese equity market, and, among other things, it contains a large number of stocks that trade in that market. First, the Index consists of 300 actively-traded stocks traded on the first section of the TSE. Second, the market capitalizations of the stocks comprising the Index are very large. Specifically, the total capitalization of the Index, as of March 31, 1994, was US$2.25 trillion, with the market capitalization of the individual stocks in the Index ranging from a high of US$76.5 billion to a low of US$875 million, with a median value of US$3.3 billion and a mean of US$7.5 million. Third, no one particular stock or group of stocks dominates the Index. Specifically, no single stock comprises more than 3.41 percent of the Index's total value, and the percentage weighting of the five largest issues in the Index accounts for 15.14 percent of the Index's value. Accordingly, the Commission believes it is appropriate to classify the Index as broad-based.

In addition, because none of the Index component stocks are traded in the United States in any form, and the primary market for component stocks is closed throughout the CBOE's trading day, the Commission believes it is not unreasonable for the Exchange to decide to begin trading Index options at 8:00 a.m. (Chicago time).

B. Customer Protection

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as Nikkei 300 Index options (including full-value and reduced-value Index LEAPS), can commence on a national securities exchange. The Commission notes that the trading of standardized, exchange-traded options occurs in an environment that is designed to ensure, among other things, that (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the Index options and Index LEAPS will be subject to the same regulatory regime as the other standardized options currently traded on the CBOE, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Nikkei 300 Index options and full-value and reduced-value Nikkei 300 Index LEAPS.

C. Surveillance

As a general matter, the Commission believes that comprehensive surveillance sharing agreements between the relevant foreign and domestic exchanges are important where an index product comprised of foreign securities is to be traded in the United States. In most cases, in the absence of such a comprehensive surveillance sharing agreement, the Commission believes that it would not be possible to conclude that a derivative product, such as a Nikkei 300 Index option, was not readily susceptible to manipulation.

[13] *See* CBOE Rule 24.9(b).

[14] *See* CBOE Rule 24.9(b)(2)(B).

[15] *See* CBOE Rule 24.4(a)(i).

[16] *See* CBOE Rule 24.5.

[17] *See* CBOE Rule 24.4(e).

[18] *Id.*

[19] *See* CBOE Rule 24.7.

[20] *See* CBOE Rule 24.11.

[21] *See infra* Section III.C.

[22] 15 U.S.C. § 78f(b)(5) (1988).

[23] Pursuant to Section 6(b)(5) of the Act, the Commission must predicate approval of any new securities product upon a finding that the introduction of such product is in the public interest. Such a finding would be difficult with respect to an option that served no hedging or other economic function, because any benefits that might be derived by market participants likely would be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns.

Although the CBOE and the TSE do not yet have a written surveillance sharing agreement that covers the trading of Nikkei 300 Index options,[24] a number of factors support approval of the proposal at this time. First, while the size of an underlying market is not determinative of whether a particular derivative product based on that market is readily susceptible to manipulation, the size of the market for the securities underlying the Nikkei 300 Index makes it less likely that the proposed Index options are readily susceptible to manipulation.[25] In addition, the Commission notes that the TSE is under the regulatory oversight of the Japanese Ministry of Finance ("MOF"). The MOF has responsibility for both the Japanese securities and derivatives markets. Accordingly, the Commission believes that the ongoing oversight of the trading activity on the TSE by the MOF will help to ensure that the trading of Nikkei 300 Index options will be carefully monitored with a view toward preventing unnecessary market disruptions.

Finally, the Commission and the MOF have concluded a Memorandum of Understanding ("MOU") that provides a framework for mutual assistance in investigatory and regulatory matters.[26] Moreover, the Commission also has a longstanding working relationship with the MOF on these matters. Based on the longstanding working relationship between the Commission and the MOF and the existence of the MOU, the Commission is confident that it and the MOF could acquire information from one another similar to that which would be available in the event that a comprehensive surveillance sharing agreement were executed between the CBOE and the TSE with respect to transactions in TSE-traded stocks related to Nikkei 300 Index option transactions on the CBOE.[27]

Nevertheless, the Commission continues to believe strongly that a comprehensive surveillance sharing agreement between the TSE and the CBOE covering Nikkei 300 Index options would be an important measure to deter and detect potential manipulations or other improper or illegal trading involving Nikkei 300 Index options. Accordingly, the Commission believes it is critical that the TSE and the CBOE continue to work together to consummate a formal comprehensive surveillance sharing agreement to cover Nikkei 300 Index options, and the component securities, as soon as practicable.[28]

D. Market Impact

The Commission believes that the listing and trading on the CBOE of Nikkei 300 Index options, including full-value and reduced-value Index LEAPS, will not adversely impact the securities markets in the United States or Japan.[29] First, as described above, the Index is broad-based and presently is comprised of 300 stocks with no one stock dominating the Index. Second, as noted above, the stocks contained in the Index have large capitalizations and are actively-traded. Third, the proposed position and exercise limits of 25,000 contracts on the same side of the market, provided that no more than 15,000 of such contracts are in series in the nearest expiration month, will serve to minimize potential manipulation and market impact concerns. Lastly, existing CBOE stock index options rules and surveillance procedures will apply to options on the Index.

E. Accelerated Approval of Amendment No. 1

The Commission finds good cause for approving Amendment No. 1 to the Exchange's proposed rule change prior to the thirtieth day after the date of publication on notice of filing thereof in the **Federal Register**. Amendment No. 1 reduces the proposed position limits with respect to Nikkei 300 Index options from 50,000 contracts on the same side of the market to 25,000 contracts (provided that no more than 15,000 contracts, as opposed to 30,000 contracts as originally proposed, are in series in the nearest expiration month). By reducing the position limits, this amendment will serve to protect investors and the public interest, and further minimize the potential for manipulation. Further, the proposal containing the higher position limits was published for the full 21-day comment period, and no comments were received. Therefore, the Commission finds that no new regulatory issues are raised by Amendment No. 1. Accordingly, the Commission believes it is consistent with Sections 19(b)(2) and 6(b)(5) of the Act to approve Amendment No. 1 to the Exchange's proposal on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1 to the proposed rule change. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the foregoing that are filed with the Commission, and all written communications relating to the foregoing 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, N.W., Washington, D.C. Copies of such filings also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–CBOE–94–14, and should be submitted by August 15, 1994.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (SR–CBOE–94–14), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[31]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–17952 Filed 7–22–94; 8:45 am]

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[24] The Exchange represents that it currently is pursuing a surveillance sharing agreement with the TSE, which the Exchange expects will enable it to better carry out its regulatory responsibilities with respect to the surveillance of trading in the stocks comprising the Index.

[25] In evaluating the manipulative potential of a proposed Index derivative product, as it relates to the securities that comprise the index and the index product itself, the Commission has considered several factors, including (1) the number of securities comprising the index or group; (2) the capitalizations of those securities; (3) the depth and liquidity of the group or index; (4) the diversification of the group or index; (5) the manner in which the index or group is weighted; and (6) the ability to conduct surveillance on the product. *See* Securities Exchange Act Release No. 31016 (August 11, 1992), 57 FR 37012 (August 17, 1992).

[26] *See* Memorandum of United States Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information, dated May 23, 1986.

[27] It is the Commission's expectation that this information would include transaction, clearing, and customer information necessary to conduct an investigation.

[28] *See supra* note 24.

[29] In addition, the CBOE and the Options Price Reporting Authority ("OPRA") have both represented that they have the necessary systems capacity to support those new series of options that would result from the introduction of Index options (including full-value and reduced-value Index LEAPS). *See* Letter from Joseph P. Corrigan, Executive Director, OPRA, to Eileen Smith, CBOE, dated June 28, 1994.

[30] 15 U.S.C. § 78s(b)(2) (1988).

[31] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34396; File No. SR–CBOE–94–16]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Expanding the Services Provided by Members Registered as "Stock Services"

July 18, 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 June 1, 1994, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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

Currently CBOE Rule 6.77, "Stock Execution Services," states that a stock service is a member registered with the Exchange for the purpose of providing stock execution services to market makers on the CBOE's floor. The CBOE proposes to amend CBOE Rule 6.77 to replace "stock service" with "order service firm" and to allow order service firms to take market maker orders for the purchase or sale of commodity futures contracts and options thereon and forward the orders to the appropriate futures exchange. In addition, the CBOE proposes to adopt CBOE Rule 6.78, "Letters of Guarantee Required of Order Service Firms," which requires an order service firm to have on file with the Exchange and in effect an Order Service Firm Letter of Guarantee issued for the service firm by a member of the Options Clearing Corporation ("OCC"). Under proposed CBOE rule 6.78(b), the letter of guarantee must provide that the issuing clearing member accepts financial responsibility for all orders handled by the order service firm on the CBOE floor and for all financial obligations of the order service firm to the Exchange.

The text of the proposal is available at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The CBOE states that the purpose of the proposal is to permit members that are registered as "stock services" under CBOE Rule 6.77 to expand the scope of their activity on the floor of the CBOE to encompass order handling services in connection with commodity interests. Currently CBOE Rule 6.77 provides that a member organization that is registered with the CBOE as a "stock service" may provide stock execution services to market makers on the floor of the Exchange.[1] The proposal would revise CBOE Rule 6.77 to permit designated member organizations also to take orders for the purchase or sale of commodity interests from market makers on the floor of the Exchange and forward such orders to the appropriate futures exchange. The execution of all orders to purchase or sell commodity interests would occur on a futures exchange that has been designated as a contract market by the Commodity Futures Trading Commission ("CFTC"). To reflect more accurately the expanded scope of activities permitted under CBOE Rule 6.77, the term "stock service" would be deleted from CBOE Rules 3.1, "Public Securities Business," 6.20, "Admission to and Conduct on the Trading Floor," and 6.77 and replaced with the term "order service firm."

The CBOE believes that the proposed rule change will facilitate market making capacity in stock index options. Market makers in stock index options are subject to the risk that market price will change before they can liquidate their positions, and hedge this risk by executing transactions in related commodity interests.[2] The proposed rule change would facilitate the ability of market makers in stock index options to execute hedging transactions by providing them with a more efficient means of effecting such transactions.

Order service firms that accept orders to buy or sell commodity interests may be required to comply with certain provisions of the Commodity Exchange Act of 1974, as amended ("CEA"). For example, Section 4(a)(1) of the CEA generally provides that transactions in commodity futures contracts may be executed only on a board of trade which has been designated as a "contract market" in the underlying commodity by the CFTC. In addition, Sections 4d and 4k of the CEA generally provide that any person that is engaged in soliciting or accepting orders for the purchase or sale of commodity interests must be registered as an introducing broker or as an associated person. The proposed rule change adds section (d) to CBOE Rule 6.77 to state expressly that to the extent an order service firm accepts and forwards orders for the purchase or sale of commodity interests, such firms must comply with the CEA and the rules and regulations promulgated thereunder. Additionally, the proposal requires such firms to keep the CBOE's Department of Financial Compliance ("Department") apprised of its registration status under the CEA on an ongoing basis, including any financial reporting or capital requirements.

In addition to revising CBOE Rule 6.77, the proposed rule change adds CBOE Rule 6.78 to the Exchange's rules. Under proposed Rule 6.78, any member organization that intends to act as an order service firm must file with the Exchange a letter of guarantee issued by a member of the OCC. Pursuant to this letter of guarantee, the clearing member must accept financial responsibility for all orders handled by the order service firm on behalf of Exchange market makers and all financial obligations of the order service firm to the Exchange. In order to limit the potential risk to any single clearing member, no clearing member shall be permitted to guarantee more than three order service firms without the prior written approval of the Department. In considering a request to guarantee more than three such firms, the Department shall consider the clearing member's level of excess net capital, additional financial resources, and such other facts as the Department deems appropriate.

The CBOE believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that it would facilitate the ability of options market makers for which there are related commodity interests to reduce their exposure to

[1] The services provided by these firms generally consist of taking orders for the purchase or sale of stocks and forwarding these orders to broker-dealers for execution.

[2] *See* Division of Market Regulation, *Market Analysis of October 13 and 16, 1989* (December 1990) at 73–74.

market risk by providing them with a more efficient means of effecting hedging transactions in such commodity interests.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days after 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 reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be 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, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written 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, N.W., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 15, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–17953 Filed 7–22–94; 8:45am]

BILLING CODE 8010–01–M

[Release No. 34–34397; File No. SR–CBOE–93–54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Pricing Increments and Priority Principles on Combined Trades

July 18, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder[2] notice is hereby given that on November 17, 1993, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On July 14, 1994, the CBOE submitted Amendment No. 1 ("Amendment No. 1") to the proposed rule change.[3] 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 CBOE proposes to amend Rule 6.42 and 6.45 and Interpretations and Policies to Rule 6.42 concerning pricing and priorities on spread, straddle, and combination orders. The text of the proposal is available at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The CBO states that the purpose of the proposed rule change is twofold: first, to revise the minimum increments permissible for bids and offers on spread, straddle, and combination orders and, second, to prescribe the priority principles to apply to such orders when priced net at a multiple of one sixteenth of a dollar. The CBOE believes that these changes will facilitate the orderly execution of spread, straddle, and combination orders.

The first change, to Rule 6.42, clarifies the language of the rule and adds a new Interpretation and Policy .02. This new Interpretation reflects the determination of the CBOE's Floor Procedure Committee that quotes for spreads, straddles, and combination orders ("combined trades") may be expressed in any fractional or decimal price, which will makes it easier for members to price combined trades in relation to the current market. The second change, to paragraph (d) of Rule 6.45, adjusts the priority principles applicable to combined trades. As revised, a CBOE member holding an order on a combined trade that is priced net at a multiple of 1/16 (i.e., 1/4, 3/8, 7/16, 1/2, etc.) has priority over bids and offers in the trading crowd if all legs of the combined trade would trade at a price that is at least equivalent to quotes in the crowd. Furthermore, the order will also take priority over bids and offers in the customer limit order book if, in addition to all legs of the combination at least matching quotes in the crowd, at least one leg of the combination trades at a price that is better than the corresponding bid or offer in the book. Bids or offers that are part of a combined trade and that are not priced at a net multiple of 1/16, while permissible, will not be entitled to priority under the exception contained in paragraph (d) to Rule 6.45.

Also under the proposed rule change, special priority principles will apply to stock-option combination orders that are priced net at a multiple of 1/16. Under this change, a stock-option order, as defined in CBOE Rule 1.1(ii)(a), that consists of an order to buy or sell a given number of shares of an underlying stock and an opposite side of the market

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[3] 17 CFR 200.30–3(a) (12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1993).

[3] *See* Letter from Barbara J. Casey, Vice President, Department of Market Regulation, CBOE, to Michael Walinskas, Derivative Products Regulation, SEC, dated July 13, 1994.

order to buy or sell an option covering the same number of shares will be considered to be a combined trade for purposes of priority over bids and offers in the crowd, but not over bids and offers in the book. A stock-option order, as defined in CBOE Rule 1.1(ii)(b), that consists of an order to buy or sell an underlying stock with the purchase and sale of an equal number of puts and calls, each having the same exercise price, expiration date and covering the same number of shares of the underlying stock, each being on the opposite side of the market from the order to buy or sell stock, and covering in the aggregate twice the number of shares represented by the stock order, will be considered to be a combined trade and will have priority over orders in the crowd and in the book.

As an illustration, assume that Option A is quoted at 5 bid, 5⅛ asked, and option B is quoted at 6 bid, 6⅛ asked, and assume that all four quotes are represented in the book. In that instance, a spread involving the purchase (or sale) of option A and the sale (or purchase) of option B may trade at a net credit or debit of 1 (e.g., a net credit of 1 if option A is bought at 5 and option B sold at 6, or a net debit of 1 if option A is sold at 5⅛ and option B is bought at 6⅛. In this example, because the net price is a multiple of 1/16 and the execution of the spread involves taking the same side of the market as the book on only one side of the spread, the spread would receive priority even though it "touches" quotes in the book on both sides. (That is, in the spread consisting of the purchase of option A at 5 and the sale of option B at 6, only the *purchase* of option A occurs at the same price and on the same side of the market as the book, which is bid at 5; the *sale* of option B at 6 is on the opposite side of the market in the book, which is *bid* at 6.) In the same example, it would not be permissible under Rule 6.45(d) to trade the spread at a net debit of ⅞ by selling the first option at 5⅛ and buying the second at 6, because this trade would be executed at the same price and on the same side of the market as the book on *both sides* of the spread.

To qualify for priority treatment, combined orders must meet the existing requirements of Rule 6.45(d), i.e., one member must represent all legs of the combined trade, each leg must cover the same number of options, and the trade must be executed against one other member. In those circumstances, the CBOE believes, it is fair to give combined trades priority when priced net at a multiple of 1/16. Additionally, the CBOE represents that it has the systems capacity to disseminate transactions in decimals and also has a prefix field which will be used to identify, among other things, trades effected as part of a spread. Any transaction effected at non-standard prices would be disseminated in decimals and identified as being part of a spread by entering an "S" in the prefix field.[4]

The CBOE believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that it is designed to 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 CBOE does not believe that the proposed rule change will impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days after 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 reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be 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. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 15, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

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[4] *See* Amendment No. 1.

[5] 17 CFR 200.30–(a)(12) (1993).

[Release No. 34–34405; File Nos. SR–CBOE–87–03; SR–PSE–87–21; SR–Phlx–87–05]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Pacific Stock Exchange, Inc.; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval to Amendments to Proposed Rule Changes Relating to Market Index Option Escrow Receipts

July 19, 1994.

I. Introduction

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] the Chicago Board Options Exchange, Inc. ("CBOE"), the Pacific Stock Exchange, Inc. ("PSE") and the Philadelphia Stock Exchange, Inc. ("Phlx")[3] submitted to the Securities and Exchange Commission ("SEC" or "Commission") proposed rule changes to permit, on a permanent basis, the use of cash, cash equivalents, one or more qualified equity securities, or a combination thereof, as collateral for market index option escrow receipts ("MIOERs") issued to cover short call positions in broad-based stock index options.[4] On May 12, 1994, May 25,

[1] 15 U.S.C. § 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1990).

[3] Hereinafter, the terms "exchanges" and "self-regulatory organizations" ("SROs") refer to the CBOE, PSE and Phlx.

[4] The Phlx also has proposed to allow the use of cash and cash equivalents as collateral for escrow receipts issued to cover short put positions in both broad-based stock index options and individual stock options.

1994 and July 5, 1994, respectively, the CBOE, PSE and Phlx submitted to the Commission Amendment Nos. 1, 7 and 5 to the proposed rule changes in order to conform their proposals with recently approved amendments to the rules of the Options Clearing Corporation ("OCC").[5]

The proposed rule changes were noticed in Securities Exchange Act Release Nos. 24253 (March 24, 1987), 52 FR 10433 (April 1, 1987) (File No. SR–CBOE–87–03); 24708 (July 15, 1987), 52 FR 27604 (File No. SR–PSE–87–21); and 24383 (April 23, 1987), 52 FR 15796 (April 30, 1987) (File No. SR–Phlx–87–05). No comments were received on the proposals. This order approves the proposed rule changes, including the most recent amendments on an accelerated basis.

II. Background

For various reasons, such as state and federal regulations, many institutions may write call options only on a covered basis in a cash account.[6] Many of these institutions, however, are legally restrained from having deposits of cash or securities at a brokerage firm. Accordingly, in lieu of such a deposit, a bank may issue to the broker an escrow receipt on behalf of their mutual customer, in order to meet the margin requirements for any short options the customer may have written.[7]

Because it is difficult to apply the traditional concept of "cover" to broad-based, cash-settled index options,[8] in 1984, the Commission approved SRO proposals to allow index options writers to enter into escrow agreements without requiring them to collateralize the agreements with all the securities underlying the index.[9] The original MIOER program permitted the use of escrow receipts for short call positions if, among other things, a bank or trust company held for the customer a "basket" of at least ten qualified equity securities. Due to inadequate recordkeeping procedures, settlement delay and financial disincentives, many market participants found this program to be impracticable and uneconomic, particularly in comparison to similar products traded on commodities exchanges.[10]

Accordingly, in 1985, the Commission approved, on a pilot basis, SRO proposals to change the type of property acceptable as an escrow deposit.[11] These pilot programs subsequently have been extended eight times,[12] in order to provide the exchanges and OCC with the opportunity to resolve certain matters concerning the format of the receipt and administration of the program.

Currently, a MIOER may be collateralized by cash, cash equivalents, one or more qualified equity securities, or a combination thereof. Pursuant to Regulation T, the term "cash equivalents" is defined to mean the market value of any of the following instruments with one year or less to maturity: (1) Securities issued or guaranteed by the United States or its agencies; (2) negotiable bank certificates of deposit; or (3) bankers acceptances issued by banking institutions in the United States and payable in the United States.[13] An equity security (other than warrants, rights or options) is qualified to be used as collateral for MIOERs issued to cover short call positions if it is traded on a national securities exchange and substantially meets the listing requirements of the New York Stock Exchange ("NYSE") or American Stock Exchange ("Amex") or if it is enumerated on the current list of over-the-counter margin stocks published by the Federal Reserve Board.

The current escrow receipt program requires that, at the time the option is written, the total value of the collateral underlying the MIOER must be at least equal to the aggregate initial position value (*i.e.*, the index value at trade date times the applicable index multiplier times the number of options contracts covered by the collateral). Although the escrow deposit may include only one or even no securities, the customer must affirm that he is writing index options against a diversified portfolio. In addition, the issuing bank or trust company must be approved by OCC if the receipt is to be forwarded to OCC to meet the clearing member's margin obligations.[14]

Thereafter, the terms of the MIOER[15] specify that, if the value of the collateral falls below 55% of the current position value, the issuing bank or trust company promptly must notify the customer and request that the escrow deposit be supplemented. If the value of the collateral falls below 50% of the current position value, the bank or trust company promptly must notify OCC and the broker who, in turn, will disregard the MIOER and request that margin be deposited for the previously covered short position.

III. Description of the Proposals

The exchanges' most recent amendments (Amendment Nos. 1, 7 and

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[5] *See* Securities Exchange Act Release No. 33549 (January 31, 1994), 59 FR 5629 (February 7, 1994) (File No. SR–OCC–89–04) ("OCC approval order"). Amendments Nos. 1–6 to the PSE filing and Amendments Nos. 1–4 to the Phlx filing requested extensions of the pilot program and previously were approved by the Commission. *See infra*, note 12.

[6] In the context of a short call position, an options writer is covered if he owns the securities underlying the options he has written.

[7] Pursuant to Regulation T of the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), in a cash account, an escrow agreement may be used in lieu of margin for a short call option position if a bank hold the underlying security for the customer writing the option. *See* 12 CFR 220.8(a)(4)(i) (1990).

[8] Existing options on broad-based stock indexes overlie from 20 to over 2,000 securities. As a result, it can be impracticable for an index options writer to be "covered" by having appropriate positions in each component security. In addition, because index options are cash-settled, the securities underlying an index option are never delivered upon assignment.

[9] *See, e.g.*, Securities Exchange Act Release Nos. 20619 (February 6, 1984), 49 FR 5221 (February 10, 1984) (File No. SR–CBOE–83–31); and 21032 (June 8, 1984), 49 FR 24964 (June 18, 1984) (File No. SR–PSE–84–07). At that time, the staff of the Federal Reserve Board indicated that it believed a MIOER could be used as cover in a cash account. *See* letter from Laura Homer, Securities Credit Officer, Federal Reserve Board, to Richard G. Ketchum, Associate Director, SEC, Division of Market Regulation, dated January 27, 1984.

[10] In addition, OCC, at that time, did not accept escrow receipts for index options margin. For further discussion of the original MIOER program and the problems encountered thereunder, *see* Securities Exchange Act Release No. 22323 (August 13, 1985), 50 FR 33439 (August 19, 1985) (File Nos. SR–Amex–84–33; SR–CBOE–84–28; SR–NYSE–84–35; SR–PSE–85–19; SR–Phlx–85–18— ("pilot approval order").

[11] *See* pilot approval order, *supra* note 10. The Commission simultaneously approved the use by the clearing member of an escrow receipt form, in lieu of margin payments to OCC. *See* Securities Exchange Act Release No. 22324 (August 13, 1985), 50 FR 33443 (August 18, 1985) (File No. SR–OCC–85–07)

[12] *See, e.g.*, Securities Exchange Act Release Nos. 23552 (August 25, 1986), 51 FR 31183 (September 2, 1986) (File No. SR–CBOE–86–26); 24246 (March 23, 1987), 52 FR 10432 (April 1, 1987) (File No. SR–CBOE–87–04); 24383 (April 23, 1987), 52 FR 15796 (April 30, 1987) (File No. SR–Phlx–87–05); 24405 (April 29, 1987), 52 FR 16969 (May 6, 1987) (File No. SR–PSE–87–10); 24708 (July 15, 1987), 52 FR 27604 (July 22, 1987) (File No. SR–CBOE–87–29; SR–PSE–87–21; and SR–Phlx–87–22); 25242 (January 4, 1987), 53 FR 648 (January 11, 1988) (File No. SR–CBOE–87–55); 25486 (March 18, 1988), 53 FR 9722 (March 24, 1988) (File No. SR–Phlx–88–01 and SR–PSE–87–21); 25888 (July 6, 1988), 53 FR 26457 (July 13, 1988) (File No. SR–CBOE–88–11; SR–PSE–87–21; and SR–Phlx–87–05); 26274 (November 10, 1988), 53 FR 46522 (November 17, 1988) (File No. SR–CBOE–88–21; SR–PSE–87–21; and SR–Phlx–87–05); 27189 (August 28, 1989), 54 FR 37064 (September 6, 1989) (File No. SR–CBOE–89–16; SR–PSE–87–21; and SR–Phlx–89–46); 27657 (January 30, 1990), 55 FR 4295 (February 7, 1990) (File No. SR–CBOE–90–01; SR–PSE–87–21; and SR–Phlx–90–02).

[13] *See* 12 CFR 220.8(a)(3)(ii) (1990).

[14] There are also certain financial, regulatory and depository standards for MIOER issuers. For further discussion of OCC's monitoring obligations, *see* OCC approval order, *supra*, note 5.

[15] Under the SROs' rules, escrow receipts must be in a form satisfactory to the exchange. Because the Commission has only reviewed the escrow receipt submitted by OCC, the Commission previously has indicated that approval of these proposals is limited to the use of escrow receipts containing terms and conditions substantively identical to those in the OCC escrow receipt.

5 to the CBOE, PSE and Phlx filings, respectively) propose to convert their MIOER programs [16] from pilot to permanent status and to conform their rules with recently approved amendments to OCC's rules.[17] Despite certain refinements, as discussed in more detail below, the current rules will, for the most part, continue to apply.

First, the SROs proposals will limit acceptable "cash equivalents" to securities issued or guaranteed by the United States and having one year or less to maturity ("short-term United States government securities"). As a result, securities issued or guaranteed by agencies of the United States, certificates of deposit and bankers acceptances will no longer be eligible as collateral for MIOERs issued to cover short call position.

In addition, the definition of "qualified equity securities" will be amended to incorporate all exchange-traded securities, whether or not they meet NYSE or Amex listing standards. The proposals also will make certain editorial changes to the exchanges' rules regarding the use of over-the-counter securities to collateralize an escrow receipt, in order to conform that language with the phrasing used in OCC's rules.

The exchanges believe that the proposed rule changes are consistent with Section 6 of the Act in general and, in particular, with Section 6(b)(5), in that they are designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, as well as to protect investors and the public interest by establishing a MIOER consistent with OCC rules and procedures.

IV. Discussion

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[18] In particular, the Commission believes the proposals are consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts, and, in general, protect investors and the public interest.

After careful review of the operation of the pilot programs, the Commission has concluded that the revised MIOER should help provide a safe and efficient mechanism by which index call options can be written in a cash account. As set forth in more detail in its order approving the pilot procedures,[19] the commission believes that the range of collateral permitted thereunder should provide market participants with greater flexibility, prevent settlement delays and eliminate many of the problems encountered under the original MIOER program. To the extent that the revised escrow receipt is a cost-effective means for institutions restricted to cash account transactions to manage portfolio risk, its implementation on a permanent basis should encourage broader participation in the index options market, thereby adding depth and liquidity to that market.

Based on their experience with the pilot program, however, the SROs, along with OCC, have proposed certain minor refinements to the types of property acceptable as collateral for MIOERs issued to cover short call positions. As the Commission noted in regard to the recently approved OCC proposal,[20] these new standards will ensure that only liquid assets are eligible to underlie escrow receipts. Specifically, the Commission believes that the proposed rule changes are a reasonable response to OCC's finding that certificates of deposit and bankers acceptances present an undue risk to OCC because it has no means of ensuring that issuers of such instruments are financially sound.[21] Thus, the Commission agrees with the SROs that limiting "cash equivalents" to short-term United States government securities will enhance the integrity of escrowed collateral. Moreover, the changes to the definition of "qualified equity security" are consistent with the Federal Reserve Board's definition of "margin security" or existing OCC rules.

Finally, the Commission has determined that the escrow receipt contains safeguards (*e.g.*, minimum collateral levels; the requirement that issuing banks or trust companies notify customers and OCC of reductions in collateral [22] that should help ensure the adequacy of the collateral posted and diminish the risks associated with MIOERs. To date, the SROs' experience with the pilot program supports the Commission's earlier conclusion that, absent extremely unusual circumstances, the value of the collateral should be greater than the cash difference between the current index value and the exercise price of the option (*i.e.*, the amount that must be delivered upon assignment).[23] The Commission therefore believes that implementation on a permanent basis is now appropriate.

The Phlx proposal regarding the types of property acceptable as collateral for escrow receipts issued to cover short put positions [24] is identical to existing rules in other options markets.[25] The Commission finds that the Phlx proposal will provide sufficient investor protection while facilitating hedging transactions in both broad-based stock index options and individual stock options.

The commission finds good cause for approving Amendment Nos. 1, 7 and 5 to the CBOE, PSE and Phlx proposals, respectively, prior to the thirtieth day after the date of publication of notice of filing thereof. These amendments merely conform the exchanges proposals with recently approved amendments to OCC rules.[26] Finally, the Commission did not receive any comments on either original CBOE, PSE and Phlx proposals or the comparable OCC proposal, both of which were noticed for he full statutory period.

Interested persons are invited to submit written data, views and arguments concerning the most recent amendments to the proposed rule changes. 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 rules

[16] *See* CBOE Rule 24.11(d); PSE Rule 7.16(d); and Phlx Rule 722(c).

[17] *See* OCC approval order, *supra*, note 5.

[18] 15 U.S.C. § 78f(b) (1988).

[19] *See* pilot approval order, *supra*, note 10.

[20] *See* OCC approval order, *supra*, note 5.

[21] In contrast to its monitoring of MIOER issuers, OCC receives no financial information on banks issuing certificates of deposit or bankers' acceptances. Because of the potential exposure if the issuer fails and the instruments become worthless, OCC proposed eliminating them as eligible types of collateral. *See* Securities Exchange Act Release No. 26951 (June 21, 1989), 54 FR 26870 (June 26, 1989) (File No. SR–OCC–89–04). OCC also found that few customers utilize such instruments. *Id.*

[22] For further discussion of value requirements and incentives for the industry to police itself, *see supra*, notes 14–15 and accompanying text.

[23] *See* pilot approval order, *supra*, note 10.

[24] *See supra*, note 4.

[25] *See, e.g.*, NYSE Rule 431(f)(2)(H)(iv).

[26] For further discussion of the substance of these amendments, *see supra*, notes 16–17 and accompanying text. *See also* OCC approval order, *supra* note 5.

changes that are filed with the Commission, and all written communications relating to these amendments between the Commission and any persons, 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 filings will also be available at the principal offices of the CBOE, PSE and Phlx. All submissions should refer to File Nos. SR–CBOE–87–03; SR–PSE–87–21; and SR–Phlx–87–05 and should be submitted by August 15, 1994.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule changes permitting, on a permanent basis, the use of cash, cash equivalents, one or more qualified securities, or a combination of the foregoing, as collateral for escrow receipts issued to cover short call positions in broad-based stock index options, in lieu of margin (SR–CBOE–87–03; SR–PSE–87–21; and SR–Phlx–87–05) hereby are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18030 Filed 7–22–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34392; International Series Release No. 687; File No. SR–ISCC–94–1]

Self-Regulatory Organizations; International Securities Clearing Corporation; Order Temporarily Approving on an Accelerated Basis a Proposed Rule Change Amending ISCC's Clearing Fund Formula

July 15, 1994.

On June 9, 1994, International Securities Clearing Corporation ("ISCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The Commission published notice of the proposed rule change in the **Federal Register** on June 22, 1994.[2] No comments were received on the notice. As discussed below, the Commission is temporarily approving the proposed rule change on an accelerated basis through July 18, 1995.

I. Description

In 1986, ISCC and the London Stock Exchange ("LSE") entered into a linkage agreement which allows ISCC to obtain comparison and settlement services in the United Kingdom from the LSE on behalf of ISCC members. Pursuant to this linkage agreement, ISCC is responsible for paying for all securities believed. ISCC has no requirement to complete open pending trades.[3] On July 18, 1994, the LSE is moving to a ten day rolling settlement cycle with trades settling ten days after trade date.[4] In response to this change, ISCC is adjusting its method of calculating its clearing fund requirements.[5]

ISCC bases its clearing fund calculations on the assumption that it will take one day to sell all of a defaulting participant's positions. This results in an eleven day exposure for market risk with ten days between trade date and settlement date and one day between settlement date and close out of positions. There also will be a one day exposure for foreign exchange risk. (ISCC will convert U.S. dollars into British pounds on settlement day and will convert the proceeds from the close out of positions into U.S. dollars the next day.) The formula, therefore, is the sum of two components—the amount collected to cover market risk and the foreign exchange factor.

To calculate the amount of clearing fund deposit attributable to market risk, ISCC establishes a market risk factor which is the largest percentage change over eleven days in the Financial Times Index over a minimum of 365 days. Initially, the market risk factor will be set at seven percent.[6] The market risk factor is multiplied by the largest single daily gross debit value for the applicable week less 15% of the Institutional Net Settlement ("INS") receive value for that day based on debit values for the calendar week following the week in which the calculation is performed ("adjusted gross debit value").[7]

The foreign exchange factor is calculated by multiplying the adjusted gross debit value by the largest one day percentage change in the U.S. Dollar-British Pound foreign exchange rate over a minimum of 365 days ("estimated foreign exchange volatility").[8] The product is then reduced by the product of the adjusted gross debit value times the estimated foreign exchange volatility times the market risk factor. The reduction is made because the risk of foreign exchange is on the amount of money converted into U.S. dollars after sale of the securities not on the entire amount of dollars ISCC originally converted into British pounds.

Previously for ISCC members on surveillance status, the market risk factor and the foreign exchange factor of the clearing fund formula were increased, in the discretion of ISCC, by requiring up to an additional 3%, 5%, and 7% of average daily debits for members on Advisory, Class A, and Class B surveillance, respectively. Under the new formula, both the market risk factor and the foreign exchange factor may be increased by a maximum of 3%, a maximum of 5%, and a maximum of 7% for members on Advisory, Class A, and Class B surveillance, respectively.

II. Discussion

The Commission believes the proposed rule change is consistent with Section 17A of the Act and, therefore, is approving the proposal. Specifically, the Commission believes the proposal is consistent with Section 17A(b)(3)(F)[9] of the Act in that it better enables ISCC to safeguard securities and funds for which it is responsible. ISCC's adjustments to its clearing fund formula will result in a more accurate reflections of its risks. Instead of basing the formula on past obligations of the ISCC member, the formula is now based on the actual obligations of such member during the

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[27] 15 U.S.C. 78s(b)(2) (1982).

[28] 17 CFR 200.30–3(a)(12) (1990).

[1] 15 U.S.C. 78s (b)(1) (1988).

[2] Securities Exchange Act Release No. 34222, International Series Release No. 674 (June 16, 1994), 59 FR 32254.

[3] ISCC is not responsible for trades that are scheduled to settle after the day of default of an ISCC member. Agreement, dated December 22, 1988, between ISCC and LSE.

[4] Currently, the LSE settles trades on a fortnightly basis with all trades that occur during a two-week period settling on the same day.

[5] Currently, ISCC collects three percent of member's average gross settlement value over two account periods on a biweekly basis. This figure represents both market risk and foreign exchange risk. As of July 18, 1994, the clearing fund deposit will be calculated and collected on a weekly basis. The calculation will be made on Tuesday and collected within three days. Therefore, ISCC will collect clearing fund deposits prior to the settlement day.

[6] ISCC will review annually the market risk factor.

[7] Under the INS system, redeliveries of securities from the ISCC member to institutional participants can occur automatically through the LSE. Therefore, ISCC generally is not required to pay the LSE for these securities. These debits are offset only partially because these items may be reclaimed by the receiver, and in such circumstance, ISCC is liable to the LSE for the full value of the reclamation.

[8] During the period from 1989 to 1992, the maximum fluctuation in the U.S. Dollar-British Pound exchange rate was 4.445%. Initially, this number will be used in calculating the foreign exchange factor. ISCC will review annually the foreign exchange risk factor.

[9] 15 U.S.C. 78q–1(b)(3)(F) (1988).

relevant time period. This should provide ISCC increased protection when an ISCC member has unusually heavy trading activity. In addition, the previous ISCC clearing fund formula relied on a calculation of market risk factor and of foreign exchange risk factor that is now outdated. ISCC's increase in the size of these factors provides ISCC with greater protection consistent with likely movements in securities prices and in foreign exchange rates.

On June 17, 1980, the Commission issued a release announcing the standards to be used by the Division of Market Regulation in connection with the registration of clearing agencies.[10] In that release, the Commission stated that it is appropriate for a clearing agency to establish an appropriate level of clearing fund contributions based, among other things, on its assessment of the risks to which it is subject. In addition, contributions to the clearing fund should be based on a formula that applies to users on a uniform, nondiscriminatory basis. The Commission believes that ISCC's proposal is consistent with these guidelines. The new clearing fund formula is based on the risks (*i.e.*, time, market, and foreign exchange risks) created by the LSE's method of settlement. In addition, the formula is applied uniformly to all ISCC members in accordance with their usage of the LSE link.

The Commission preliminarily finds that the proposal is consistent with Section 17A of the Act. The Commission believes that in light of its significance to ISCC and its members, the proposed revisions to ISCC's clearing fund formula should be carefully monitored before they become a permanent feature. For this reason, the Commission is approving the proposal on a temporary basis through July 18, 1995.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of filing. The LSE is scheduled to move to its new settlement cycle on July 18, 1994. ISCC needs to have its new clearing fund formula in place at the same time in order to sufficiently cover its new risks. The Commission therefore believes that it is appropriate to accelerate approval of the proposal.

III. Conclusion

It is therefore ordered pursuant to section 19(b)(2) of the Act that the proposed rule change (File No. SR-ISCC-94-01) be, and hereby is, temporarily approved through July 18, 1955.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Director.

[FR Doc. 94-18026 Filed 7-22-94; 8:45 am]

BILLING CODE 8010-01-M

[10] Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920.

[Release No. 34-34394; File No. SR-NSCC-94-07]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval on an Accelerated Basis of a Proposed Rule Change Modifying NSCC's Trade Comparison Service

July 15, 1994.

On June 3, 1994, the National Securities Clearance Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-NSCC-94-07) under Section 19(b) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposed rule change was published in the **Federal Register** on June 24, 1994, to solicit comment from interested persons.[2] No comments have been received by the Commission. This order approves the proposal.

I. Description of the Proposal

The proposed rule change will modify NSCC's Rules and Procedures relating to trade comparison. The proposed rule change is designed to support the New York Stock Exchange, Inc. ("NYSE") and the American Stock Exchange, Inc. ("Amex" in their efforts to implement trade-date comparison systems.[3] To achieve trade-date comparison, the NYSE and Amex require their member organizations to submit trade comparison data to the NYSE and Amex rather than to NSCC for comparison processing.

Prior to the NYSE and Amex implementing their trade-date comparison systems, NSCC received locked-in trade data from the NYSE and Amex and initial two-sided, uncompared trade data from its member organizations. The uncompared trade data from its members were matched by NSCC and were reported back to the members on contract lists. The locked-in trade data, which is compared at the point of execution by the exchanges, bypasses NSCC's comparison process but for record purposes is reported back to the members organizations on contract lists.

Under the new systems, the NYSE and Amex will process the initial two-sided, uncompared trade data in their trade-date comparison system. When these trades do no compare, the NYSE and Amex will report such unmatched trades (known as "questioned trades" or "QTs" at the NYSE and "don't knows" or "DKs" at the Amex) to NSCC along with the matched, two-sided trades and the locked-in trades. The compared trades (including the locked-in trades and the matched, two-sided trades) will bypass NSCC comparison processing, but the unmatched trades will be included in NSCC's comparison process and in NSCC's trade correction process if necessary.

NSCC states that the proposed rule change will permit the NYSE and Amex to submit on behalf of NSCC members uncompared trade data relating to trades for regular way, when-issued, cash, next day, and sellers-option settlement in equity securities executed on such exchanges directly to NSCC for inclusion in NSCC's comparison process. Even though the NYSE and Amex require their members to submit their trade data to the exchanges, the revisions to NSCC's Rules and Procedures still permit NSCC members to submit such data directly to NSCC in order to have the data included in that day's processing. This authority is necessary because a member may miss the exchanges' submission time frames. NSCC notes that the NYSE and Amex have concurred in this procedure.

As member organizations become accustomed to the NYSE's and Amex's trade-date comparison systems, NSCC expects that the NYSE and Amex will no longer permit members to submit data directly to NSCC. At the time, NSCC, upon the request of the NYSE and Amex, will file a rule change under Section 19(b)(2) of the Act eliminating the ability of NSCC members to submit such data directly to NSCC other than on an exception basis.

II. Discussion

For the reasons discussed below, the Commission believes the proposal is consistent with the Act and particularly with Section 17A of the Act. Section 17A(b)(5) of the Act states that the rules of a clearing agency should be designed

[1] 15 U.S.C. § 78s(b) (1988).

[2] Securities Exchange Act Release No. 34221 (June 16, 1994), 59 FR 32724.

[3] For information on NYSE's and Amex's trade date comparison systems, refer to Securities Exchange Act Release Nos. 34153 (June 3, 1994), 59 FR 30071 [File No. SR-NYSE-94-08] (order approving proposed rule change) and 34298 (July 1, 1994), 59 FR 35397 [File No. SR-Amex-94-13] (order approving proposed rule change)

to foster cooperation and coordination with person engaged in the clearance and settling of securities transactions, to remove impediments to and perfect the mechanism of a national system for the clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.[4]

The risks posed by uncompared trades and by the long span of time between trade execution and trade comparison (*i.e.*, as long as five business days for equity trades) came under intense scrutiny after the Market Break of October 1987. The leading studies of the Market Break of 1987 identified uncompared trades as a major stress point in post-trade processing which, together with the unprecedented trading volume and the unprecedented price volatility during the Market Break, posed an unacceptable threat to the marketplace.[5] The Commission, in its recommendations to Congress in February of 1988, proposed that markets accelerate their efforts to compare all trades on trade date.[6]

Since 1988, NSCC, among others, has sought to improve clearing operations and to reduce exposure to losses associated with market volatility occurring during the period between execution and settlement. The NSCC, together with the NYSE and Amex, reduced the comparison cycle in stocks first from T+5 to T+3 in 1989 and then to T+1 in 1990.[7]

As stated above, the Commission believes that the proposed rule change, by shortening the NYSE and Amex comparison cycles for equity trades from T+1 to trade date, will make the comparison process safer in terms of the risks resulting from market price volatility. The Commission believes that the proposal will offer additional protection to NSCC and investors, brokers, and other persons that safeguard investors' funds and facilitate investors' transactions. The proposal also should help in the implementation under the Act of Rule 15c–6 which requires settlement of securities transactions on T+3 effective on June 1, 1995.[8] In the Commission's view, this proposal should help provide fundamental and important improvements to the marketplace.

NSCC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing in the **Federal Register.** Accelerated approval will permit NSCC to coordinate with the NYSE and Amex in the early phases of those exchanges' efforts to move toward trade-date comparison. Therefore, the Commission believes there is good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[9] that the above-mentioned proposed rule change (File No. SR–NSCC–94–07) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18027 Filed 7–22–94; 8:45 am]

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[4] 15 U.S.C. § 78q–1(b)(3)(F) (1988).

[5] *E.g.*, Division of Market Regulation, *The October 1987 Market Break*, at 10–2 to 10–12 (February 1989); *see also* Division of Market Regulation, *Market Analysis of October 13 and 16, 1989*, 117–129 (December 1990).

[6] Testimony on the Securities and Exchange Commission's Recommendations Regarding the October 1987 Market Break delivered by David S. Ruder, Chairman, Commission, before the Senate Committee on Banking, Housing and Urban Affairs at 23–24 (February 3, 1988).

[7] Securities Exchange Act Release Nos. 26785 (May 4, 1989), 54 FR 20221 [File No. SR–NSCC–89–02] (order approving proposed rule change) and 27074 (July 28, 1989), 54 FR 32405 [File No. SR–NSCC–89–04] (order approving proposed rule change).

[8] 17 CFR 240.15c–6. Fed. Sec. L. Rep. ¶ 23,351 at 20,582 (Oct. 1993); Securities Exchange Act Release No. 33023 (October 6, 1993), 58 FR 52891.

[9] 15 U.S.C. § 78s(b)(2) (1988).

[10] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34393; International Series Release No. 688; File Nos. SR–OCC–92–31 and SR–OCC–92–32]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Partial Withdrawal and Order Temporarily Approving Proposed Rule Changes Relating to the Acceptance of Certain Currencies as Margin Deposits

July 15, 1994.

On September 22, 1992, The Options Clearing Corporation ("OCC") filed proposed rule changes (File Nos. SR–OCC–92–31 and SR–OC–92–32) with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b) of the Securities and Exchange Act of 1934 ("Act").[1] On December 3, 1992; OCC filed a technical amendment to File No. SR–OCC–92–31. Notices of the proposals were published in the **Federal Register** on December 18, 1992, and December 7, 1992, respectively, to solicit comments from interested persons.[2] No comments were received. On July 13, 1994, OCC withdrew the portions of the proposed rule changes related to the acceptance of foreign sovereign debt as margin deposits.[3] As discussed below, this order approves the remainder of the proposed rule changes through December 31, 1995.

I. Description

Generally, the purpose of the proposed rule changes is to allow OCC to expand the categories of non-U.S. dollar denominated collateral it will accept as margin deposits. First, the proposed rule changes allow all OCC clearing members to deposit with OCC margin consisting of any foreign currency which is the trading currency[4] or the underlying currency[5] for an OCC-cleared foreign currency option or for an OCC-cleared cross-rate foreign currency option ("cross-rate").[6] Currently, only cross-rate clearing members are permitted to deposit foreign currencies, specifically only trading currencies, as margin.

To accommodate the acceptance of non-U.S. dollar denominated currencies as margin, OCC is making several changes to its By-Laws and Rules. Presently for each class of cross-rates in which a cross-rate clearing member maintains positions, OCC Rule 2108 requires the cross-rate clearing member to establish and to maintain a bank account with an approved OCC clearing bank in the country of origin of each trading and underlying currency and to authorize OCC to withdraw funds from

[1] 15 U.S.C. § 78s(b) (1988).

[2] Securities Exchange Act Release Nos. 31588 (December 11, 1992), 57 FR 60263 [File No. SR–OCC–92–31] (notice of filing of proposed rule change) and 31536 (November 30, 1992), 57 FR 57849 [File. No. SR–OC–92–32] (notice of filing of proposed rule change).

[3] Letter from James C. Yong, Deputy General Counsel, OCC, to Jerry W. Carpenter, Esq., Chief, Branch of Clearing Agency Regulation, Division of Market Regulation, Commission (July 13, 1994).

[4] Trading currency is defined by OCC's rules as the foreign currency in which premium and exercise prices are denominated for a class of foreign currency options or cross-rate currency options. Currently, the trading currencies of approved OCC-cleared cross-rates are the Japanese yen and the German deutsche marks.

[5] Underlying currency is defined by OCC's rules as the foreign currency which is required to be delivered upon the exercise of a class of foreign currency options or cross-rates. Currently, the foreign currencies which are the underlying currencies for OCC-cleared foreign currency options and cross-rates are those of Australia, France, Germany, Japan, Switzerland, and the United Kingdom.

[6] Cross-rates are options to buy or sell a foreign currency ("underlying currency") where the premium and the exercise price are denominated in another foreign currency ("trading currency"). For a detailed discussion of cross-rates, refer to Securities Exchange Act Release No. 29920, International Series Release No. 340 (November 7, 1991), 56 FR 58105 (File No. SR–OCC–91–04) (order approving OCC's clearance and settlement rules for cross-rates).

such bank accounts in accordance with OCC's rules. OCC will impose those same requirements on all clearing members desiring to deposit trading and underlying currencies as margin. Accordingly, amended Rule 203 will require every clearing member that desires to deposit foreign currency as margin to establish and to maintain an account with an OCC-approved clearing bank in each country of origin and must authorize OCC to withdraw funds from such bank account in accordance with OCC's rules. The criteria used in approving banks to act as custodians for deposits of the trading and underlying currencies deposited as margin will be the same as the criteria currently used in approving banks to settle cross-rates.[7]

OCC is amending Rule 604(a) to add trading currencies and underlying currencies to the forms of collateral that clearing members may deposit to satisfy margin requirements.[8] OCC also is adding and defining, as appropriate, the terms underlying currency and trading currency in various Articles of its By-Laws.

II. Discussion

The Commission believes the proposal is consistent with the purposes and requirements of Section 17A of the Act.[9] In particular, the Commission believes the proposal meets the requirement of Sections 17A(b)(3) (A) and (F) that a clearing agency be organized and have the capacity to safeguard securities and funds in its custody or control or for which it is responsible.[10]

In accepting the deposit of trading and underlying currencies, OCC is recognizing the global nature of the financial industry today. For example, by accepting foreign currencies as margin deposits, OCC may reduce the risk of having to buy-in a foreign currency clearing member or a cross-rate clearing member upon default of a delivery obligation because the deposit of the underlying currency may be used to meet such obligation. The Commission believes that the acceptance of trading and underlying currencies as margin will provide OCC with added flexibility in managing a clearing member's default of a delivery obligation and, therefore, should further OCC's ability to meet its safeguarding obligations. For this reason, the Commission is temporarily approving those portions of the proposals enabling OCC to accept trading and underlying currencies as margin deposits.

The Commission is temporarily approving the filings in order that the Commission and OCC will have adequate time and data to review the program before the Commission grants permanent approval. OCC has agreed to undertake a review of the program for accepting non-U.S. dollar denominated currencies as margin collateral after the program has been operational for one year. OCC's review will be submitted in writing to the Commission and will include such things as a study of the effects of accepting foreign currencies as margin collateral, any perceived risk to liquidity, and any perceived need for concentration limits.[11]

III. Conclusion

For the reasons stated above, the Commission finds that OCC's proposal is consistent with Section 17A of the Act.[12]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule changes (File Nos. SR-OCC-92-31 and SR-OCC-92-32) be, and hereby are, approved through December 31, 1995.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-18028 Filed 7-22-94; 8:45 am]

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[7] The criteria used in approving banks to settle cross-rates are set forth in the letter from Jacqueline Luthringshausen, Staff Attorney, OCC, to Jeffrey T. Brown, Staff Attorney, Division of Market Regulation, Commission (November 20, 1992).

[8] Also language is being added to Rule 604(a) to make clear that OCC will convert deposits of trading or underlying currencies into U.S. dollar equivalents for purposes of determining clearing members' compliance with OCC's margin requirements. In valuating foreign currency for conversion to U.S. dollar equivalents, OCC reduces the exchange rate by a margin interval to insure that daily currency fluctuations create little risk of loss to OCC. The margin intervals are chosen to cover three standard deviations or such greater amount as to actually cover 99.7% of the daily percentage price changes over the past ten years. Letter from Jacqueline R. Luthringshausen, OCC, to Jerry W. Carpenter, Esq., Chief, Branch of Clearing Agency Regulation, Division of Market Regulation, Commission (March 11, 1994).

[9] 15 U.S.C. § 78q-1 (1988).

[10] 15 U.S.C. §§ 78q-1(b)(3)(A) and (F) (1988).

[11] Letter from James C. Yong, Vice President and Deputy General Counsel, OCC, to Jerry W. Carpenter, Esq., Chief, Branch of Clearing Agency Regulation, Division of Market Regulation, Commission (March 16, 1994).

[12] 15 U.S.C. § 78q-1 (1988).

[13] 15 U.S.C. § 78s(b)(2) (1988).

[14] 17 CFR 200.30-3(a)(12) (1992).

[Release No. 34-34401; File No. SR-PHLX-94-28]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Quote Spread Parameters for National Over-the-Counter Index ("XOC") Options

July 19, 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 June 13, 1994, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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

Currently, PHLX Rule 1014, "Obligations and Restrictions Applicable to Specialists and Registered Options Traders," and PHLX Floor Procedure Advice ("Advice") F-6, "Option Quote Spread Parameters," establish a maximum quote spread of $1.00 for index options with bids of $20.00 or more. The PHLX proposes to amend its rules to establish the following maximum quote spreads for National Over-the-Counter Index ("XOC") options: $2.00 for XOC options with bids of $20.00 to less than $40.00; and $3.00 for XOC options with bids of $40.00 or more.

The text of the proposed rule change is available at the Office of the Secretary, PHLX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The PHLX proposes to amend the quote spread parameters (bid/ask differential) applicable to XOC options. The current parameters appear in PHLX Rule 1014(c) as well as Advice F–6. The PHLX proposes to widen the quote spread parameters applicable to higher-priced quotations for XOC options as follows: $2.00 for XOC options with bids of $20.00 to less than $40.00; and $3.00 for XOC options with bids of $40.00 or more.

The PHLX states that quote spread parameters, also referred to as bid/ask differentials, govern the width of market quotations;[1] specifically, the maximum widths between the bid and ask for PHLX options are mandated by PHLX Rule 1014(c). Although specific parameters appear in PHLX Rule 1014(c), this rule also permits the Exchange to establish differentials other than those listed for one or more series or classes of options. The Exchange notes that although a violation of the maximum quote spread may result in a fine,[2] the quote spreads are not applicable during fast market conditions, pursuant to Advice F–10, "Extraordinary Market Conditions (Fast Markets)."[3]

Currently, the bid/ask differentials applicable to equity and index options are identical; with respect to higher-priced premiums, where the bid is $20.00 or more, the quote spread parameter is $1.00. The PHLX states that recent volatility in the XOC resulted in temporary floor official relief, pursuant to Advice F–6,[4] being granted to the XOC crowd allowing for the proposed wider quotation. The Exchange proposes to codify these wider quote spread parameters for higher-priced XOC series.

The purpose of the wider quotations is to reflect the wider bid/ask differential in the over-the-counter ("OTC") securities underlying the XOC. In order to hedge XOC exposure, positions in these OTC securities are typically purchased and sold. According to the Exchange, the aggregate bid/ask differential for the XOC's component securities is often greater than $5.00 wide.[5]

The wider bid/ask differential particularly problematic with respect to higher-priced option series because the higher bids represent a greater premium dollar value and thus more risk. Accordingly, the Exchange proposes to widen the XOC quote spread parameter applicable to higher-priced series only. The Exchange believes that this limitation is appropriate because a $40.00 bid, for example, represents a $4,000 premium. The Exchange notes that the XOC series priced at $20.00 or less are most often chosen for investment by public customers (*i.e.*, "customers" who are not associated with broker-dealer organizations or subject to discretionary authorization by assisted persons of broker-dealers).

The PHLX received one letter stating that wider quote spread parameters for XOC options will not benefit public customers and may discourage public customers from purchasing index options on the Exchange.[6] In response to the March 24 Letter, the PHLX indicates that the Exchange's Committee on Options considered the quote spread parameters established by the Chicago Board Options Exchange, Inc. for its Nasdaq 100 Index. In addition, the PHLX notes that the XOC trading crowd has increased its minimum volume guarantee to 20 contracts for public customer orders in series with previous-close bid values of $10.00 or less.[7]

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act, in general, and, in particular with Section 6(b)(5), in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, as well as to protect investors and the public interest, because widening higher-priced XOC quote spread parameters should facilitate hedging, and, in turn, liquidity.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

One written comment in opposition to the change was received from a registered representative of Smith Barney Shearson.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be 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. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 15, 1994.

[1] For example, if the maximum quote spread for an XOC option is ½ where the bid is $6.00, then the following is an acceptable quotation: 6–6–½.

[2] Violations of Advice F–6 may result in the issuance of a fine pursuant to the Exchange's minor rule violation enforcement and reporting plan.

[3] Advice F–10 states that in the interest of maintaining a fair and orderly market under unusual trading conditions, two floor officials may declare a "fast market," during which displayed quotes are not firm and the volume guarantees of Advice A–11, "Responsibility to Make Ten-Up Markets," are not applicable; nevertheless, specialists and trading crowds are required to use best efforts to update quotes and fill incoming orders in accordance with Advice A–11.

[4] Advice F–6 states that relief from the established bid/ask differentials may be granted upon the receipt of approval of two floor officials.

[5] The bid/ask differential in the underlying securities is determined by adding the bids for such securities and dividing by 100 (the number of securities comprising the XOC) to arrive at the composite bid; to arrive at a composite, or average, offer, the offers for the underlying securities are similarly added together and divided by 100.

[6] Letter from Barry J. Weisberg, CFP, Vice President, Financial Consultant, Smith Barney Shearson, to Gerald O'Connell, Vice President, Market Surveillance, PHLX, dated March 24, 1994 ("March 24 Letter").

[7] Letter from Gerald O'Connell, Vice President, Market Surveillance, PHLX, to Barry J. Weisberg, CFP, Vice President, Financial Consultant, Smith Barney Shearson, dated April 29, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-18025 Filed 7-22-94; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-20410; File No. 812-8928]

Preferred Life Insurance Company of New York, et al.

July 18, 1994.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of Application for an Amended Order under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: Preferred Life Insurance Company of New York ("Company"), Preferred Life Variable Account C ("Variable Account"), and NALAC Financial Plans, Inc.

RELEVANT 1940 ACT SECTIONS: Amended Order requested under Section 6(c) of the 1940 Act for exemptions from Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act.

SUMMARY OF APPLICATION: Applicants seek an Amended Order to permit the deduction of a mortality and expense risk charge under certain variable annuity contracts from the assets of the Variable Account, or any other separate account established by the Company in the future to support materially similar variable annuity contracts.

FILING DATE: Applicants initially filed an application on February 7, 1989. Notice of the Application for Exemption was published on March 22, 1989 (Release No. IC-16890, File No. 812-7238) and an Order Granting Exemptions was issued on April 20, 1989 (Release No. IC-16934). The Applicants filed this Application for an Amended Order on April 7, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the Application for an Amended Order and superseding the existing Order will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving the Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 12, 1994, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Applicants: 152 West 57th Street, 18th Floor, New York, NY 10019.

FOR FURTHER INFORMATION CONTACT: W. Thomas Conner, Attorney, or Michael V. Wible, Special Counsel, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. The Company is a stock life insurance company organized under the laws of the state of New York. The Company is a wholly-owned subsidiary of Allianz Life Insurance Company of North America ("Allianz"). Allianz is a stock life insurance company organized under the laws of Minnesota.

2. The Variable Account is a segregated investment account of the Company and is registered under the 1940 Act as a unit investment trust. The Variable Account was established to fund certain variable annuity contracts ("Contracts") issued by the Company. The Variable Account is subdivided into sub-accounts, each of which invests in a fund of the Franklin Valuemark Funds, a Massachusetts business trust registered under the 1940 "Act" as a diversified open-end management investment company.

3. NALAC Financial Plans, Inc., a broker-dealer registered under the Securities Exchange Act of 1934, is the distributor of the Contracts.

4. The Contracts are individual flexible payment deferred variable annuity contracts ("Deferred Contracts") or individual immediate variable annuity contracts ("Immediate Contracts"). The Contracts are available in connection with retirement plans that qualify for Federal tax advantages and for plans that do not so qualify.

5. The Contracts provide for certain charges. Any premium taxes or other taxes payable to a state or other governmental entity will be charged against the Contract values. The Company may, in its sole discretion, pay taxes when due and deduct that amount from the Contract at a later date.

6. Owners of Deferred Contracts may transfer all or a part of their interest in a sub-account to another sub-account. The Company reserves the right to charge, per transfer, the lesser of $25 or 2% of the amount transferred. Prior to the date annuity payments begin ("Annuity Date"), there is no charge for the first three transfers per Contract year. Currently, the Company permits twelve transfers per Contract year without a transfer fee.

Owners of Immediate Contracts may transfer all or part of their interest in a sub-account to another sub-account without the imposition of any transfer fee.

7. For Deferred Contracts, the Company will deduct an annual contract maintenance charge of $30. Applicants represent that this charge has not been set at a level greater than actual cost and contains no element of profit. There is no contract maintenance charge for Immediate Contracts.

8. The Company deducts an administrative expense charge that is equal on an annual basis to .15% of the average daily net assets of the Variable Account. This charge, together with the contract maintenance charge, is designed to reimburse the Company for the expenses it incurs in the establishment and maintenance of the Contracts and the Variable Account. The Company does not intend to profit from this charge. Should this charge be insufficient, the Company will not increase this charge and will incur the loss. Applicants rely on Rule 26a-1 to deduct the contract maintenance charge and the administrative expense charge. Applicants represent that the administrative expense charge will be reduced in the future to the extent that the amount of this charge is in excess of that necessary to reimburse the Company for its administrative expenses.

9. The Contracts do not provide for a front-end sales charge to be deducted from purchase payments. Under the Deferred Contracts, a contingent deferred sales charge ("CDSC") is imposed on full or partial surrenders to reimburse the Company for expenses incurred in connection with the promotion, sale, and distribution of the Contracts. The CDSC applies only to purchase payments received within five years of the date of surrender. No CDSC is imposed on distributions made as annuity payments. In calculating the CDSC, purchase payments are allocated to the amount surrendered on a first-in, first-out basis. The amount of the CDSC is calculated by (i) allocating purchase payments to the amount surrendered; (ii) multiplying each allocated purchase payment that has been held under the Contract by a percentage corresponding to the period for which the payment was held; and (iii) adding the product of

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[8] 17 CFR 200.30-3(a)(12) (1993).

each multiplication in (ii) above. Under certain of the Deferred Contracts, the percentages are as follows:

Years since payment	Percentage
0–1	5
1–2	5
2–3	4
3–4	3
4–5	1.5
5+	0

Under other of the Deferred Contracts, the percentages are as follows:

Years since payment	Percentage
0–1	6
1–2	5
2–3	4
3–4	3
4–5	1.5
5+	0

In no event will the aggregate CDSC exceed 9% of the total purchase payments made. A Contract owner may surrender no more than once annually 15% of purchase payments less prior surrenders without incurring a CDSC. The Company may eliminate or reduce the CDSC under Company procedures then in effect. There is no CDSC imposed on Immediate Contracts.

10. For all Contracts issued in connection with the Variable Account, the Company deducts a mortality and expense risk charge that is equal, on an annual basis, to 1.25% of the average daily net assets of the Variable Account. Of this 1.25% charge, approximately .90% is for mortality risks and .35% is for expense risks.

The mortality risks assumed by the Company arise from its contractual obligation to make annuity payments after the Annuity Date for the life of the annuitant in accordance with the annuity rates guaranteed in the Contracts. The expense risk assumed by the Company is that all actual expenses involved in administering the Contracts, including Contract maintenance costs, administrative costs, mailing costs, data processing costs, legal fees, accounting fees, filing fees, and the costs of other services may exceed the amount recovered from the contract maintenance charge and the administrative expense charge.

Applicants' Legal Analysis and Conditions

1. Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act prohibit a registered unit investment trust and any depositor or underwriter thereof from selling periodic payment plan certificates unless the proceeds of all payments are deposited with a qualified trustee or custodian and held under arrangements that prohibit any payment to the depositor or principal underwriter except a fee, not exceeding such reasonable amounts as the Commission may prescribe, for performing bookkeeping and other administrative services.

2. Applicants request an amended order under Section 6(c) of the 1940 Act exempting them from Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to the extent necessary to permit the deduction of the mortality and expense risk charge from the assets of the Variable Account under the Contracts. Applicants request that the Amended Order also permit the deduction of the mortality and expense risk charge from the assets of any other separate account established by the Company in the future to support variable annuity contracts offered on a basis similar in all material respects to the basis on which the Contracts are offered.

3. Applicants submit that their request for an Amended Order that applies to the Variable Account and to future separate accounts issuing contracts that are substantially similar to the Contracts is appropriate in the public interest. Such an amended order would promote competitiveness in the variable annuity contract market by eliminating the need for the Company to file redundant exemptive applications, thereby reducing its administrative expenses and maximizing the efficient use of its resources. Applicants further submit that the requested relief is consistent with the purposes of the 1940 Act and the protection of investors for the same reasons. Investors would not receive any benefit or additional protection by the Company by being required repeatedly to seek exemptive relief with respect to the same issues addressed in this application.

4. Applicants represent that the mortality and expense risk charge is reasonable in relation to the risks undertaken by the Company and within the range of industry practice with respect to comparable annuity products. Applicants base this representation on an analysis of the mortality risks, taking into consideration such factors as any contractual right to increase charges above current levels, the guaranteed annuity purchase rates, the expense risks taking into consideration the existence of charges against separate account assets for other than mortality and expense risks, and the estimated costs, now and in the future, for certain product features as well as an examination of comparable annuity products. The Company represents that it will maintain at its principal office a memorandum, available to the Commission, setting forth in detail this analysis.

5. If a profit is realized from the mortality and expense risk charge, all or a portion of such profit may be viewed as being offset by distribution expenses not reimbursed by the CDSC. The Company represents that there is a reasonable likelihood that the proposed distribution financing arrangements will benefit the Variable Account and Contract owners. The basis for such conclusion will be set forth in a memorandum maintained by the Company at its principal office and available to the Commission upon request.

6. The Company represents that the Variable Account will invest only in management investment companies that undertake, in the event the company adopts a plan to finance distribution expenses under Rule 12b–1 under the 1940 Act, to have a board of directors, a majority of whom are not interested persons of the company within the meaning of Section 2(a)(19) of the 1940 Act, formulate and approve any such plan.

Conclusion

Applicants assert that, for the reasons and upon the facts set forth above, the requested exemptions from Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to deduct the mortality and expense risk charge from the assets of the Variable Account under the Contracts meet the standards in Section 6(c) of the 1940 Act. Applicants assert that the exemptions requested are necessary and appropriate in the public interest and consistent with the protection cf investors and the policies and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18029 Filed 7–22–94; 8:45am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ended July 15, 1994

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: 49646

Date filed: July 11, 1994

Parties: Members of the International Air Transport Association
Subject: MV/PSC/098 dated May 31, 1994; Amend RP1708—Delete Full Stop Delimiter
Proposed Effective Date: August 16, 1994

Docket Number: 49647
Date filed: July 11, 1994
Parties: Members of the International Air Transport Association
Subject: Telex Reso 024—Lesotho/Swaziland, August 1, 1994
Proposed Effective Date: August 1, 1994

Docket Number: 49648
Date filed: July 11, 1994
Parties: Members of the International Air Transport Association
Subject: COMP Telex Mail Vote 695—Reso 010q; COMP Telex Mail Vote 696—Reso 010xx; Madagascar Fares/Rates—Convert to US Dollars
Proposed Effective Date: August 1, 1994

Docket Number: 49649
Date filed: July 11, 1994
Parties: Members of the International Air Transport Association
Subject: TC3 Telex Mail Vote 697; Japan-Russian Federation Fares; r-1—0531, r-3—063i, r-5—048c, r-2—043i, r-4—063ii, r-5—084c
Proposed Effective Date: July 25, 1994

Docket Number: 49659
Date filed: July 15, 1994
Parties: Members of the International Air Transport Association
Subject: TC31 Telex Mail Vote 693; India-TC1 fares
Proposed Effective Date: August 1, 1994

Docket Number: 49660
Date filed: July 15, 1994
Parties: Members of the International Air Transport Association
Subject: CAC/Reso/179 dated June 24, 1994; Mail Vote A087—Reso 851d (Internal Audit Program)
Proposed Effective Date: August 1, 1994.

Phyllis T. Kaylor,
Chief, Documentary Services Division.
[FR Doc. 94–17983 Filed 7–22–94; 8:45 am]
BILLING CODE 4910–62–P

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended July 15, 1994

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: 49654
Date filed: July 13, 1994
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 10, 1994
Description: Application of American Airlines, Inc., pursuant to Section 401 of the Act and Subpart Q of the Regulations, requests that the following condition be added to its certificates of public convenience and necessity for Routes 137, 370, 487, 576, 602, 604, and 648: "( ) The holder may combine services on any segment of this certificate with (1) any other segment of this certificate, (2) certificate authority it holds on any segments on Routes 137, 370, 487, 576, 602, 604, and 648, and (3) any exemption authority it holds to provide foreign air transportation; provided, however, that such operations are in compliance with all treaties and agreements between the United States and other countries."

Phyllis T. Kaylor,
Chief, Documentary Services Division.
[FR Doc. 94–17982 Filed 7–22–94; 8:45 am]
BILLING CODE 4910–62–P

Coast Guard

[CGD–94–054]

National Boating Safety Advisory Council; Applications for Appointment

AGENCY: Coast Guard, DOT.

ACTION: Request for applicants.

SUMMARY: The U.S. Coast Guard is seeking additional applicants for appointment to membership on the National Boating Safety Advisory Council (NBSAC). The Council is a 21 member Federal advisory committee that advises the Coast Guard on matters related to recreational boating safety.

DATES: Completed application forms must be received by September 23, 1994.

ADDRESSES: Requests for application forms, as well as the completed application forms, should be sent to Commandant (G–NAB), U.S. Coast Guard Headquarters, Washington, DC 20593–0001; telephone: (202) 267–1077.

FOR FURTHER INFORMATION CONTACT: Mr. A. J. Marmo, Executive Director, National Boating Safety Advisory Council (G–NAB), Room 1202, U.S. Coast Guard Headquarters, 2100 Second Street, NW., Washington, DC 20593–0001; (202) 267–1077.

SUPPLEMENTARY INFORMATION: The NBSAC was established by the Federal Boat Safety Act of 1971. Members for the Council are drawn equally from the following sectors of the boating community: State officials responsible for State boating safety programs; recreational boat and associated equipment manufacturers; and national recreational boating organizations and the general public. Members are appointed by the Secretary of Transportation. Applicants are considered for membership on the basis of their expertise, knowledge, and experience in boating safety. The terms of appointment are staggered so that seven vacancies occur each year.

Applications are being sought for membership vacancies that will occur as follows: Three (3) representatives of State officials responsible for State boating safety programs; two (2) representatives of recreational boat and associated equipment manufacturers; and two (2) representatives of national recreational boating organizations and from the general public. To achieve the balance of membership required by the Federal Advisory Committee Act, the Coast Guard is especially interested in receiving applications from minorities and women.

The Council normally meets twice each year at a location selected by the Coast Guard. When attending meetings of the Council, members are provided travel expenses and per diem.

Dated: July 18, 1994.

G. A. Penington,
Rear Admiral, U.S. Coast Guard Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 94–17945 Filed 7–22–94; 8:45 am]
BILLING CODE 4910–14–M

Federal Aviation Administration

[Summary Notice No. PE–94–27]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain

petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 15, 1994.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC–200), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–200), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3132.

FOR FURTHER INFORMATION CONTACT: Mr. D. Michael Smith, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7470.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on July 18, 1994.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: 27735.

Petitioner: Ross Aviation, Inc.

Sections of the FAR Affected: 14 CFR 125.11 (a) and (b).

Description of Relief Sought/ Disposition: To permit Ross Aviation, Inc., a part 121 and 135 certificate holder, to operate three government-owned DC–9–15F aircraft under a part 125 certificate.

Docket No.: 27737.

Petitioner: United Technologies Corporation.

Sections of the FAR Affected: 14 CFR 21.325(b)(3).

Description of Relief Sought/ Disposition: To permit the issuance of export approval for Class II and Class III products manufactured and located at Microtecnica of Torino, Italy.

Docket No.: 27768.

Petitioner: National Air Transportation Association.

Sections of the FAR Affected: 14 CFR 135.151(a).

Description of Relief Sought: To permit certificate holders to operate aircraft on IFR flights under the rules of part 135 with two pilots and without an approved cockpit voice recorder for a limited specified period when the autopilot system is temporarily inoperative.

Dispositions of Petitions

Docket No: 26504.

Petitioner: Arnold Aviation.

Sections of the FAR Affected: 14 CFR 43.3(g).

Description of Relief Sought/ Disposition: To allow appropriately trained and certificated pilots employed by Arnold Aviation to remove and reinstall cabin seats in its Cessna model 185, 206, and 210 airplanes when on certificated mechanics are available.

Grant, June 27, 1994, Exemption No. 5541A

Docket No: 27157.

Petitioner: Dornier Luftfahrt GmbH.

Sections of the FAR Affected: 14 CFR 25.562(b)(2).

Description of Relief Sought/ Disposition: To extend Exemption No. 5704, which gave a time extension from the floor distortion test requirements of § 25.562(b)(2) of the FAR for captain's and first officer's seats in Dornier Model 328 airplanes.

Partial Grant, June 22, 1994, Exemption No. 5704A.

Docket No: 27428.

Petitioner: Snow Aviation International, Inc.

Sections of the FAR Affected: 14 CFR 21.19(a) and (b)(1).

Description of Relief Sought: To permit Snow Aviation International to apply for a supplemental type certificate (STC) for a design change that changes the number of engines from three to two on Boeing Model 727–200 airplanes.

Partial Grant, July 8, Exemption No. 5936

Docket No: 27535.

Petitioner: Aeroflot Russian International Airlines (Aeroflot).

Sections of the FAR Affected: 14 CFR 129.18.

Description of Relief Sought: To extend Exemption No. 5823, as amended, which allows Aeroflot to operate 21 IL–62M, 15 IL–86, 4 IL 96–300, and 4 TV–154 aircraft, which are not equipped with an approved TCAS II-traffic alert and collision avoidance system (TCAS II equipment), after December 30, 1993, subject to certain conditions and limitations. Aeroflot also wishes to amend this exemption to permit Aeroflot to continue to operate IL–62M aircraft that are not equipped with the TCAS system until July 21, 1994, into Miami International Airport, Florida.

Denial, July 6, 1994, Exemption No. 5823B

[FR Doc. 94–17999 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–13–M

Aviation Rulemaking Advisory Committee Meeting on Air Carrier/ General Aviation Maintenance Issues

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of the Federal Aviation Administration Aviation Rulemaking Advisory Committee to discuss air carrier/general aviation maintenance issues.

DATES: The meeting will be held on August 19, 1994, at 8:30 a.m. Arrange for oral presentations by August 5, 1994.

ADDRESSES: The meeting will be held at the Air Transport Association of America, 1301 Pennsylvania Avenue, NW., 11th floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Herber, Meeting Coordinator, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3493; fax number (202) 267–5075.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. app. II), notice is hereby given of a meeting of the Aviation Rulemaking Advisory Committee to consider air carrier/general aviation maintenance issues. The meeting will be held on August 19, 1994, at Air Transport Association of America, 1301 Pennsylvania Avenue, NW., 11th floor, Washington, DC. The receptionist will provide directions to the meeting room. The agenda will include:

- Report on the status of recommendations submitted to the FAA by the Part 65 Working Group and the Weight and Balance Working Group.
- Report on the status of the Part 65 Phase II Working Group.
- Report on the status of the Maintenance Recordkeeping Working Group.

• Report on the status of the International Airworthiness Communications Working Group.

• Report on the status of the Major/Minor Working Group.

• Report on the status of the Parts Approval Action Team Phase III Working Group.

• Report on the status of the General Aviation Maintenance Working Group.

• Discussion of future activities and other business.

Attendance is open to the interested public but may be limited to the space available. The public must make arrangements on or before August 5, 1994, to present oral statements at the meeting. The public may present written statements at any time by providing 35 copies to the Assistant Chair or by bringing the copies to him at the meeting. In addition, sign and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting. Arrangements may be made by contacting the meeting coordinator listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Washington, DC, on July 18, 1994.

Benjamin J. Burton Jr.,

Assistant Executive Director for Air Carrier/General Aviation Maintenance Issues, Aviation Rulemaking Advisory Committee.

[FR Doc. 94–18000 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–13–M

Aviation Rulemaking Advisory Committee Meeting on Transport Airplane and Engine Issues

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of the Federal Aviation Administration's Aviation Rulemaking Advisory Committee to discuss transport airplane and engine issues.

DATES: The meeting will be held on August 17, 1994 at 8:30 a.m. Arrange for oral presentations by August 5, 1994.

ADDRESSES: The meeting will be held at Boeing; 535 Garden Ave. North; Renton, Washington 98055; in Building 10–16, Conference Room 12C4.

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Office of Rulemaking, FAA, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–9682.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II), notice is given of a meeting of the Aviation Rulemaking Advisory Committee to be held on August 17, 1994 at Boeing; 535 Garden Ave. North; Renton, Washington 98055; in Building 10–16, Conference Room 12C4. The agenda for the meeting will include:

• Opening remarks.

• Review of action items.

• Reports of working groups.

• Recommendations concerning future actions in continued airworthiness will be considered.

Attendance is open to the interested public, but will be limited to the space available. The public must make arrangements by August 5, 1994, to present oral statements at the meeting. The public may present written statements to the committee at any time by providing 25 copies to the Assistant Executive Director for Transport Airplane and Engine Issues or by bringing the copies to him at the meeting. In addition, sign and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Washington, DC, on July 15, 1994.

Chris A. Christie,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. 94–18001 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–13–M

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Cedar Rapids Municipal Airport, Cedar Rapids, IA

AGENCY: Federal Aviation Administration, (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Cedar Rapids Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before August 24, 1994.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Central Region, Airports Division, 601 E. 12th Street, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Lawrence K. Mullendore, Airport Director, Cedar Rapids Municipal Airport, at the following address: 2515 Wright Bros. Blvd., SW, Cedar Rapids, Iowa 52404.

Air carriers and foreign air carriers may submit copies of written comment spreviously provided to the Cedar Rapids Airport, under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Ellie Anderson, PFC Coordinator, FAA, Central Region, 601 E. 12th Street, Kansas City, MO 64106, (816) 426–4728. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at Cedar Rapids Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On July 14, 1994, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Cedar Rapids Municipal Airport, Cedar Rapids, Iowa, was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than October 26, 1994.

The following is a brief overview of the application:

Level of the proposed PFC: $3.00.

Proposed charge effective date: December 1, 1994.

Proposed charge expiration date: December 31, 2000.

Brief description of proposed project(s): Expand terminal building to include: upper level holdroom and two new gates with loading bridges; ground level holdroom and gates; security checkpoint area; baggage claim area; and terminal apron expansion.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commerical Operators filing FAA From 1800–31.

Any person may inspect the application in person at the FAA office

listed above under FOR FURTHER INFORMATION CONTACT.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Cedar Rapids Municipal Airport.

Issued in Kansas City, Missouri, on July 15, 1994.

George A. Hendon,

Manager, Airports Division, Central Region.

[FR Doc. 94–18002 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–13–M

Maritime Administration

[Docket S–910]

Farrell Lines Incorporated; Notice of Application for Waiver of Section 804(a) of the Merchant Marine Act, 1936, As Amended

Farrell Lines Incorporated (Farrell), by application dated July 15, 1994, requests a waiver of the provisions of section 804(a) of the Merchant Marine Act, 1936, as amended, so as to permit Farrell to ad hoc charter, operate and/or act as Agent or Broker for any foreign-flag vessel between the United States Gulf and east coast ports and the Black Sea ports. The vessel type would be general-cargo ships not exceeding 12000 DWT and having refrigerated and containerized cargo capacity. The waiver is requested for the duration of Farrell's Operating-Differential Subsidy Agreement, Contract MA/MSB–482, which expires on December 31, 1997.

Farrell operates a regular U.S.-flag liner service between the U.S. east coast and Mediterranean (Trade Route 10/13) with extension to the Black Sea ports using foreign-flag feeder vessels as permitted by law. Farrell states that it is not seeking to service any other mid point areas such as the Mediterranean under the instant request and would limit such sailings to no more than twelve voyages per year.

This application may be inspected in the Office of the Secretary, Maritime Administration. Any person, firm, or corporation having any interest in such request within the meaning of section 804 of the Act and desiring to submit comments concerning the application must file written comments in triplicate with the Secretary, Maritime Administration, Room 7300, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590. Comments must be received no later than 5:00 p.m. on August 4, 1994. This notice is published as a matter of discretion and publication should in no way be considered a favorable or unfavorable decision on the application, as filed or as may be amended. The Maritime Administrator will consider any comments submitted and take such action with respect thereto as may be deemed appropriate.

(Catalog of Federal Domestic Assistance Program No. 20.804 (Operating-Differential Subsidies))

By Order of the Maritime Administrator.

Date: July 20, 1994.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 94–18017 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–81–P

National Highway Traffic Safety Administration

[Docket No. 92–42; Notice 2]

Determination that Nonconforming 1993 Jaguar Sovereign Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of determination by NHTSA that nonconforming 1993 Jaguar Sovereign passenger cars are eligible for importation.

SUMMARY: This notice announces the determination by NHTSA that 1993 Jaguar Sovereign passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the U.S.-certified version of the 1993 Jaguar Sovereign), and they are capable of being readily modified to conform to the standards.

DATES: The determination is effective July 25, 1994.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)), 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 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 49 U.S.C. § 30115 (formerly 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.**

J.K. Motors, Inc. of Kingsville, Maryland ("J.K.") (Registered Importer R–90–006) petitioned NHTSA to determine whether 1993 Jaguar Sovereign passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on May 25, 1994 (59 FR 27104) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final determination must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP 78 is the vehicle eligibility number assigned to vehicles admissible under this determination.

Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1993 Jaguar Sovereign not originally manufactured to comply with all applicable Federal motor vehicle safety standards is substantially similar to a 1993 Jaguar Sovereign originally manufactured for importation into and sale in the United States and certified under 49 U.S.C. § 30115, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: July 20, 1994.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 94–18038 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 94–43; Notice 2]

Determination That Nonconforming 1991 Alfa Romeo 164 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of determination by NHTSA that nonconforming 1991 Alfa Romeo 164 passenger cars are eligible for importation.

SUMMARY: This notice announces the determination by NHTSA that 1991 Alfa Romeo 164 passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the U.S.-certified version of the 1991 Alfa Romeo 164), and they are capable of being readily modified to conform to the standards.

DATES: The determination is effective July 25, 1994.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)), 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 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 49 U.S.C. § 30115 (formerly 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**.

Champagne Imports Inc. of Lansdale, Pennsylvania (Registered Importer No. R–90–009) petitioned NHTSA to determine whether 1991 Alfa Romeo 164 passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on May 25, 1994 (59 FR 27103) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final determination must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP 76 is the vehicle eligibility number assigned to vehicles admissible under this determination.

Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1991 Alfa Romeo 164 not originally manufactured to comply with all applicable Federal motor vehicle safety standards is substantially similar to a 1991 Alfa Romeo 164 originally manufactured for importation into and sale in the United States and certified under 49 U.S.C. § 30115, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: July 20, 1994.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 94–18037 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 94–40; Notice 2]

Determination That Nonconforming 1993 Mercedes-Benz 200E Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of determination by NHTSA that nonconforming 1993 Mercedes-Benz 200E passenger cars are eligible for importation.

SUMMARY: This notice announces the determination by NHTSA that 1993 Mercedes-Benz 200E passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the 1993 Mercedes-Benz 300E), and they are capable of being readily modified to conform to the standards.

DATE: The determination is effective July 25, 1994.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. § 30141(a)(1)(A) (formerly section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act)), 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 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 49 U.S.C. § 30115 (formerly 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**.

Champagne Imports, Inc. of Lansdale, Pennsylvania (Registered Importer R–90–009) petitioned NHTSA to determine whether 1993 Mercedes-Benz 200E passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on May 25, 1994 (59 FR 27107) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final determination must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP 75 is the vehicle eligibility number assigned to vehicles admissible under this notice of final determination

Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1993 Mercedes-Benz 200E (Model ID 124.019) is substantially similar to a 1993 Mercedes-Benz 300E originally manufactured for importation into and sale in the United States and certified under section 114 of the National Traffic and Motor Vehicle Safety Act, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141 (a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: July 20, 1994.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 94–18039 Filed 7–22–94; 8:45 am]

BILLING CODE 4910–59–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 141
Monday, July 25, 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).

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 2 p.m., Wednesday, July 27, 1994.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

MATTER TO BE CONSIDERED:

FY 1996 Budget

The staff will brief the Commission on issues related to the Commission's budget for fiscal year 1996.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207 (301) 504–0800.

Dated: July 20, 1994.

Sadye E. Dunn,

Secretary.

[FR Doc. 94–18172 Filed 7–21–94; 3:03 pm]

BILLING CODE 6355–01–M

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: Thursday, July 28, 1994.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

MATTER TO BE CONSIDERED:

Children's Sleepwear

The staff will brief the Commission on a possible notice of proposed rulemaking to amend the standards for flammability of children's sleepwear to exempt close fitting garments and garments intended for infants.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207 (301) 504–0800.

Dated: July 20, 1994.

Sadye E. Dunn,

Secretary.

[FR Doc. 94–18173 Filed 7–21–94; 3:03 pm]

BILLING CODE 6355–01–M

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 9 a.m., Wednesday, July 29, 1994.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

MATTER TO BE CONSIDERED:

Bicycle Helmets

The staff will brief the Commission and the Commission will consider proposed regulations that would implement the Children's Bicycle Helmet Safety Act of 1994.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207 (301) 504–0800.

Dated: July 20, 1994.

Sadye E. Dunn,

Secretary.

[FR Doc. 94–18174 Filed 7–21–94; 3:03 pm]

BILLING CODE 6355–01–M

FEDERAL ENERGY REGULATORY COMMISSION

The following notice of meeting is published pursuant to Section 3(a) of the Government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552b.

DATE AND TIME: July 27, 1994, 10:00 a.m.

PLACE: 825 North Capitol Street, NE., room 9306, Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

Note—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Lois D. Cashell, Secretary, Telephone (202) 208–0400. For a recording listing items stricken from or added to the meeting, call (202) 208–1627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Reference and Information Center.

Consent Agenda—Hydro, 614th Meeting—July 27, 1994, Regular Meeting (10 a.m.)

CAH–1.
Project No. 9222–005, Niagara Mohawk Power Corporation

CAH–2.
Omitted

CAH–3.
Project No. 4357–013, Clifton Hydro-Power Limited Partnership

CAH–4.
Project No. 11370–001, BAE Energy, Inc.

CAH–5.
Project No. 2984–022, S.D. Warren Company

CAH–6.
Docket No. UL94–1–000, Union Water Power Company
Docket No. UL94–3–000, Kennebec Water Power Company

CAH–7.
Project No. 1235–008, City of Radford, Virginia

Consent Agenda—Electric

CAE–1.
Docket No. ER94–6–000, Intercoast Power Marketing Company

CAE–2.
Docket No. ER94–1014–000, Central Maine Power Company
Docket Nos. ER94–1160–000 and ER94–1317–000, Northeast Utilities Service Company

CAE–3.
Docket No. ER94–1188–000, LG&E Power Marketing Inc.

CAE–4.
Docket No. ER94–1217–000, Consolidated Edison Company of New York, Inc.

CAE–5.
Docket No. ER94–1143–000, Interstate Power Company

CAE–6.
Docket No. ER94–108–000, Heartland Energy Services, Inc.

CAE–7.
Docket Nos. ER94–1150–000 and ER94–1129–000, Pacific Gas and Electric Company
Docket No. EL94–67–000, City of Redding, California v. Pacific Gas and Electric Company

CAE–8.
Docket No. FA91–53–001, New England Power Company

CAE–9.
Docket No. FA92–15–001, Southwestern Public Service Company

CAE–10.
Docket Nos. ER93–96–004 and EL93–11–000, Delmarva Power & Light Company

CAE–11.

Docket No. EL94–2–001, American Municipal Power-Ohio, Inc. v. Dayton Power & Light Company

CAE–12.
Docket Nos. ER92–595–004 and ER92–596–003, Pacific Gas and Electric Company
Docket No. ER92–626–004, Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas & Electric Company

CAE–13.
Docket No. ER94–1128–001, Entergy Services, Inc.

CAE–14.
Omitted

CAE–15.
Docket No. EL94–24–001, Consumer Advocate Division of the Public Service Commission of West Virginia, Maryland People's Counsel and Pennsylvania Office of Consumer Advocate v. Allegheny Generating Company

CAE–16.
Docket Nos. ER94–922–001 and EL93–22–004, Maine Yankee Atomic Power Company

CAE–17.
Docket No. EL89–44–003, Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Company

CAE–18.
Docket Nos. ER93–465–002 and ER93–922–001, Florida Power & Light Company

CAE–19.
Docket No. RM94–17–000, Interpretation and Amendment Clarifying Exemption to Qualifying Facilities From the Federal Power Act

CAE–20.
Docket No. EL94–31–000, Southwestern Public Service Company

CAE–21.
Docket No. EL94–57–001, Louisiana Public Service Commission, Attorney General of the State of Mississippi and Mississippi Public Service Commission v. Entergy Services, Inc.

Consent Agenda—Oil and Gas

CAG–1.
Docket No. PR94–10–000, AIM Pipeline Company

CAG–2.
Docket No. PR94–11–000, Olympic Pipeline Company

CAG–3.
Docket No. PR94–12–000, Overland Trail Transmission Company

CAG–4.
Docket No. PR94–13–000, Acacia Natural Gas Corporation

CAG–5.
Docket Nos. RP94–307–000 and RP94–264–002, Southern Natural Gas Company

CAG–6.
Docket No. RP94–300–000, CNG Transmission Corporation

CAG–7.
Docket No. RP94–302–000, Texas Gas Transmission Corporation

CAG–8.
Docket No. RP94–303–000, Texas Eastern Transmission Corporation

CAG–9.
Docket No. RP94–304–000, Algonquin Gas Transmission Company

CAG–10.
Docket No. RP94–308–000, Eastern Shore Natural Gas Company

CAG–11.
Docket No. RP94–309–000 and RP93–151–000, Tennessee Gas Pipeline Company

CAG–12.
Docket No. RP94–310–000, Carnegie Natural Gas Company

CAG–13.
Omitted

CAG–14.
Omitted

CAG–15.
Docket No. TM94–5–17–000, Texas Eastern Transmission Corporation

CAG–16.
Docket No. TM94–6–48–000, ANR Pipeline Company

CAG–17.
Docket No. TM94–14–29–000, Transcontinental Gas Pipe Line Corporation

CAG–18.
Omitted

CAG–19.
Docket No. RP94–120–004, Koch Gateway Pipeline Company

CAG–20.
Docket No. RP94–301–000, Stingray Pipeline Company

CAG–21.
Docket No. RP94–305–000, Natural Gas Pipeline Company of America

CAG–22.
Docket Nos. RP94–306–000 and 001, Mississippi River Transmission Corporation

CAG–23.
Docket No. TM94–6–28–000, Panhandle Eastern Pipe Line Company

CAG–24.
Omitted

CAG–25.
Omitted

CAG–26.
Omitted

CAG–27.
Docket Nos. RP94–37–001, RP93–198–000 and RS92–27–000, Alabama-Tennessee Natural Gas Company

CAG–28.
Docket No. RP94–214–000, Black Marlin Pipeline Company
Docket No. RP94–235–000, Richfield Gas Storage System
Docket No. RP94–265–000, Algonquin LNG, Inc.

CAG–29.
Docket Nos. RP94–43–004, 005 and 006, ANR Pipeline Company

CAG–30.
Docket No. TM94–3–8–000, South Georgia Natural Gas Company

CAG–31.
Docket Nos. RP93–4–015, RP94–68–004 and RP94–190–001, Mississippi River Transmission Corporation

CAG–32.
Docket Nos. RP94–145–000 and RP94–149–000, Pacific Gas Transmission Company

CAG–33.
Docket Nos. RP94–172–001 and RP94–205–001, Williams Natural Gas Company

CAG–34.
Docket No. RP94–186–002, Questar Pipeline Company

CAG–35.
Docket No. RP94–220–002, Northwest Pipeline Corporation

CAG–36.
Docket No. RP94–278–000, NorAm Gas Transmission Company

Docket No. TA91–1–31–013, Arkla Energy Resources, Inc.

CAG–37.
Docket No. TM94–4–17–001, Texas Eastern Transmission Corporation

CAG–38.
Docket No. TM94–4–28–001, Panhandle Eastern Pipe Line Company

CAG–39.
Docket Nos. RP90–109–012, 010, RP87–62–017 and RP86–148–012, Pacific Gas Transmission Company

CAG–40.
Omitted

CAG–41.
Docket Nos. RP85–209–000, CP86–246–000, CP88–6–000, CP88–329–000, CP88–440–000, CP88–478–000, IN86–5–000, RP84–42–000, RP86–93–000, RP86–158–000, RP87–34–000, RP88–8–000, RP88–27–000, RP88–92–000, RP88–263–000, RP88–264–000, RP88–265–000, RP89–138–000, RP90–91–000, RP91–198–000, TC88–6–000, RP89–147–000, RP90–132–000, RP92–189–000, Koch Gateway Pipeline Company
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(B) Project No. 2287–003, Public Service Company of New Hampshire. Order on application for new license.
(C) Project No. 2288–004, Public Service Company of New Hampshire. Order on application for new license.
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(E) Project No. 2311–001, James River-New Hampshire Electric, Inc. Order on application for new license.
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Docket No. RM93–19–000, Inquiry Concerning The Commission's Pricing Policy For Transmission Services Provided By Public Utilities Under The Federal Power Act. Policy Statement.
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Miscellaneous Agenda

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Docket Nos. IS90–39–002, IS91–3–000 and IS91 32–000 (Phase I), Enron Liquids Pipeline Company. Opinion and order on initial decision.

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II. Restructuring Matters

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Reserved

III. Pipeline Certificate Matters

PC–1.

Reserved

Lois D. Cashell,

Secretary.

[FR Doc. 94–18140 Filed 7–21–94; 3:03 pm]

BILLING CODE 6717–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Regular Meeting of the Board of Directors

TIME AND DATE: 2 p.m., Thursday, August 4, 1994.

PLACE: Federal Reserve System, 20th & C Street, NW., Eccles Building, Board Room, Washington, DC 20552.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Jeffrey T. Bryson, General Counsel/Secretary, (202) 376–2441.

AGENDA:

I. Call to Order
II. Approval of Minutes:
May 13, 1994, Annual Mtg.
III. Budget Committee Report:
a. FY 1994 Request for Budget Revision
b. FY 1995 Budget Request
c. FY 1996 Office of Management and Budget Submission
IV. Treasurer's Report
V. Executive Director's Quarterly Management Report
VI. Adjourn

Jeffrey T. Bryson,

General Counsel/Secretary.

[FR Doc. 94–18109 Filed 7–21–94; 10:15 am]

BILLING CODE 7570–01–M

federal register

Monday
July 25, 1994

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1915

Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1915

[Docket No. S–050]

Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: The previous Subpart B of part 1915 sets out requirements for work in explosive and other dangerous atmospheres in vessels and vessel sections and applies to shipbuilding, ship repairing, and shipbreaking operations and to related employment. The final rule being promulgated today extends the protection afforded by these previous rules to employees entering any confined or enclosed space or working in any other dangerous atmosphere in or out of a shipyard. The final rule also simplifies and clarifies some of the requirements in the previous standards.

The final rule includes requirements for a shipyard competent person, a Marine Chemist, a Certified Industrial hygienist, or a Coast Guard authorized person to evaluate conditions within a confined or enclosed space and to institute measures to ensure that entrants are protected. It also contains requirements for posting unsafe spaces, for safe performance of cleaning, cold work, and hot work, and for classifying a person as a shipyard competent person.

EFFECTIVE DATE: The Final Rule becomes effective on October 24, 1994.

ADDRESSES: In compliance with 28 U.S.C. 2112(a), the Agency designates for receipt of petitions for review of the standard the Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, room S4004, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, U.S. Department of Labor, Occupational Safety and Health Administration, room N3647, 200 Constitution Ave., NW., Washington, DC 20210 (202–219–8148).

SUPPLEMENTARY INFORMATION: The principal authors of this final rule are Joseph V. Daddura, Project Officer and Odet Shaw, Office of Maritime Standards; Michael B. Moore, Office of Fire Protection Engineering and Safety Systems; Paul Bolon, Office of Regulatory Analysis: and Claudia Thurber, Project Attorney, Office of the Solicitor, U.S. Department of Labor.

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I. Background

A. History of the Regulation

In May 1971, the Occupational Safety and Health Administration (OSHA), under authority granted by section 6(a) of the Occupational Safety and Health Act of 1970 (OSH Act, 84 Stat. 1590; 29 U.S.C. 655(a)), adopted established Federal standards issued under section 41 of the Longshore and Harbor Workers' Compensation Act (44 Stat. 1444, as amended; 33 U.S.C. 941), as standards applicable to ship repairing (29 CFR part 1915), shipbuilding (29 CFR part 1916), and shipbreaking (29 CFR part 1917) operations. Additionally, other Federal standards and national consensus standards were similarly adopted as general industry standards (29 CFR part 1910) and were made applicable to all aspects of shipyard operations not specifically covered by parts 1915, 1916, and 1917. On April 20, 1982 (47 FR 16984), parts 1915, 1916, and 1917 were consolidated into a single part 1915, for shipyard employment. The consolidated set of standards, entitled "Occupational Safety and Health Standards for Shipyard Employment," eliminated duplicate and overlapping provisions within the former three parts, but did not alter any substantive requirements. The consolidation had no effect on the applicability of the general industry standards, in part 1910, to hazards or conditions in shipyard employment not specifically addressed in the shipyard standards.

On November 29, 1988, OSHA published a proposed rule in the **Federal Register** (53 FR 48092) that would revise its previous standards on explosive and other dangerous atmospheres in vessels and vessel sections, contained in Subpart B of part 1915. The proposed standards covered safe entry into and work on board vessels and vessel sections in shipyards. The NPRM proposed the following revisions to the previous Subpart B:

* Expanding the scope so that the entire subpart applied to all phases of shipyard work on board vessels and vessel sections;

* Adding several definitions; changing the sequence of testing so that requirements for oxygen, flammability, and toxicity testing are presented in that order (the proposal would not, however, have required testing in that order);

* Increasing the oxygen content required for unprotected confined or enclosed space entry from 16.5 percent by volume to 19.5 percent by volume; adding a requirement that spaces containing concentrations of toxic contaminants above the permissible exposure limit be labeled "Not Safe for Workers";

* Adding a requirement for hot work that the concentration of oxygen not exceed 22 percent by volume; adding a requirement to label spaces if those spaces contain, or are adjacent to a space containing, concentrations of flammable gases or vapors at or above 10 percent of their lower explosive limit; and

* Adding two new appendices to aid employers and employees.

The NPRM also proposed a revision of § 1915.7, *Competent Person*. The previous § 1915.7, which is contained in Subpart A of the Shipyard Standards, defines a competent person for the purposes of Subparts B, C (Surface Preparation and Preservation), D (Welding, Cutting, and Heating), and H (Tools and Related Equipment). The proposed revision was intended to eliminate the paperwork burden involved in designating competent persons, to clarify the skills required of them, and to simplify requirements relating to logging of inspections and tests.

The notice of proposed rulemaking (NPRM) gave interested persons until February 27, 1989, to submit comments with respect to the proposal, to file objections, and to request a hearing. OSHA received over 40 comments in response to the proposed rulemaking. There were no hearing requests, and no hearing was held.

A short time after the shipyard proposed rule (Subpart B) was published, in November 1988, the Shipyard Employment Standards Advisory Committee (SESAC) was established to provide OSHA with guidance in revising its shipyard standards and in developing a vertical standard for the shipyard industry. At several SESAC meetings, the proposed rules in Subpart B were on the agenda.

Subsequently, on June 5, 1989 (several months after the comment period closed for the proposed revision

of Subpart B), OSHA published a proposed rule for permit-required confined spaces in general industry (54 FR 24080). This general industry permit space proposal was intended to apply to land-side (that is, other than on vessels or vessel sections) operations within shipyards, including all operations and work areas, such as fabricating shops, machine shops, and staging areas. As a result, shipyard employers would have been required to comply with one set of standards for shipboard operations (part 1915, Subpart B) and another for land-side operations (part 1910, § 1910.146).

The general industry permit space proposal was discussed at several SESAC meetings with a view toward incorporating applicable requirements into a vertical confined space standard for the entire shipyard. This would make it unnecessary for the general industry standard to apply to hazardous atmospheres in confined spaces in shipyards, as had been proposed in the 1910 rulemaking.

At SESAC's meeting of April 25–26, 1990, the Committee recommended that the scope of the proposed shipyard standard on vessels and vessel sections be expanded to include all confined and enclosed space operations within the shipyard (Tr. 102, 4/25/90). The committee also recommended that the title of the subpart, originally called "Explosive and Dangerous Atmospheres in Vessels and Vessel Sections," be changed to clarify that this standard addresses all confined and enclosed spaces and dangerous atmospheres encountered in shipyard employment. Additionally, SESAC recommended that several provisions similar to those proposed for general industry be added to subpart B to make it a comprehensive standard for shipyard employment. The provisions they recommended included a paragraph covering training requirements and duties of confined space entrants; a new paragraph on self-rescue and rescue teams; and a new paragraph addressing the duties of employers with respect to on-site contractors. As recommended by SESAC, the additional provisions would make subpart B a comprehensive set of requirements applicable to the hazards posed by confined and enclosed spaces and dangerous atmospheres encountered throughout shipyard employment.

In response to issues raised in various comments submitted to the docket concerning the general industry permit-required confined spaces proposal and to enable OSHA to place the SESAC recommendations into the subpart B rulemaking record, the Agency reopened the subpart B record for additional comment (57 FR 28152). In the notice reopening the record, which was published on June 24, 1992, OSHA invited public comment on seven issues. These issues were:

(1) Whether or not land-side confined and enclosed spaces and other dangerous atmospheres should be treated separately from spaces in vessels and vessel sections.

(2) What kind of training should shipyard confined space workers receive.

(3) Whether or not subpart B should require attendants for shipyard confined spaces.

(4) What should be a shipyard employer's duty with respect to rescue services.

(5) What should be a shipyard employer's duty with respect to contractors and other employers.

(6) Whether or not hot work permits should be required.

(7) What are the costs associated with applying requirements from the generic confined spaces standard to shipyards.

Interested persons were given until September 22, 1992, to submit comments. OSHA received 53 comments in response to the notice reopening the record on the revision of subpart B.

The final rule on general industry permit-required confined spaces was published in the **Federal Register** on January 14, 1993 (58 FR 4462). Shipyards were omitted from the scope of the final general industry standard because the Agency felt that it would be more appropriate to address them in the revision of subpart B of part 1915. The relationship between subpart B and § 1910.146 and OSHA's reasons for adopting a separate rule in subpart B are presented in the summary and explanation discussion of the scope and application section for subpart B (§ 1915.11).

The information OSHA relied upon to prepare the Notice of Proposed Rulemaking (NPRM), comments received in response to the (NPRM), to the notice of the reopening of the record, and the exhibits (including the written transcripts of relevant SESAC meetings) submitted during the period allowed for such submissions, constitute the rulemaking record for this proceeding. The entire record was carefully considered in the preparation of this final rule.

B. Significant Risk

The Occupational Safety and Health Administration (OSHA) has determined that there is a significant risk to the health and safety of workers who enter confined spaces in shipyards. According to the most recent data from the Bureau of Labor Statistics (BLS), SIC 3731 (Ship building and Repairing) has the highest lost workday case incidence rate for injuries of any industry ("Occupational Injuries and Illnesses in the United States by Industry, 1991," Bureau of Labor Statistics, May, 1993).

The industry as a whole therefore poses the highest risk of injury from all hazards for its employees in the U.S. Within shipyards, confined space operations are one of the riskiest activities, which is why the industry developed its own effective confined space procedures that were adopted by OSHA as subpart B in 29 CFR part 1915 in the early 1970s.

At the present time, work in confined spaces on vessels is covered by the current shipyard confined space regulations in subpart B of part 1915, but work in "land-side" confined spaces is not. This work on land-side operations is therefore not currently addressed by a specific OSHA regulation. These operations were originally included in the scope of the proposed general industry confined space rule (§ 1910.146) but were omitted in the final rule. In the preamble to that final rule, the Agency noted its intention to cover confined spaces, both on vessels and on land, in its revision of subpart B of part 1915. (58 FR 4471)

Confined space work on ships is extremely hazardous, and accidents and fatalities still occur when the procedures of subpart B are not adhered to. OSHA has recorded 20 deaths in the shipyard and boat-building industries from 1983 to 1992 from confined space accidents. The Agency has concluded that the new elements in final subpart B will address non-compliance and lack of discipline in applying subpart B and will reduce significant risk in confined and enclosed spaces and other dangerous atmosphere work. These new elements include training, duty to employers (contractors), and rescue. In addition, the Agency concludes that other additions in the final will reduce risk in confined and enclosed spaces and other dangerous atmospheres work, including: specifying the order of testing of atmospheres, increasing the required oxygen content from 16.5 percent to 19.5 percent by volume, restricting oxygen content of spaces for hot work to 22 percent by volume, and posting notification if spaces contain or are adjacent to spaces that contain, concentration of flammable gases or vapors at or above 10 percent of there LEL.

II. Summary and Explanation of the Final Rule

A. Introduction

The final rule consists of two parts—a revision of the previous shipyard competent person requirements found in subpart A and a revision of the requirements for explosive and other dangerous atmospheres found in subpart B. In this section of the preamble, OSHA is providing a brief explanation of these two revisions to help explain the final rule, together with a brief overview and explanation of the revised standards. A later section will provide a full summary and explanation of individual provisions, with complete details and discussion of the rulemaking record.

OSHA is revising § 1915.7, which sets out requirements for the designation and qualification of competent persons. Under this section, employers must designate one or more competent persons. The employer must provide a roster of competent persons, which must contain the names of these persons and the dates of their training. Competent persons are required to know and understand the requirements of subpart B (confined and enclosed spaces and other dangerous atmospheres), C (surface preparation and preservation), D (welding, cutting, and heating), and H (tools and related equipment); to know the locations and designations of spaces where work is to be performed; to have the ability to calibrate and use test equipment and perform the tests required by subparts B, C, D, and H; to be able to evaluate whether spaces need to be tested further by a Marine Chemist, Certified Industrial Hygienist, or Coast Guard authorized person; to have the ability to understand and carry out instructions and other information provided by Marine Chemists, Certified Industrial Hygienists, or U.S. Coast Guard authorized persons; and to have the ability to maintain the records required by § 1915.7. The final rule eliminates the requirement for the employer to complete OSHA Forms 73 *(Designation of Competent Persons)* and 74 *(Log of Inspection and Tests by Competent Person);* however, the employer must continue to keep records of all testing performed under subparts B, C, D, and H.

OSHA is also revising subpart B of part 1915. This subpart sets out requirements for safe entry into and work in shipyard confined spaces, enclosed spaces, and other dangerous atmospheres. The provisions of this subpart apply to spaces that might contain oxygen-deficient, oxygen-enriched, flammable, or toxic atmospheres. Examples of such spaces include spaces that have been sealed, spaces that contain or have contained materials that are flammable, toxic, corrosive, or irritant, and spaces that are adjacent to these spaces. These spaces must be tested by a competent person to determine whether or not it is safe for an employee to enter into and work within or on the space.

The revised subpart B uses a two-tiered approach for evaluating the hazards posed by confined and enclosed spaces and dangerous atmospheres. The initial evaluation of all spaces is performed by a shipyard competent person. When this evaluation discovers hazards greater than those that a competent person is capable of handling, the services of a Marine Chemist or certified industrial hygienist are necessary. The shipyard competent person and these other qualified individuals work in tandem to ensure the safe entry into and work in confined and enclosed spaces and other dangerous atmospheres.

If the tests demonstrate that it is safe, then employees may enter the space. If the tests show that it is not safe, then the space must undergo further evaluation by a Marine Chemist or certified industrial hygienist, and corrective action must be taken before employees may enter. After further evaluation, the space must be designated as "Not Safe for Workers—Enter with Restrictions" (for example, when ventilation is necessary to maintain flammable concentrations below 10 percent of the lower explosive limit of a gas or vapor) or "Not Safe for Workers" (for example, spaces with atmospheres that are immediately dangerous to life or health). Spaces designated as "Not Safe for Workers—Enter with Restrictions" or "Not Safe for Workers" must be posted with their designation so that employees do not enter the spaces accidentally.

Employees who enter confined or enclosed spaces or dangerous atmospheres must be trained to perform their work safely. The standard requires training in hazard recognition, in the use of protective equipment, and in self-rescue techniques. The employer must certify that entrants have been trained before they are allowed to enter confined and enclosed spaces or dangerous atmospheres. In addition, employers must provide for rescue, either by having an on-site rescue team or by arranging for the use of outside rescue services.

A space that has contained a flammable or toxic substance must be cleaned before it can be made "Safe for entry" without restrictions. The final rule sets requirements for performing the necessary cold work (such as cleaning, scraping, inspecting the structure, and surveying the space) usually to prepare the spaces for hot work. First, residues of hazardous materials must be removed (for example, flammable liquids are pumped out, then the space is cleaned). The atmosphere within the space must be tested for flammability, and these tests must be repeated as often as necessary throughout the course of work to ensure that the concentration of flammable gases and vapors is in a safe range. (These tests are in addition to the tests required before entry.) The standard also requires ignition sources to be controlled or eliminated during cold work to limit further the possibility of explosion or fire.

If hot work is to be performed, confined and enclosed spaces and dangerous atmospheres are classified in two groups. If the spaces contain or have contained flammable liquids or gases or if the spaces are adjacent to such spaces, then a Marine Chemist or Coast Guard authorized person must test and certify the space as safe for hot work. Other types of confined and enclosed spaces and hazardous atmospheres must be tested for safety by a competent person before hot work is allowed.

The standard also contains provisions for maintaining safe working conditions. Pipelines that carry hazardous materials must be blocked or flushed and cleaned to prevent hazardous materials from discharging into a space. The space must be tested periodically to ensure that safe working conditions are maintained. Additionally, work operations must be halted and the space exited when conditions change and the space no longer meets the criteria specified by the Marine Chemist or Coast Guard authorized person for safe work in or on the space.

The standard sets requirements for the posting of confined and enclosed spaces and dangerous atmospheres. The signs must be understood by all employees working in the area and must be posted at the means of access to the work area.

The following summary and explanation of the individual provisions within the standard discusses the important elements of the final standard, explains the purpose of the individual requirements, and explains any differences between the final rule and previous standards. This section also discusses and resolves issues that were raised during the rulemaking period, significant comments received as part of the rulemaking record, and substantive changes from the language

of the proposed rule. References in parentheses are to exhibits (Ex.) and transcripts (Tr.)[1] in the rulemaking record.

B. Subpart A, § 1915.7—Competent Person

In this final rule, OSHA is revising various requirements related to the designation and use of competent persons. Among the revised provisions are the following: allowing an employer to avoid designating competent persons if their tasks are always performed by a Marine Chemist; allowing employers to select the form in which they may keep records on competent persons; clarifying the criteria competent persons must meet; and simplifying the way the competent person's records of tests and inspections may be kept. In this regard, and as proposed, OSHA is only revising § 1915.7, which establishes both the duty for employers to designate competent persons and the criteria for designating such persons. The definition for competent person in § 1915.4 remains the same. The duties of competent persons, other than the duties contained in Subpart B and addressed below in this rulemaking, also remain the same.

In addition to substantive and editorial revisions to the regulatory text of § 1915.7 contained in the final rule, OSHA has reorganized the paragraphs for clarity and coherence. OSHA prefers to place paragraphs addressing the scope or application of a regulation at the beginning of the applicable paragraphs, sections, or subparts of that regulation. The previous paragraph addressing the application of § 1915.7 is contained in paragraph (d) located at the end of § 1915.7. To be consistent with other OSHA rulemaking, OSHA has redesignated the paragraphs of § 1915.7 so that the previous paragraph (d) entitled, "Application," becomes new paragraph (a) in the final rule. Previous paragraphs (a), (b), and (c) have been redesignated (b), (c), and (d), respectively.

Application. Paragraph (a) of the final standard sets forth the application of § 1915.7 that was previously contained in paragraph (d) as discussed above. In addition, editorial changes have been made to improve the language. For example, the old paragraph specified that application would be to "employers engaged in general ship repair, shipbuilding and shipbreaking" while in the new paragraph the general inclusive term "shipyard employment" is used. The coverage provided to employees by the new language is identical.

Designation of a competent person. In paragraph (b)(1), OSHA continues the requirement in old paragraph (a)(1) of § 1915.7 that the employer designate at least one competent person for the purpose of testing the atmospheres of work spaces in shipyard employment unless all of the employer's testing under Subpart B is performed by an NFPA Certified Marine Chemist.

OSHA also proposed to delete "National Fire Protection Association Certified Marine Chemist" in previous paragraph (a)(1) and to replace it with "Marine Chemist." The phrase "National Fire Protection Association Certified" which modifies "Marine Chemist" is redundant since the term "Marine Chemist" will be defined in the final rule as "an individual who possesses a current Marine Chemist Certificate issued by the National Fire Protection Association."

OSHA proposed to allow an employer to avoid designating competent persons when the employer states that atmospheric testing is done by other qualified individuals, who include NFPA Certified Marine Chemists. Some commenters (e.g., Exs. 6–3, 6–12, 6–15) asserted that competent persons were as capable as the Marine Chemist in performing the atmospheric tests required in Subparts B, C, D, and H. For example, Bay Shipbuilding Corp.

(Ex. 6–15) commented:

> If an employer is just dealing with a common element like high flash point fuels, oxygen content, carbon monoxide, or hydrogen sulfide, which are easily detectable with electronic measuring devices, you do not need a skilled chemist, provided you have a well trained and equipped competent person.

OSHA agrees that a competent person is capable of testing atmospheric conditions and certifying spaces for entry, and that Marine Chemists are certainly capable of performing that testing. However, the proposal would also have allowed the employer not to designate a competent person if the testing were done by a Coast Guard authorized person. OSHA has determined that this would not promote adequate safety because the Coast Guard authorized person may not have been trained to have all the skills and knowledge of a competent person. In fact, Coast Guard authorized persons are only allowed to authorize someone to test and certify a space "Safe for Hot Work." (See the text of 46 CFR 35.01–1(a) through (c), 71.60(c)(1), and 91.50–1(c)(1) in Appendix B to subpart B). A shipyard that relied only upon Coast Guard approved persons would not have an individual who had all the skills and knowledge necessary to protect employees from atmospheric hazards in confined and enclosed spaces and other dangerous atmospheres. Therefore, consistent with the previous standard, an employer can only avoid designating a competent person(s) if the employer states that all testing will be done by a Marine Chemist.

In paragraph (b)(2), OSHA has carried forth most of the requirements of previous paragraph (a)(2), which addressed the recording of information on employees who have been designated competent persons. An employer is still required to keep a list of his or her competent persons, but the employer will have more flexibility in determining the form of the record, and instead of being required to send the list to the OSHA area office, employers will be required to maintain the list and make it available upon request.

Paragraph (a)(2) of the previous rule required the employer to indicate on a "Designation of Competent Person" (OSHA 73 form) either the names of employees designated as competent persons or that the prescribed functions of a competent person would always be carried out by a NFPA Certified Marine Chemist. In addition, a new OSHA 73 form had to be completed when additions or changes were made to the information concerning persons designated as competent persons and that it be filed with the local OSHA area office.

The exception in paragraph (b)(1) which allows an employer to designate "any person who meets the applicable portion of the criteria [for competent persons] set forth in paragraph (c)" in certain situations was in the previous standard at § 1915.7(d) *Application.*

OSHA proposed that the employer prepare a "certification record," that would include the employer's name, the identification of the designated competent person or a statement that a Marine Chemist or a Coast Guard authorized person would be used, the date of training, and that the employer maintain the most recent record on file. Coast Guard authorized persons were also to be added to the exception from designating a competent person. The proposal also eliminated the need to use an OSHA 73 form for recording the information required by the standard.

In this final rule, OSHA addresses the proposed requirements under three separate paragraphs. In paragraph (b)(2)(i) of the final rule, OSHA continues to require employers to keep a record of employees who have been

[1] Transcript of the SESAC meeting of September 2–3, 1992, Baltimore, MD.

designated as competent persons or a statement that the employer plans to use a Marine Chemist for the testing of atmospheres.

Paragraph (b)(2)(ii) continues the requirement that the record of designated persons be maintained but adds a requirement that the employer make the record available for inspection by OSHA, NIOSH, employees, or their designated representatives. This is consistent with other OSHA standards including §§ 1915.1025(l)(2) and 1915.1027(o), and with industry practice. OSHA believes it is imperative that competent persons be easily identified because their skills are critical for the provision and maintenance of a safe workplace. In addition, the new requirement will facilitate enforcement of the maintenance of records requirement.

OSHA has eliminated the requirement to use an OSHA 73 because OSHA believes that the OSHA 73 form requires more information than is necessary. The primary purpose of the "Designation of Competent Person" form was to provide the identification of employees designated as competent persons or to indicate that a Marine Chemist would be used to perform tests. OSHA believes that such information can be recorded and provided in other ways.

Since the OSHA 73 form is no longer required, it no longer needs to be provided to the OSHA area office each time a change is made. Now employers can maintain the record of designated employees at the place of employment or other location, such as the main office of the employer, so long as the record can be provided for inspection upon request.

The U.S. Coast Guard MIONY (Ex. 6–4) and Mr. Alan Spackman (Ex. 6–5) supported the elimination of OSHA Form 73, but only if the employer is required to maintain the alternative method of certification. Mr. Spackman (Ex. 6–5) stated,

> This action is acceptable only if the employer is required to either post or make the competent person's certification record available upon request and without retaliation to employee and other persons who may be in the workplaces. The proposal fails to give this assurance.

OSHA believes that by allowing alternative reporting media for identifying designated employees and by requiring that records be maintained and made available for inspection rather than submitted to the local OSHA area office, the final rule addresses Mr. Spackman's concerns. Bay Shipbuilding Corp. (Ex. 6–15) commented,

> Form 73 is non-productive and obsolete. The form could be revised to indicate information such as name, date, employment/experience in shipbuilding/repairs/ship breaking, and schooling or training * * *

Therefore, in the final rule, the employer is permitted to use any form or format of reporting that identifies the employees who are designated as competent persons and the date they were trained or that a Marine Chemist will be used to perform atmospheric testing. Under the final rule, OSHA will continue to recognize the OSHA 73 form as an acceptable recordkeeping medium, but will not require its use. Employers are free to use whatever recordkeeping medium they choose as long as the record contains the minimum information required in the final rule and can be presented for inspection upon request. By requiring that the record be made available for inspection upon request, OSHA is eliminating the need for employers to file new OSHA 73 forms or certifications of designated persons with the nearest OSHA area office as required in the previous language of § 1915.7(a)(2).

In paragraph (b)(2)(iii), OSHA has reorganized the requirements of the certificate designating employees as competent persons, keeping most that were proposed, but eliminating the requirement to include the date the record was made and adding a requirement to include the date the competent person was trained. As long as the list of competent persons represents the current situation, there is no need to know when it was created. However, knowing when a competent person was trained will enable OSHA to determine easily that the employee was trained, thus facilitating enforcement and ensuring that the employer is aware of the date the employee was trained.

Criteria for a competent person. In the proposal, the Agency requested public comment on whether there should be OSHA-approved or OSHA-required training for competent persons, whether competent persons should be certified, when such requirements could be implemented, and how many persons would need training and certification.

Several commenters believed that OSHA should not require training or certification of shipyard competent persons. For example, the Shipbuilders Council of America (SCA) (Ex. 6–3) and Newport News Shipbuilding (Ex. 6–6), commented:

> The vast majority of confined space entry incidents are the result of poor application of confined space entry procedures. There are few, if any, confined space incidents involving errors by a competent person. The criteria for designating competent persons in the present standard in § 1915.7 are sufficiently specific and rigorous to ensure qualified individuals, and should be retained.

SCA (Ex. 6–3) additionally suggested that,

> OSHA should continue to offer and support Shipyard Competent Person training courses. However, the fact that an individual has taken the course alone does not ensure competency.

Other commenters urged OSHA to institute mandatory training and certification (e.g., Ex. 6–14, 6–24, 6–31). For instance, NIOSH recommended that OSHA require and take responsibility for the certification and training of shipyard competent persons (Ex. 6–14).

The U.S. Navy's Environmental Health Center (Ex. 6–31) related the issue of shipyard competent persons to their Gas Free Engineers by stating that:

> OSHA should adopt a formal policy on this issue. Naval shipyards currently have a 3 week Gas Free Engineer (GFE) course which is given to Navy personnel so that they may perform as Gas Free Engineering Technicians.

Another commenter, Independent Testing and Consulting, Inc. (Ex. 6–24) expressed this viewpoint:

> The NFPA in conjunction with OSHA has re-introduced a voluntary training program for Competent Persons * * *. The provision of training by outside agencies lifts a burden from the employer and the benefits outweigh the costs.
>
> The requirements of 1915.7 are adequate but every effort should be made to provide employers with the opportunity to send personnel to training courses which should be OSHA approved. Such approval should require that persons be recertified periodically, say every 3–5 years. This would assure that competent persons keep abreast of changes in technology, law etc.

OSHA received support for periodic re-training and many suggestions with a variety of time limits (Ex. 6–4, 6–12, 6–14, 6–21, 6–22, 6–27, 6–28, 6–33, 6–36). For example, the U.S. Coast Guard MIONY (Ex. 6–4) and the Navy's Sea Systems Command (Ex. 6–12) believe that competent persons should attend initial training and then attend refresher training each year thereafter. NIOSH (Ex. 6–14) recommended that annual training of the competent person be required for recertification.

Several commenters, however, believed that the criteria for designating a competent person should remain the same as the previous standard. The NFPA (Ex. 6–10), for example, stated :

> * * * Emphasis should be placed upon enforcement of existing requirements (the performance requirements to be designated for a competent person) and that formal training be directed toward the existing duties and responsibilities of a competent person.

And as expressed by Delta Laboratory and Gas Testing, Inc. (Ex. 6–35):

> * * * the present system provides a tried and tested system of confined space entry and work * * *. To change the basic format of the system would be sheer folly and would benefit the few at the expense of many.

While OSHA supports the need for training requirements, OSHA agrees with the position of the majority of commenters that the competent person criteria contained in § 1915.7 achieve the same result, that is, a highly trained individual who has knowledge of the unique aspects of shipyard operations and the ability to carry out and perform the required atmospheric tests. The criterion in paragraph (c) of § 1915.7 requires the shipyard competent person to have the skill and knowledge necessary to perform atmospheric testing. Because each shipyard is unique, how much training a shipyard competent person must have and how often it must be repeated is left to the employer who is in the best position to determine what skills and knowledge must be reinforced and what resource information needs to be presented. As such, OSHA is of the opinion that by continuing the previous competent person criteria, employers will ensure that the necessary training will continue to be provided to shipyard employers who are so designated as competent persons. Furthermore, OSHA believes that this performance-oriented approach will allow the most flexibility in ensuring the availability of competent person services and in ensuring that the unique conditions in each shipyard can be addressed.

Paragraph (c)(1) is the same as previous paragraph (b)(1) except that the competent person is now required to be able to understand and carry out the written or oral instructions left by the Certified Industrial Hygienist as well as the Marine Chemist and the Coast Guard Authorized Person. Certificates issued by the Marine Chemist, Certified Industrial Hygienist, or Coast Guard authorized person are written instructions. OSHA had proposed to separate the requirements to understand certificates and to carry out verbal instructions left by the Marine Chemist or Certified Industrial Hygienist or Coast Guard authorized person but the Agency has concluded that the requirements are sufficiently interrelated that they can continue to be listed together in paragraph (c)(1).

Paragraph (c)(2) continues the requirement of previous paragraph (b)(3) that competent persons have a knowledge of Subparts B, C, D, and H of part 1915. OSHA did not propose to change this requirement, and has made only an editorial change in order to improve clarity.

Paragraph (c)(3) is the same as old paragraph (b)(4), requiring that competent persons have a familiarity with the structure and knowledge of the location and designation of spaces on the types of vessels on which repair work is done. OSHA did not propose to change this requirement but in the final rule reflects OSHA's decision to expand the scope of Subpart B to cover all phases of shipyard employment.

In paragraph (c)(4), OSHA continues to require competent persons to have the ability to use and interpret the readings of oxygen indicators, combustible gas indicators, and carbon dioxide indicators, but consistent with the proposal, the Agency has added a requirement that the competent person be able to calibrate the testing equipment and that the equipment not be limited to these monitors.

The proposed language in paragraph (b)(3) was performance-oriented in that it did not limit the testing equipment to the types recognized specifically in paragraph (b)(2) of the previous rule. As new technologies develop and new chemical hazards are encountered in the shipyard working environment, it becomes necessary for competent persons to use new types of environmental monitors and detectors. Skill in the use of this new equipment is necessary for competent persons to be able to identify sources of hazardous exposures in shipyard employment. In addition, OSHA believes that in order for the competent person to have the ability to read and interpret the readings of any type of chemical indicator that may be needed to test atmospheres in the shipyard, a competent person must be familiar enough with the instrumentation to capably calibrate it.

In paragraph (c)(5), OSHA continues the requirement contained in the first portion of paragraph (b)(5) in the previous rule. Paragraph (b)(5) of the previous rule contains two requirements and OSHA has decided to divide the previous rule into two separate requirements in the final rule: Paragraphs (c)(5) and (c)(7). Paragraph (c)(5) requires that competent persons must have the capability to perform the tests and inspections required by Subparts B, C, D, and H of part 1915. The requirement in the final rule is consistent with the language proposed in paragraph (b)(6) of the proposal. There were no comments objecting to this change and OSHA considers it to be editorial.

In paragraph (c)(6) OSHA is adding a new requirement to the final rule that coincides with shipyard industry practice. Paragraph (c)(6) requires competent persons to have the ability to evaluate spaces after a test to determine the need for further testing by Marine Chemists, Certified Industrial Hygienists, or by the U.S. Coast Guard authorized persons. OSHA has added this new language to make it clear that there may be atmospheric conditions present in the shipyard that can not be evaluated effectively by a person trained only to the competent person level and that more highly trained individuals may be needed to accurately evaluate an atmosphere. In such cases, OSHA believes this new language would make it clear that an individual such as a Marine Chemist, a Certified Industrial Hygienist, or a Coast Guard authorized person must be called for assistance.

The State of Washington, Department of Transportation (WADOT) (Ex. 6–26) noted the "tremendous responsibility" placed upon the competent person and even recommended further training.

WADOT commented,

> Regarding changes to 1915.7 Competent person: Throughout the existing and proposed regulation, the competent person is given tremendous responsibility to ensure worker safety through inspection and testing. * * *
>
> * * * a requirement should be added at 1915.7(b)(8): Knowledge of the physical hazards and the air contaminants which may be produced in the course of the work to be done, the means of preventing employee exposure to them." The regulation could even go so far as to require the competent person to attend a 2-day training class certified by the National Fire Protection Association. NFPA maintains a list of certified classes.

OSHA agrees that it may appear from the proposal that competent persons are expected to perform some duties equivalent to those of the Marine Chemist, Certified Industrial Hygienist, or Coast Guard authorized person. This was not the intent. OSHA does not believe, based upon the duties that are expected from a competent person, that it is necessary to specify the competent persons be trained by the NFPA as suggested by Washington State. Rather, OSHA believes the knowledge and training requirements in paragraph (c) are appropriate for the testing that a competent person is allowed to do. However, the competent person needs to be trained to recognize the need for more sophisticated assistance and must know how to call for that assistance. This new requirement makes it clear that competent persons, rather than perform all tests and evaluations alone, must have the ability to determine when the expert assistance of the Marine Chemist, Certified Industrial Hygienist,

or Coast Guard authorized person is needed.

In paragraph (c)(7) OSHA is continuing the requirement found in the second part of paragraph (b)(5) in the previous rule. Paragraph (c)(7) requires that a competent person must have the capability to maintain the records required by the standard. As noted earlier, OSHA has divided the previous requirements of paragraph (b)(5) into two separate paragraphs, (c)(5) and (c)(7). There were no objections to this change as it was proposed in paragraph (b)(6) and (b)(7). Therefore, OSHA considers paragraph (c)(7) to be an editorial change to previous paragraph (b)(5).

Recordkeeping. OSHA has redesignated the logging of inspections and test requirements as paragraph (d) Recordkeeping. The changes proposed to the requirements of previous paragraph (c) addressing logging of inspections and tests were contained in paragraph (c) of the proposal.

In paragraph (d)(1) OSHA has made substantive changes to the language of previous paragraph (c)(1). OSHA is requiring that the employer ensure that the competent person, Marine Chemist or Certified Industrial Hygienist performing any tests required by Subparts B, C, D, or H of this part, records the test locations, time, date, location of inspected spaces, and the operations performed, as well as the test results and any instructions. OSHA has combined paragraphs (c)(1) and (c)(2) of the proposal and eliminated the need for the OSHA 74 form. The new language continues the previous requirement that persons conducting tests and inspections record the results of those tests and inspections. However, it eliminates the mandated use of the OSHA 74 form. OSHA believes that the format or instrument of the test report is not important, so long as the information required by OSHA is contained in the record.

OSHA received a number of comments urging the Agency to allow other forms of reporting the atmospheric testing results in addition to the OSHA 74 form.

The Navy's Sea Systems Command (Ex. 6–12) commented that,

> [Section] 1915.7(c) requires that all tests be logged on the OSHA Form 74. Recommend insertion of the words "or equivalent" to allow for use of locally developed (e.g. computer-generated) forms which include at least all of the information required by the OSHA Form 74.

Marine Hydraulics International (Ex. 6–21), Colonna's Shipyard (Ex. 6–22), S.T.A.S. (Ex. 6–37) and Moon Engineering (Ex. 6–38) agreed and submitted identical comments that stated:

> We suggest that the following words be added to the end of this paragraph: "or equivalent." The OSHA 74 does not possess room for additional instructions to workers, and by allowing the use of an equivalent form, workers could be informed of other requirements that the Shipyard Competent Person may invoke.

In previous paragraph (c)(1), competent persons were required to make a record of the locations, operations performed and the date, time, and results of any test they performed on a "Log of Inspections and Tests by Competent Person" (OSHA 74 form). Competent persons were also required under previous paragraph (c)(1) to use a separate form for each vessel on which tests and inspections were made. By allowing the use of alternative forms to record atmospheric test results, the employer will have more flexibility in complying. However, employees will be protected and OSHA will be aided in its enforcement by the fact that employers will still be required to maintain records of tests and inspections.

In paragraph (d)(2) of the final rule, OSHA continues the maintenance of records requirement of previous paragraph (c)(2). OSHA is requiring the employer to ensure that records created to comply with the recordkeeping requirements of this section are posted in the immediate vicinity of the affected operations while work is progress and for a period of at least three months from the completion date of the specific job for which they were generated. OSHA considers the new language to be a non-substantive change.

In paragraph (d)(3) of the final rule, OSHA continues the availability of records requirement of previous paragraph (c)(2). Paragraph (d)(2) requires the employer to ensure that the records required in this section are available for inspection by the Assistant Secretary, Director, employees, or their representatives while work in the affected spaces is in progress. The new language contains editorial corrections for clarity and consistency with other OSHA record inspection requirements. OSHA considers the changes to this paragraph to be non-substantive.

C. Subpart B, Sections 1915.11 through 1915.16

1. § 1915.11 Scope and Application

The scope contained in previous § 1915.11 applies the requirements in Subpart B to vessels and vessel sections found in shipyards during ship repair and ship breaking; § 1915.16 applies to ship repair only. On November 29, 1988, OSHA proposed to amend its shipyard standards addressing safe entry into and work within spaces containing explosive and other dangerous atmospheres on board vessels and vessel sections in shipyards (53 FR 48092). Under this proposal, OSHA would have applied Subpart B to all types of shipyard work on vessels and vessel sections, including ship building, ship repair, and shipbreaking. The Agency proposed extending the scope of Subpart B in this manner to protect employees entering and working in explosive and other dangerous atmospheres, regardless of the type of work they were performing.

Subsequently, after the closing date for comments on this proposed shipyard rule, OSHA also proposed new rules for confined spaces in general industry (54 FR 24080, June 5, 1989). The general industry proposal would have had the effect of covering land-side (that is, other than shipboard) confined spaces in shipyards, such as piping systems in shops or confined spaces in staging areas.

As noted earlier, SESAC reviewed the general industry proposal and made recommendations regarding its possible application to shipyard work. In June 1992, OSHA reopened the record for Subpart B (57 FR 28172, June 24, 1992), to place the SESAC recommendations in the rulemaking record and to gather additional information on whether or not the proposed general industry confined spaces standard was appropriate for land-side confined spaces entered during shipyard work.

The scope of revised Subpart B has been expanded so that the final rule covers all shipyard work, and the title of the Subpart, originally called "Explosive and Other Dangerous Atmospheres in Vessel and Vessel Sections," has been changed to "Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment." OSHA believes this change more accurately reflects the scope of this Subpart, which now addresses all shipyard employment operations and which is not limited to confined spaces. The entire subpart applies regardless of whether shipbuilding, ship repair, or shipbreaking is being done.

The scope of the 1988 proposal differed from the previous standard in two major respects:

(1) The proposed standard would have extended coverage to employees in shipbuilding, who were not protected by previous §§ 1915.12 through 1915.16, and

(2) the proposed standard would have extended coverage to employees in shipbreaking who were not protected by the previous § 1915.16.

The notice of proposed rulemaking listed two reasons for extending the scope of Subpart B in this manner:

(1) That the national consensus standard corresponding to Subpart B (NFPA 306, *Control of Gas Hazards on Vessels*) imposes the same basic requirements to all shipyard work, regardless of whether ship building, ship breaking, or ship repair is being performed; and

(2) that the protective measures required under the previous §§ 1915.12 through 1915.16 are current industry practice in all aspects of shipyard work.

NFPA 306 (1988) is the national consensus standard that applies to work covered by revised Subpart B. Like Subpart B, it contains requirements for atmospheric testing, for cold work and hot work, and for maintaining safe atmospheres for employees while shipbuilding, shipbreaking, or ship repairing is being performed. Under section 6(b)(8) of the OSH Act, any standard that OSHA adopts in regard to atmospheric hazards on vessels must be at least as protective as the NFPA document unless another standard would be more consistent with the purpose of the act.[2] Expanding the scope of the current standard to all of shipyard employment is consistent with the scope of NFPA 306 and therefore providing at least equivalent protection.

Before the publication of the 1988 proposal, 30 groups, representing government agencies, employers, unions, and associations, commented on the first draft rewrite of Subpart B. All of these groups supported the concept of expanding Subpart B coverage to both shipbuilding and shipbreaking (53 FR 48094). As noted in the preamble to the proposal, OSHA believes that this is because the shipyard industry was already applying the requirements of previous Subpart B to the entire shipyard. In fact, the preliminary regulatory impact analysis identified no cost impact from the application of the proposal to shipbuilding, shipbreaking, and ship repair (53 FR 48104).

In response to the 1988 notice of proposed rulemaking, OSHA received no comments in opposition to the extension of this coverage and several expressions of support for applying the standard uniformly throughout the shipyard (Ex. 6–3, 6–6, 6–23). The position of the 39 commenters is best expressed by the following statements. The Shipbuilders Council of America (SCA) (Ex. 6–3), which represents 25 major U.S. shipyards that employ 95 percent of shipyard production workers, stated:

> * * * having a single standard addressing this issue would achieve the objective of providing employees and employers with one set of rules for given situations.

Newport News Shipbuilding (Ex. 6–6), the largest shipyard in the western hemisphere:

> * * * the industry treats confined spaces ashore and afloat in a similar manner.

The American Waterways Shipyard Conference (AWSC) (Ex. 6–23), representing the interests of small- to medium-sized commercial shipbuilding and repair industry stated:

> AWSC is very supportive of OSHA's efforts to develop this vertical standard. The end product will eliminate the confusion which currently exists concerning the applicability of the General Industry Standards to the shipbuilding and repair industry, and will up-date all standards to the existing technology level.
>
> * * * * *
>
> The alternative to the expansion of the scope of this subpart appears to be the institution of a different program for [shore-side] confined spaces. To introduce a new type of confined space entry program into a shipyard facility which already has a workable program seems ludicrous. Two programs would only confuse the employee. By extending the current program, employees will be protected and will immediately recognize the program.

OSHA has concluded that the requirements contained in revised Subpart B are necessary for the protection of employees exposed to hazardous atmospheres in shipyards, regardless of the type of work being performed. Hazardous atmospheres can be found in shipbuilding, as well as in shipbreaking and ship repair. The work practices implemented by employees working in vessels and vessel sections should be the same from one job to the next. The atmospheric hazards will basically be the same and the employees move from job to job within the entire shipyard, so the work practices should be consistent. Using one set of work procedures for atmospheric hazards in a shipbuilding job and another for the same hazards for a ship repair job would serve to confuse the employee and could easily lead to accidents. Therefore, revised Subpart B applies to shipbuilding, shipbreaking, and ship repair.

A short time after the November 1988 publication of the proposed rule on Explosive and Other Dangerous Atmospheres in Vessel and Vessel Sections, the Shipyard Employment Standards Advisory Committee (SESAC) was established. SESAC was chartered to provide OSHA with guidance in revising, consolidating, and modernizing the varying sets of regulations that were being applied in the shipyard industry into what is ultimately intended to be a truly vertical standard for all shipyard employment. Shipyard employers would be required to comply with a single set of occupational safety and health standards as opposed to a mixture of shipyard and general industry standards. Consequently, the newly developed shipyard employment standards would apply to all shipyard employment regardless of the type of work being performed (for example, vessel repair or fabrication of railroad cars) or location (for example, in the traditional shipyard or "up river" or on sea trials). As a step towards this goal, SESAC recommended that the scope of the proposed Subpart B be expanded beyond vessels and vessel sections, to cover all land-side confined space and hazardous atmosphere situations (Tr. 101, 4/25/90).

In order for OSHA to include SESAC's recommendations into the rulemaking record and to consider fully comments submitted to the docket concerning the general industry confined spaces proposal, OSHA reopened the record on Subpart B (57 FR 28152, June 24, 1992). The Agency raised a number of questions in the notice reopening the record. The most significant issue that underlines a number of the specific questions is rooted in the unique concept of confined space entry that has been the accepted practice in the shipyard industry for over 25 years (36 FR 10466, May 29, 1971). The fundamental basis of OSHA's shipyard standard has been a reliance on preventing employees from ever being exposed to confined space atmospheric hazards. This has been accomplished by the built-in system of testing and ventilating that has become industry practice and has been very successful at preventing confine and enclosed spaces and other dangerous atmospheres accidents.

The concept of a single standard, Subpart B, for all shipyard employment was unanimously endorsed by SESAC as well as supported by all of the commenters who addressed this issue in the June 1992, notice (Ex. 11–3, 11–4, 11–5, 11–6, 11–8, 11–10, 11–13, 11–14, 11–15, 11–16, 11–18, 11–19, 11–20, 11–

[2] Section 6(b)(8) of the OSH Act reads as follows: Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the **Federal Register** a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

21, 11–24, 11–26, 11–29, 11–31, 11–33, 11–34, 11–35, 11–39, 11–41, 11–48, 11–50). For example, the National Fire Protection Association (Ex. 11–19), a voluntary membership organization dedicated to the protection of people and property from fire and related hazards, set out this position as follows:

NFPA favors the development of a single standard which provides for safety during entry and work in confined spaces within the shipyard.

* * * * *

In general, application of two distinctly different standards for vessels and [land-side] operations would be a burden on the industry and would be confusing to employees. Specific points are as follows:

First, * * * employees in the shipyard are familiar with the dangers of all confined spaces, not just those confined spaces associated with tanks aboard ships. This has occurred due to the absence of prior safety requirements for general industry.

The shipyards have already adapted the practices and procedures derived from the vessel requirements and applied them to the [land-side], as appropriate.

Second, the shipyard industry has demonstrated the effectiveness of the current and proposed 29 CFR 1915, Subpart B requirements over the past 10 years.

Third, requiring the 1910 general industry requirements for [land-side] activities instead of the current and proposed 1915 shipyard requirements complicates the training element, by necessitating dual procedures. The training for both sets of requirements will be incompatible, since the standards each take a different approach—1915 Subpart B utilizes a "performance oriented" approach, while 1910.146 relies on specifications to achieve its objectives.

Ingalls Shipbuilding (Ex. 11–20) agreed, stating:

The SESAC recommendation stresses preventions, training and self-rescue. This approach, which relies on testing before entry and use of engineering controls to eliminate the hazards is, in our opinion, much safer than the general industry standard which requires the use of attendants at each confined space to summon rescue personnel when an emergency occurs. (SESAC'S recommendations put the emphasis on prevention). In addition to being safer it is also more economical than the general industry standard.

The industry has adopted a single approach to working in and around explosive and dangerous atmospheres throughout the shipyard for several reasons:

(1) The number and type of atmospheric hazards associated with products contained in the spaces is unpredictable. Some vessel repairers encounter over 100 different chemical cargoes (Ex. 11–27);

(2) The complexity of confined spaces is increased due to the extensive internal structures, adjacent spaces, pipelines, vent systems, heating coils, and the like (Ex. 11–7, 11–27); and

(3) The cross-contamination of previous and successive products complicates the atmospheric evaluation process (Ex. 11–7).

(4) The nature of the work associated with the confined space entry in shipyards tends to be more complex. This work frequently involves hot work which can greatly affect atmospheric conditions within the space (Ex. 11–7, 11–27).

Based on the record, OSHA has made a determination that a single standard should be applied for entry into confined and enclosed spaces and other dangerous atmospheres throughout the shipyard industry, following the Subpart B approach. OSHA has arrived at this conclusion for two basic reasons:

(1) A single procedure, applicable throughout the shipyard and addressing hazards related to confined and enclosed spaces and other dangerous atmospheres will best protect employees, and

(2) That the provisions adopted in revised Subpart B will provide shipyard employees with a comprehensive set of protective safety measures.

A single standard applying to all shipyard confined and enclosed spaces and other dangerous atmospheres will provide employees with one procedure for working in any shipyard location, whether on a vessel or on land. The commenters overwhelmingly agreed that this approach would best protect employees (Ex. 11–3, 11–6, 11–9, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–29, 11–35, 11–39, 11–41, 11–50). OSHA agrees with these commenters that two procedures for dealing with confined and enclosed space and dangerous atmosphere hazards would confuse employees who have to implement those procedures. The Agency is concerned that the confusion resulting from different standards for shipboard and land-side spaces would actually lead to accidents rather than prevent them.

As in the past, the primary focus of Subpart B will continue to be atmospheric hazards. Non-atmospheric hazards such as those relating to slips, trips, or falls are covered by other provisions of the shipyard standards. A more specific detailed discussion of non-atmospheric hazards is contained in the following paragraph.

OSHA believes that land-side confined spaces in shipyards pose hazards similar in nature to those found in vessels and vessel sections covered by revised Subpart B. The evidence in the record demonstrates that the atmospheric and non-atmospheric hazards in vessels and vessel sections are also present in land-side confined spaces (Ex. 11–19, 11–26, 11–27, 11–32, 11–39, 11–41, 11–47). The Agency agrees with the vast majority of commenters who stated that the procedures used to protect workers from these hazards in vessels and vessel sections could readily be adopted for use in land-side confined space operations (Ex. 11–1, 11–3, 11–6, 11–9, 11–10, 11–11, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–29, 11–30, 11–31, 11–32, 11–33, 11–34, 11–37, 11–39, 11–41, 11–42, 11–44, 11–45, 11–46, 11–47, 11–49, 11–50, 11–51).

A few commenters stated that vessels and vessel sections pose greater hazards (Ex. 11–7, 11–8, 11–11, 11–13, 11–22, 11–27, 11–30, 11–35, 11–46). They noted such differences as greater complexity with respect to the hazards involved in vessels and vessel sections, movement of the vessel (which causes movement of atmospheric hazards), the total number of spaces involved, the multitude of systems (for example, fuel, refrigeration, and compressed air) present on-board ships, and the interrelationships between adjacent vessel sections (that is, hazards in one section can affect procedures to be used in adjacent sections). Nonetheless, most of these commenters contended that the Subpart B requirements were still appropriate for land-side confined spaces (Ex. 11–11, 11–13, 11–30, 11–31, 11–35, 11–44, 11–46). They argued that the Subpart B provisions would afford employees with greater protection than would be provided by § 1910.146, and that procedures necessary to comply with Subpart B were already in place in most shipyards.

OSHA has concluded that it is appropriate to apply revised Subpart B to all phases of shipyard work. The Agency has determined, based on the record, that shipyard employers can readily adapt their ship-side procedures which already conform to these requirements, for use in land-side confined space entry, as well.

OSHA has included the phrase "regardless of geographic location" in the scope only as a clarification since it has been the Agency's position that this section, and indeed the entire Part 1915, apply to inland shipyard employment.

SESAC examined requirements proposed in the general industry confined space standard § 1910.146, to determine to what extent that proposal should address shipyard work and to determine whether or not specific provisions within that proposal were appropriate for application to work in shipyard confined and enclosed spaces

and other dangerous atmospheres. The committee agreed that a single standard should apply to this work and recommended the addition to Subpart B of several provisions based on proposed § 1910.146 so that the shipyard standard would be as comprehensive as its part 1910 counterpart (Tr. 102, 4/25/90). As noted earlier, OSHA reopened the record on the proposed revision of Subpart B to request comments on SESAC's recommendations in this regard, as well as to explore the possible expansion of the scope of Subpart B to all aspects of shipyard work. The issues raised in the notice reopening the record addressed how Subpart B could be revised to make it as protective as the general industry permit space standard.

Paragraph (c)(1) of § 1910.146 requires employers to evaluate the workplace to determine if any spaces are permit-required confined spaces. Paragraph (c)(6) of that standard requires employers to reevaluate non-permit confined spaces whenever there are changes that might increase the hazards to entrants. The notice reopening the record on Subpart B requested comments on whether or not shipyard employers should similarly evaluate their workplaces.

Most commenters agreed that the shipyard standard should not adopt requirements comparable to paragraphs (c)(1) and (c)(6) of § 1910.146 (Ex. 11–1, 11–3, 11–6, 11–7, 11–9, 11–10, 11–11, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–22, 11–24, 11–25, 11–26, 11–29, 11–30, 11–31, 11–34, 11–39, 11–41, 11–42, 11–45, 11–47, 11–49, 11–50, 11–51). They argued that proposed Subpart B was adequate since it already required testing before initial entry of all confined spaces that could contain atmospheric hazards and additional frequent testing to ensure that atmospheric conditions are maintained. A few contended that the shipyard industry treated all confined spaces alike, evaluating them for hazardous conditions before entry (Ex. 11–13, 11–19, 11–31, 11–49). For example, Mr. Joseph J. Ocken (Ex. 11–31) stated:

> The present practice is to consider ANY confined space NOT SAFE until currently tested and posted otherwise. This is a simple fail-safe work practice for workers. To expect every space to have been evaluated and posted properly invites simple error to lead to catastrophe. There are too many confined spaces in shipyards to count on 100% perfection at all times. Enclosed spaces can also contain confined space hazards and must be approached with suspicion by workers as well.

On the other hand, a few commenters stated that OSHA should adopt requirements similar to those in § 1910.146 for evaluating confined spaces (Ex. 11–2, 11–28, 11–33, 11–37, 11–38). They believed that evaluating confined spaces for the types and extent of hazards is a useful tool in any confined space program. Con-Space Communications, Ltd. (Ex. 11–28), argued as follows:

> Evaluation of a workplace to determine if it contains Confined Spaces is the very first step that an employer must take in a serious company wide entry program. An inventory of Confined Spaces would be a permanent reference which, if updated on each entry, could be a useful planning tool. In the event of a rescue, this information would be invaluable especially if the Confined Space is assigned a number along with a list of potential hazards associated with it and special equipment needed for safe entry. Physical attributes of the space could also be listed.

Section 1910.146 places confined spaces into two categories: permit-required confined spaces and non-permit-required confined spaces. The purpose of paragraphs (c)(1) and (c)(6) of § 1910.146 is to ensure that employers have properly identified confined spaces posing hazards to entrants. The large class of confined spaces are determined not to be permit entry spaces, are evaluated only as required in these two paragraphs. Entry into such spaces is essentially performed without reference to the permit entry procedures of § 1910.146 (unless the entrants bring a hazard into the space or create one during entry operations).

By contrast, Subpart B treats all confined spaces and other spaces that might contain a hazardous atmosphere equally. Initial testing and inspection, followed by continuous ventilation and further testing, is required of all these spaces to ensure the safety of employees working within them. Because of these additional protection which Subpart B requires on a routine bases, OSHA has determined that no separate, formal evaluation requirements need be adopted in Subpart B.

Paragraph (e) of § 1910.146 requires general industry employers to institute a permit system for permit space entry operations. This paragraph requires the employer to document, by means of a permit, the completion of measures required for the safety of entrants. A permit must be completed before entry is allowed into any permit space. The notice, reopening the record on Subpart B, requested comments on whether or not such permits should be required for entry into spaces addressed by the shipyard standard.

The vast majority of commenters stated that a permit system as set out in proposed § 1910.146 was unnecessary for incorporation into Subpart B (Ex. 11–1, 11–3, 11–6, 11–7, 11–9, 11–10, 11–11, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–22, 11–24, 11–25, 11–26, 11–29, 11–31, 11–32, 11–35, 11–36, 11–39, 11–40, 11–41, 11–42, 11–44, 11–45, 11–46, 11–47, 11–49, 11–50, 11–51). They argued that shipyard employee safety would not be increased through the imposition of such a requirement. Many also argued that the system in use in shipyards and required by proposed Subpart B was the equivalent of a permit system (Ex. 11–3, 11–6, 11–10, 11–11, 11–13, 11–14, 11–18, 11–20, 11–24, 11–25, 11–26, 11–29, 11–32, 11–35, 11–36, 11–39, 11–41, 11–44, 11–49, 11–50, 11–51). These commenters noted that the only spaces employees were permitted to enter were those designated as "Safe for Workers" after initial inspection and testing. For example, Moon Engineering Co., Inc. (Ex. 11–14), stated:

> Moon Engineering feels a permit system is necessary for any confined space entry aboard vessels or any land-side operations. We do not believe the proposed system described in 1910.146 is feasible for shipboard applications.
>
> The system, used successfully by Moon Engineering since the early 1970's, is simple and applicable to our operation. The individual shipyard shops communicate with the Safety Department on a daily basis and advises what spaces they will be working the following day. The Safety Department uses OSHA Competent Persons and/or NFPA certified Marine Chemist to test all spaces due to be worked for that particular day. The results of inspection are posted at the entrance of the space and highlight inspection date, time, tester and whether the space is SAFE FOR WORKERS/SAFE FOR HOT WORK or whatever the status. This designation is consistent with the language of the existing 1915 standard. This Log of Inspections is available and it is the responsibility of all employees to view this documentation prior to beginning their work. This system works and has an excellent track record.

Other commenters believed that a permit system similar to that required under § 1910.146(e) should be imposed (Ex. 11–2, 11–28, 11–30, 11–33, 11–34, 11–37). NIOSH (Ex. 11–33) explained this position as follows:

> NIOSH recommends that entry into a confined space be by permit only. * * * The permit is an authorization and approval in writing that specifies the location and type of work to be done, certifies that all existing hazards have been evaluated by the qualified person, and that necessary protective measures have been taken to ensure the safety of each worker. The permit requirements will vary by the nature of the space, the nature of the hazard, and the work to be performed. All confined spaces should

be evaluated by appropriately trained and qualified persons to determine that the space involved and the work to be performed will not present a hazard to the worker; the permit system ensures that this evaluation has been performed.

OSHA has not incorporated a requirement for a formal permit system in the final revised subpart B. The Agency agrees with the commenters who stated that subpart B provides an informal permit system that contains evaluation mechanisms, tracking criteria, and control measures that are as protective as the formal one required under § 1910.146(e). Confined and enclosed spaces on vessels and vessel sections that might contain a dangerous atmosphere are certified "Safe for Workers" when they are safe for employees to enter, and entry is not permitted until that certification. Shipyard employees are also trained to remain outside of any space not so certified. Additionally, under § 1915.14(a)(1), a Marine Chemist (or, with certain restrictions, a Coast Guard authorized person) must inspect and test the space and certify its safety before work in the most hazardous conditions can begin. Furthermore, OSHA believes that imposing a § 1910.146-type permit system for shipyard work because of the content and placement of the permits could undermine the effectiveness of the Marine Chemist's certificate, which is the primary vehicle for certifying certain spaces "Safe for Hot Work."

Paragraph (d)(6) of § 1910.146 requires at least one attendant outside a permit space while entry operations are underway. This attendant monitors entrants and conditions inside and outside the space, prevents the entry of unauthorized persons, and summons rescue services in an emergency. The notice reopening the record requested comments on whether attendants should be required for "permit-required" confined spaces covered by Subpart B.

Nearly every commenter stated that attendants were unnecessary for the safety of employees performing work in dangerous atmospheres or in confined or enclosed spaces in shipyards (Ex. 11–1, 11–2, 11–3, 11–6, 11–7, 11–9, 11–10, 11–11, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–22, 11–24, 11–25, 11–26, 11–29, 11–30, 11–31, 11–33, 11–34, 11–36, 11–37, 11–38, 11–39, 11–40, 11–41, 11–42, 11–43, 11–44, 11–45, 11–46, 11–49, 11–50, 11–51). They argued that the procedures required by Subpart B would make spaces safe for workers and that, as a result, there would be no need for an attendant. Many of these commenters also contended that the cost of providing attendants for every entry, if such would be necessary, would be prohibitive (Ex. 11–1, 11–3, 11–11, 11–13, 11–25, 11–29, 11–43, 11–44, 11–49, 11–50).

One commenter supported a requirement for an attendant to monitor any confined space that was designated as a permit space (Ex. 11–28). Other commenters, who opposed a general requirement for attendants, acknowledged that there is a need for an attendant to monitor spaces posing unusual hazards, such as entry into IDLH atmospheres, entry by an employee working alone, and non-routine entry (Ex. 11–2, 11–3, 11–7, 11–10, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–29, 11–30, 11–31, 11–33, 11–34, 11–41, 11–51). The statement of the NFPA (Ex. 11–19) typified these comments, as follows:

NFPA believes that the permit described in proposed 1910.146(b)(9) contains information that is not needed by entrants into confined spaces and could be confusing. NFPA believes that such a permit would not be feasible for confined spaces in the vessel construction and repair industry, for either vessel or shore-side activities. The proposed 1910.146 permit systems, described in 1910.146(d) establishes specifications for a permit system designed to satisfy several problems with one form.

Accident statistics indicate that workers do not recognize the dangers of confined spaces. Statistics also point out that workers involved in accidents have commonly been authorized to enter the space (source (NIOSH FACE study). Additionally, a high percentage of fatalities in confined space incidents are personnel attempting to effect worker rescue. OSHA, with this permit system, has attempted to alert the worker (entrant), establish a control point (person authorizing entry), and ensure safe rescue attempts are performed by specifying relevant information on one form.

Throughout the industry, shipyards have adapted entry permit systems to make the system simple. Frequently, shipyards have incorporated a color-coded tag and sign system. The foundation for the various shipyard systems is linked to the Marine Chemist Certificate and Shipyard Competent Person Inspection Form (OSHA 74 Log of Inspections and Tests). This allows individual shipyards to tailor their system to the type of confined spaces and work performed at their yard. In the larger shipyards, the permit and sign system has been incorporated throughout the yard, including both vessel and shore-side work sites.

NFPA believes that a specification requiring a permit system as described in 1910.146 would be excessive for many shipyards since the nature of the spaces and hazards is so variable. NFPA also believes that such a requirement would not provide any increase in the level of safety. The key to the effectiveness of any permit system will be its simplicity and the training of workers on its implementation. The 1910.146 proposed system introduces increased confusion for many of the shipyard applications and will not necessarily result in increased safety. OSHA needs to recognize that the shipyard industry currently uses a dual permit system for documenting initial and follow-up conditions for its vessel confined space activities. The advantage of this system has been the lack of specification, thus enabling individual shipyards to adapt their systems with the performance requirements of current proposed Subpart B. This approach would work in land-side confined spaces within the shipyard, as well. Use of one system throughout the shipyard facilitates the training of all workers.

The final revised Subpart B does not require the presence of an attendant for confined and enclosed spaces or for work in dangerous atmospheres. OSHA notes that the purpose of Subpart B is to ensure that a space is completely safe to enter and work in. In this regard, § 1910.146(c)(5) of the general industry generic confined space standard sets detailed requirements for atmospheric testing and ventilation for some spaces, and also, recognizes that there are some permit spaces which can be made safe for entry without the need for written permits or attendants. Final revised Subpart B provides equivalent requirements for confined and enclosed spaces and for work in dangerous atmospheres in shipyards. If the testing requirements contained in Subpart B do not indicate a safe atmosphere, then entry is restricted to emergencies and periods of short duration to accomplish ventilation and additional precautions are required (such as posting the space as Not Safe for Workers, continuous monitoring, and the absence of ignition sources), by § 1915.152 (such as air line respirators, attendants and life lines) and by § 1915.94 (frequent checks of employees working in a confined or enclosed space or alone in an isolated location). Once the hazard is removed and the space is safe for entry, the employer is required to test frequently to monitor and maintain the space as safe for workers. As a result, OSHA does not believe it is necessary to require attendants in Subpart B as well.

Paragraph (c)(2) of § 1910.146 requires general industry employers to post signs or use other effective means of informing employees about the existence and location of and the danger posed by permit spaces; paragraphs (c)(3) and (d)(1) require general industry employers to take measures to prevent unauthorized entry into permit spaces; and paragraph (i)(8) requires attendants to take measures to keep unauthorized persons out of permit spaces. The notice reopening the record requested comments on whether or not shipyard

employers should be required to take measures, such as those proposed in § 1910.146, to prevent unauthorized entry into work areas covered by Subpart B.

The commenters agreed that the systems being employed by the shipyard industry have been effective at preventing unauthorized access under the previous Subpart B (Ex. 11–3, 11–6, 11–7, 11–10, 11–11, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–31, 11–32, 11–39, 11–41, 11–42, 11–43, 11–44, 11–45, 11–49, 11–50). They contended that all spaces are made safe before entry and that the posting and training requirements proposed in Subpart B and outlined in the notice reopening the record would keep employees from entering unsafe areas. The Jonathan Corporation (Ex. 11–18) presented these arguments as follows:

As a result of routine training, our employees are cognizant of the fact that only spaces which have been tested and posted as being SAFE FOR WORKERS are cleared for entry. This system has served our company very well. This proposal does not recognize our daily involvement with confined spaces.

Mr. Joseph J. Ocken (Ex. 11–31) agreed, stating:

Any expectation that every confined space (or enclosed space presenting confined space hazards) will somehow be properly barricaded courts disaster. My Coast Guard training emphasizes a straight forward safe work practice: ANY SPACE presenting confined space hazards must be RECENTLY tested by THOROUGHLY trained and equipped individuals and have appropriate ENGINEERING CONTROLS applied BEFORE ENTRY. Any other space, REGARDLESS OF BARRIERS, is treated as UNSAFE.

OSHA concurs with these comments. The revised Subpart B protects employees from "unauthorized" entry through the use of several protective techniques. First, § 1915.12(d) requires employees to be trained to recognize the characteristics of confined spaces and the hazards involved. They are also required to be trained to perform their duties safely (§ 1915.12(d)) and to understand all warning signs and labels (§ 1915.16(a)). Second, confined spaces and spaces containing dangerous atmospheres must be tested and found safe before entry under paragraphs (a), (b), and (c) of § 1915.12. Third, under these same paragraphs, spaces found not to be safe for entry are labeled "Not Safe for Workers". Under the unique conditions of shipyard employment, these measures are effective at preventing unauthorized employees from entering spaces containing dangerous atmospheres. To illustrate, when a space is marked "Not Safe for Workers," the only authorized entrants are those who are entering for emergencies or for short durations to accomplish ventilation to make the space safe. It is not until the space is retested and certified as "Safe for Workers" that employees are allowed to do work in the space.

Under the general industry standard, only a confined space containing a hazard that may expose an employee to the risk of death, incapacitation, or impairment of ability to self-rescue is deemed to be a permit space, requiring the adoption of the protective measures set out in § 1910.146. The general industry standard addresses hazards that are exacerbated by the lack of adequate means of access and egress and by the enclosing nature of the space. By contrast, Subpart B treats all confined and enclosed spaces and other dangerous atmospheres that could present an atmospheric hazard as having this potential, and requires protective measures before entry takes place. In the shipyard context, this approach provides an effective means of protecting employees who must enter confined and enclosed spaces and other dangerous atmospheres.

Section 1910.146 also requires employers to consider non-atmospheric hazards, such as engulfment and internal configuration of the space, in determining whether or not a confined space is a permit space. The proposed revision of Subpart B did not address non-atmospheric issues. Because OSHA was considering the expansion of Subpart B to land-side confined spaces in lieu of applying § 1910.146, the notice reopening the record requested comments on whether or not Subpart B, as expanded, would adequately address non-atmospheric hazards that may be encountered in confined space work (Specific Issue B–1, Question J).

The vast majority of commenters agreed that Subpart B, in combination with other requirements in part 1915, adequately protected employees (Ex. 11–2, 11–3, 11–6, 11–9, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–28, 11–29, 11–30, 11–31, 11–35, 11–37, 11–39, 11–40, 11–41, 11–45, 11–47, 11–49, 11–50). These commenters contended that non-atmospheric hazards are readily identified, are covered by other part 1915 standards, and are the responsibility of line supervisors and employees. The statement of Ingalls Shipbuilding (Ex. 11–30) was typical of these comments:

Ingalls believes that such non-atmospheric hazards are adequately addressed by their current respective standards.

Ingalls further believes the foreman or supervisor of the workers is responsible for the above listed non-atmospheric hazards. Subsequent to an inspection by the competent person, non-atmospheric hazards may develop as a result of ongoing work (for example, a welder installing his welding leads which create a tripping hazard). The foreman or supervisor is responsible for the health and safety of his employees and for the actions of his employees on a continual basis throughout the workday. Non-atmospheric hazards are obvious without the need for special instrumentation, whereas, the tests performed by the competent person are used to detect unseen atmospheric hazards using specialized instrumentation.

The Department of the Navy (Ex. 11–30) noted that while Subpart B does not address non-atmospheric hazards, it should not be amended to address such hazards:

As proposed, Subpart B does not address other dangers in confined spaces. However, the dangers from slips, falls, electricity, machine guarding etc. are not unique to or necessarily intensified in confined spaces. Precautions to guard against general non-atmospheric shipyard hazards should be specified for the entire shipyard (all workplaces). Therefore, it is recommended that Subpart B not be expanded to include general safety hazards; rather, these should be covered elsewhere in 29 CFR 1915 (e.g., Subpart E/Access and Egress, Subpart F/General Working Conditions, and/or Subpart M/Fall Protection).

OSHA does believe that a confined or enclosed space can exacerbate the risk faced by an employee working in a confined space containing serious non-atmospheric hazards. If an employee is injured in a confined space the limited means of access and egress makes emergency medical assistance problematic. For this reason, OSHA adopted language in § 1910.146 for general industry so as to define permit-required confined space "in the broadest possible terms" so that employers are required to protect affected employees from any serious hazards which may be confronted in a permit space [58 FR 4478–4479]."

The Agency believes that shipyard employees will be adequately protected under revised Subpart B without incorporating additional requirements directed towards non-atmospheric hazards. As part of the pre-entry test, the competent person is required to make a visual inspection of the confined or enclosed space. At this time, they can alert the employer to non-atmospheric hazards that are addressed by other standards. For further information, see the discussion of visual inspection in the preamble to § 1915.12 below.

The notice reopening the record on Subpart B also requested comments on whether or not OSHA should adopt various provisions from proposed

§ 1910.146 that SESAC had recommended for inclusion in revised Subpart B. These provisions included those on training, rescue, and exchanging information between employers. The summary and explanation of § 1915.12 discusses comments received on these provisions. Additionally, OSHA requested comments on whether any other requirements from proposed § 1910.146 would be appropriate for inclusion in revised Subpart B. No one suggested the adoption of any proposed § 1910.146 provisions other than those relating to attendants, permits, and unauthorized entry discussed earlier.

Paragraph (b) of § 1915.11 sets definitions for revised Subpart B. These definitions, derived in large part from NFPA 306, are intended to facilitate compliance with the revised standard.

Previous Subpart B contains no definitions. The few definitions relating to the previous subpart are contained in § 1915.4, which defines the following Subpart B related terms: hazardous substance, competent person, confined space, enclosed space, hot work, and cold work.

In § 1915.11(b), the NPRM proposed to add definitions specifically applicable to revised Subpart B. This paragraph in the proposed rule included the terms "competent person" and "hot work," which as noted previously, are also defined in existing § 1915.4. The NPRM also raised issues regarding the definitions of "inert or inerted atmospheres," "Marine Chemist," and "Not Safe for Workers."

The definitions contained in revised Subpart B are discussed in the following summary and explanation of § 1915.11(b). This discussion provides a brief explanation of each defined term, justifies any differences between the existing or proposed definitions and those contained in the final rule, and discusses comments received regarding the three terms that were raised as issues in the NPRM (no substantive comments were received on any other terms proposed in § 1915.11(b)).

"Adjacent spaces" means spaces bordering another space in all directions. The wording of the definition of this term has been revised editorially from the definition in the proposal for consistency with NFPA 306. Additionally, the final rule defines the term "adjacent spaces," whereas the proposal defined the term "adjacent compartments or spaces," because the final rule does use the term "adjacent compartments".

The final rule includes a definition of the term "Assistant Secretary", which means the Assistant Secretary of Labor for Occupational Safety and Health or his or her designated representative. This term is used in revised Subpart B, so OSHA has adopted a definition based on § 1910.2.

OSHA has not carried forward into the final rule the proposed definition of "bulk". The Agency believes that a definition of this term is not necessary to the meaning of the standard.

"Certified Industrial Hygienist" (CIH) means an industrial hygienist certified by the American Board of Industrial Hygiene. This definition is unchanged from the proposal.

A "Coast Guard authorized person" is one who meets the U.S. Coast Guard regulations concerning persons designated to perform the functions of a Marine Chemist when a Marine Chemist is not reasonably available. The definition in the final rule is essentially the same as that contained in proposed § 1915.11(b); however, substantive requirements proposed in that definition have not been carried forward, as they are inappropriate for use in a definition.

OSHA has not carried forward into the final rule the proposed definition of "competent person". As noted earlier, this term is defined in § 1915.4, and this definition is appropriate for application to revised Subpart B.

"Dangerous atmosphere" means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (i.e., escape unaided from a confined or enclosed space), injury, or acute illness. Although no definition of this term was proposed, the Agency believes that it is essential for employers and employees to know what a dangerous atmosphere is in the application of revised Subpart B.

The final rule includes a definition of the term "Director", which means the Director of the National Institute for Occupational Safety and Health or his or her designated representative. This term is used in revised Subpart B, so OSHA has adopted a definition based on Section 3 of the OSH Act.

The term "entry" refers to the act by which a person passes through an opening into a space and to the work performed in that space. Entry is considered to have occurred as soon as any part of the entrant's body breaks the plane of an opening into the space. This term was not included in the proposed revision of Subpart B, but OSHA believes that its inclusion is necessary for clarity. The definition has been taken from § 1910.146(b).

The term "Enter with Restrictions" denotes a space where entry is only permitted under specified conditions of engineering controls, personal protective equipment, clothing, and time. Although this term was not defined in the proposal, the definition of this term has been included in the final rule to help clarify when entry is permitted and when it is prohibited.

In the NPRM, the term "Not Safe for Workers" was used to describe compartments or spaces that do not meet the minimum safety criteria necessary to permit unrestricted entry. The term was used to describe either of two situations that occur. In the first, the space was not safe for workers to enter unless personal protective equipment was worn or unless the length of time of employee exposure was limited. In the second, the space was not safe for entry under any circumstances, regardless of whether personal protective equipment was worn. To address this seeming contradiction, OSHA requested comments on the issue of whether or not a separate category of "Safe with Restrictions" should be included in proposed Subpart B.

Three commenters opposed the adoption of an additional category of spaces (Ex. 6–4, 6–5, 6–8). They argued that the term "Safe with Restrictions" might not be understood by all workers and that the term "Not Safe for Workers" was not only more appropriate, but safer as well. For example, Sound Testing, Inc. (Ex. 6–8), stated:

> If everyone, or even if most people, in the shipyards wore respirators, I would see "safe with restrictions" as a primary designation. But, that's not the case. Moreover, some one third of shipyard workers are reputed to be functionally illiterate. Thus, "Safe with Restrictions" needlessly complicates certificate language. In the most simple terms, a tank is either safe or not safe, and the workman deserves to be told straightforwardly which is the case.

Other commenters supported the additional designation (Ex. 6–10, 6–13, 6–15, 6–18, 6–21, 6–22, 6–23, 6–24, 6–27, 6–28, 6–33, 6–34, 6–37, 6–38). They believed that the extra designation would recognize existing safe work practices under the OSHA standard. For example, the U.S. Department of Transportation (Ex. 6–13) stated:

> Engineering controls are not always capable of reducing confined space hazards to "safe" levels. By recognizing and addressing the existing use of certificates with restrictions, additional protection may be realized. Particular restrictions will be placed on a space after consideration by the Marine Chemist and an employer's representative.
>
> Such certificates should not be issued for convenience or for the purpose of avoiding the use of preferred control measures. In

addressing this practice under Part 1915, OSHA should specify that entering such spaces is only allowed when preferred engineering controls are used to the greatest extent feasible and found to be inadequate.

Some of these rulemaking participants believed that the term "Enter with Restrictions" was a more appropriate description of the type of location involved (Ex. 6–10, 6–21, 6–22, 6–23, 6–24, 6–27, 6–28, 6–33, 6–34, 6–37, 6–38). NFPA (Ex. 6–10) stated their reasoning behind this suggested term, as follows:

NFPA supports the addition of some provision for "restricted entry". NFPA does not support the use of the word "safe" in this case since it may be misconstrued and it would be inconsistent with the "Enter With Restrictions" designation in NFPA 306.

OSHA agrees with the commenters who supported the use of the term "Enter with Restrictions". The Agency believes that this term better describes the intent of requirements that are intended to limit rather than strictly prohibit employee entry under all conditions. For example, § 1915.12(c)(3) recognizes that a Marine Chemist or a Certified industrial hygienist may designate a space as "Enter with Restrictions" and may provide a list of protective measures to be taken before entry is allowed. Additionally, this term is consistent with the terminology used in NFPA 306, with which most shipyard employers are familiar and with which they are complying. For these reasons, OSHA is incorporating this term in revised Subpart B wherever entry is permitted under certain conditions and is using the term "Not Safe for Workers" wherever entry is strictly forbidden.

"Hot work" means any activity involving fire- or heat-producing operations, such as riveting, welding, and burning. The definition of this term also indicates that grinding, drilling, abrasive blasting, and similar spark-producing operations are also considered to be hot work unless they are isolated from atmospheres containing a concentration of any flammable or combustible substance greater than 10 percent of the lower explosive limit of that substance. While the definition in the final rule is substantially the same as that contained in the proposed standard, it has been editorially revised for clarity. It should be noted that the definition of "hot work" in revised Subpart B will be applied to Subpart B whereas the definition of the same term in § 1915.4 applies to the rest of part 1915.

"Immediately dangerous to life or health"[3] (IDLH) means an atmosphere that poses an immediate threat to life or that is likely to result in acute or immediate severe health effects. This definition has been adopted without substantive change from the proposal.

"Inert or inerted atmosphere" means an atmospheric condition in which:

(1) The oxygen content of the atmosphere is maintained at a level less than or equal to 8 percent by volume or at a level of 50 percent of the amount required to support combustion, whichever is lower, or

(2) The space is flooded with water and the vapor concentration of flammable or combustible materials in the free space above the water line is less than 10 percent of the lower explosive limit for the material. This definition has been adopted without substantive change from the proposal.

In the NPRM, OSHA raised the issue of whether or not the proposed definition of "inert or inerted atmosphere" was appropriate, especially with respect to the maximum permissible level of oxygen. The Agency asked for guidance on whether or not specific oxygen levels for various substances should be published along with the rule.

The persons who commented on this issue felt that OSHA should not publish specific levels in the final rule (Ex. 6–10, 6–18, 6–23, 6–24, 6–27, 6–28, 6–33, 6–34). They argued that since a Marine Chemist would be the person authorizing and monitoring the inerting of atmospheres and since Marine Chemists are thoroughly familiar with the selection of appropriate procedures involved, specifying oxygen levels in the OSHA standard was unnecessary. Endorsing this view, NFPA (Ex. 6–10) stated:

Inerting in the marine industry is overseen by Marine Chemists in accordance with the requirements of the "Control of Gas Hazards on Vessels—NFPA 306 (1988)." The provisions for inerting as contained in NFPA 306, 2–3.7(a), are based upon the industry accepted practice for inerting. It takes into account the theoretical lower limit for the amount of oxygen to support combustion, which is approximately 11% by volume for most petroleum products. The procedure specifies either reducing the oxygen content to 8% by volume or 50% of the amount to support combustion, whichever is less. In practice, because the value of 50% of the amount to support combustion is usually less than 8% by volume, an even greater margin of safety is achieved. The minimum oxygen for combustion values are contained in Appendix B, "Explosion Prevention Systems—NFPA 69 (1986)". NFPA 306 requires in 2–3.7(a), (c) that the selection and disposal of the inert gas medium be acceptable to the Marine Chemist who provides specific instructions on his/her Marine Chemist Certificate.

NFPA supports the addition of the definition for inerting and the levels as specified in the definition since these levels are industry accepted and provide for an adequate level of safety when administered by a Marine Chemist in accordance with NFPA 306.

The Marine Chemist Association, Inc. (Ex. 6–34), agreed stating:

The Marine Chemist Association feels that inerting is not a procedure free of potential hazards and that inerting for hot work should only be attempted with the proper skill to determine each of the above mentioned factors. If OSHA provides only partial details of these factors, it may lead to unauthorized personnel attempting the procedure outside current regulatory requirement, and could possibly result in the generation of hazardous situations.

For the reasons stated by NFPA and the Marine Chemist Association, OSHA is not specifying the precise levels of oxygen acceptable under the definition of "inert or inerted atmosphere", either directly in the definition or in an appendix. Under § 1915.14(a), an atmosphere to be inerted must be tested and certified by a Marine Chemist or a U.S. Coast Guard authorized person, who would be thoroughly familiar with the proper techniques involved. The Agency fully concurs with the Marine Chemist Association that setting out these levels within the standard itself might encourage unqualified persons to undertake the inerting of a hazardous atmosphere, possibly leading to a severe accident.

"Labeled" means identified with a sign, placard, or other form of written communication that informs all employees of the status or condition of the work space to which it is attached. This term was not included in the proposed revision of Subpart B, but OSHA believes that its inclusion is necessary for clarity.

"Lower explosive limit" (LEL) means the minimum concentration of vapor below which propagation of a flame does not occur in the presence of an ignition source. This definition is unchanged from the proposal.

"Marine Chemist" means an individual who possesses a current Marine Chemist Certificate issued by the National Fire Protection Association. This definition is substantially the same as the one in the proposal.

In the NPRM, OSHA requested comments related to the definition of "Marine Chemist". Although some

[3] The definition of "immediately dangerous to life or health" in § 1910.146 reads as follows:

Immediately dangerous to life or health (IDLH) means any condition that poses an immediate or delayed threat to life or that would cause irreversible adverse health effects or that would interfere with an individual's ability to escape unaided from a permit space.

comments were received on this subject, they all related to the issue of whether or not anyone else could perform the duties required of a Marine Chemist. These comments are discussed under the summary and explanation of §§ 1915.12(c)(3) and 1915.14(a)(1), later in this preamble.

"Nationally Recognized Testing laboratory" (NRTL) means a laboratory recognized by OSHA as meeting the provisions of Appendix A of § 1910.7. In the previous standard, OSHA referred to "Underwriters Laboratories" as one of the organizations that could approve lamps for use in Class I, Group D atmospheres. Since OSHA has promulgated the NRTL standard, laboratories meeting that standard are the appropriate organizations to approve such lamps.

"Not Safe for Hot Work" denotes a space where hot work may not be performed. This definition is substantially the same as the one in the proposal.

"Not Safe for Workers" denotes a space that employees may not enter. The proposed definition of "Not Safe for Workers" contained criteria to be used to determine whether or not a space was safe for entry. OSHA has not carried these criteria forward into the definition of this term in the final rule. The same criteria also appeared under the proposed definition of "Safe for Workers". OSHA believes that removing the redundancy will help clarify revised Subpart B. (See the summary and explanation of the definition of "Enter with Restrictions", earlier in this preamble, for additional discussion of issues regarding the use of the term "Not Safe for Workers".)

"Oxygen-deficient atmosphere" means an atmosphere having an oxygen concentration of less than 19.5 percent by volume. "Oxygen-enriched atmosphere" means an atmosphere that contains 22.0 percent or more oxygen by volume. These two definitions have been carried forward from the proposal without substantive change.

"Safe for Hot Work" denotes a space that meets the following criteria:

(1) The atmosphere is not oxygen-enriched;

(2) The concentration of flammable vapors in the atmosphere is less than 10 percent of the LEL;

(3) Residues or materials within the space, under existing atmospheric conditions in the presence of hot work and while maintained as directed by the Marine Chemist or competent person, are not capable of producing a higher concentration of oxygen or flammable vapors than permitted under the first two criteria; and

(4) All adjacent spaces have been cleaned or inerted or otherwise treated sufficiently to prevent the spread of fire.

The definition in the final rule is substantively the same as the corresponding definition in the proposal; however, the language has been improved for clarity.

"Safe for Workers" denotes a space that meets the following criteria:

(1) The atmosphere is neither oxygen-deficient nor oxygen- enriched;

(2) The concentration of flammable vapors is below 10 percent of the LEL;

(3) Any toxic materials associated with cargo, fuel, tank coatings, inerting mediums, or fumigants are within permissible concentrations at the time of inspection; and

(4) Residues or materials associated with the work authorized by the Marine Chemist, Certified Industrial Hygienist, or competent person will not produce uncontrolled toxic materials under existing atmospheric conditions while maintained as directed.

The definition in the final rule is substantively the same as the corresponding definition in the proposal, except that the language has been improved for clarity and the "exception" in the proposal regarding the concentration of flammable vapors has not been carried forward. OSHA believes that this exception, which is recognized in § 1915.13(b)(6) in the final rule, more properly falls under the new term "Enter with Restrictions".

"Space" means an area on a vessel, vessel section or within a shipyard such as, but not limited to, a cargo tank or hold, pump or engine room, storage locker, tank containing flammable or combustible liquids, gases, or solids; a room within a building, crawl space, tunnel, and accessway. Although no definition of this word was proposed, its meaning is essential to the content of revised Subpart B. The final rule uses the word "space" broadly to encompass all the different types of areas in a shipyard where dangerous atmospheres might be found. The definition of this word in the final rule is intended to convey this meaning to employers and employees who must comply with the standard.

"Upper explosive limit" (UEL) means the maximum concentration of flammable vapor above which propagation of flame does not occur on contact with a source of ignition. This definition is unchanged from the proposal.

"Vessel section" means a subassembly, module, or other component of a vessel being built, repaired, or broken. This definition is unchanged from the proposal.

"Visual inspection" means the physical survey of the space, surroundings and contents by the competent person, Marine Chemist, or Certified Industrial Hygienist to identify hazards such as, but not limited to, restricted accessibility, residues, unguarded machinery, and piping or electrical systems that could create or enhance hazards. This term is defined in the final rule to clarify what is required of the person preforming the inspection.

OSHA has not carried forward into the final rule the proposed definition of "weather deck". The Agency believes that a definition of this term is not necessary to the meaning of the standard.

2. § 1915.12 Precaution Before Entering Spaces.

OSHA has made several significant changes to § 1915.12. First, OSHA has reformatted this section to address more appropriately the order of atmospheric testing to be conducted by competent persons when determining hazards within confined and enclosed spaces and other dangerous atmospheres prior to employee entry. Second, OSHA has raised the minimum level of oxygen for entry and addressed oxygen-enriched atmospheres in this section. Third, the Agency has specified when and under what conditions an employee may enter a space that has been found "not safe for workers." Finally, OSHA has added new paragraphs to this section to address: (1) The training of individuals who enter dangerous and confined spaces (paragraph (d)), (2) rescue teams (paragraph (e)), and (3) the exchange of hazard information between employers (paragraph (f)).

OSHA is also making the requirement to visually inspect each space explicit in this final standard. In the NPRM, comments were solicited on whether the shipyard competent person should be required to conduct a physical examination of the tank and pipelines when making an inspection. Many commenters supported OSHA's decision (Ex. 6–4, 6–10, 6–12, 6–13, 6–15, 6–18, 6–24, 6–28, 6–31, 6–33, 6–34). For example, NFPA (Ex. 6–10) stated:

> NFPA strongly supports the inclusion of a requirement that in addition to atmospheric testing the shipyard competent person should also be required to conduct a physical examination of the space and associated pipelines. NFPA 306, 2–1 requires the Marine Chemist to conduct a physical inspection and to conduct test within the space. For high flash point, low vapor pressure products such as diesel, a test for flammable or combustible vapors is not sufficient, since at atmospheric temperatures there are not enough vapors being evolved for

the combustible gas indicator to detect. It is essential that physical inspections be conducted.

OSHA has decided that a visual inspection is a crucial element in ascertaining that confined and enclosed spaces and other dangerous atmospheres are safe for entrants. Based on the visual inspection and other information available to the employer about non-atmospheric hazards, the employer is required to take specific actions as required by other subparts. For example, precautions to be taken for electrical hazards are covered by § 1915.181 (shipboard) and § 1910.147 (shipboard) and machinery is addressed by § 1915.164 (for vessels) and § 1910.212 (land-side).

In paragraphs (a), (b), and (c) of final § 1915.12, OSHA is requiring atmospheres to be tested for oxygen content first, flammability second, and toxicity third. The format of the previous standard implied that atmospheres be tested for flammability first, toxicity second, and oxygen deficiency third.

Even before the revision of Subpart B was proposed, Newport News Shipbuilding and Harbor Testing Laboratory commented that the proper sequence is testing for oxygen, then flammability, then toxicity (53 FR 48096). To address this problem, OSHA proposed to present the testing requirements in the proper sequence. However, as noted in the NPRM, the proposed rule would not have required testing in any particular order.

OSHA believes that it is important for atmospheric testing to be conducted in the proper sequence. The Agency reached the same conclusion in the rulemaking on § 1910.146, which adopted a rule requiring atmospheric testing in the correct order in that final rule, for the following reasons:

> A test for oxygen must be performed first because most combustible gas meters are oxygen dependent and will not provide reliable readings in an oxygen deficient atmosphere. In fact, the Johnson Wax Company (Ex. 14–222) stated that "there is [a] specific (sensor dependent) oxygen level below which the combustible gas sensor will *not* respond at all [emphasis was supplied in original]." Combustible gases are tested for next because the threat of fire or explosion is both more immediate and more life threatening, in most cases, than exposure to toxic gases. [53 FR 48096]

This reasoning applies to the revision of Subpart B as well. Atmospheric testing in confined and enclosed spaces and other dangerous atmospheres in shipyards is basically the same as atmospheric testing in general industry permit spaces. Therefore, the revision of § 1915.12 requires shipyard employers to perform atmospheric testing in the following sequence: oxygen content, flammability, toxicity.

In paragraph (a)(1), OSHA continues the requirement (in § 1915.12(c)(1)) for competent persons to test atmospheres of specific spaces that may contain oxygen-deficient atmospheres. These spaces are listed specifically as follows:

(1) Spaces that have been sealed,

(2) Spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases,

(3) Spaces and adjacent spaces that contain or have contained liquids, gases, or solids that are toxic, corrosive, or irritant,

(4) Spaces that have been fumigated, and

(5) Spaces containing materials or residues that could create an oxygen-deficient atmosphere. This final rule adopts the language from the NPRM to require competent persons to test atmospheres of these spaces for "oxygen content" rather than just "oxygen deficiency." Paragraph (a)(2) of final § 1915.12 addresses the maximum permissible oxygen concentration within confined and enclosed spaces and other dangerous atmospheres. Therefore, the testing to be performed must be for content rather than for oxygen deficiency alone. (The rationale for adopting a requirement for maximum permissible oxygen exposure is discussed under the summary and explanation of final § 1915.12(a)(2).)

In the previous rule § 1915.12(c)(1) required tests to be conducted "[b]efore employees are initially permitted to enter" any of the regulated spaces. Paragraphs (b)(1) and (c)(1) contain this identical language for pre-entry testing for flammable gases and vapors and for toxic substances. The NPRM used the language "prior to initial entry" in proposed § 1915.12(a)(1) and the language "prior to entry" in proposed § 1915.12 (b)(1) and (c)(1). The preamble to the proposal noted that questions had arisen regarding what was intended by "initial entry" in the previous standard and that the Coast Guard had interpreted the OSHA standard to require retesting if more than 24 hours had elapsed since the previous testing. The NPRM raised the issues of whether "initial entry" should be defined in Subpart B and, if so, what that definition should be.

Several commenters believed that OSHA should not specify the maximum time permitted to elapse before additional testing is required (Ex. 6–3, 6–6, 6–8, 6–12, 6–18). They argued that the length of time between testing and entry could vary depending on the space and the possible hazards involved. For example, Mr. Charles K. Klein, representing Newport News Shipbuilding, stated:

> OSHA should not specify a time limit regarding re-certification of spaces after "initial entry" certification has been given. The Coast Guard's interpretation for re-certification is based on a 24-hour lapse period since a tank has been previously determined safe for entry. However, we feel that as long as conditions have not changed since the space was certified for "initial entry", additional certification is not required. Periods longer than 24 hours may be appropriate in cases where a confined space does not contain a hazardous substance, is not connected to a system which contains a hazardous substance and has not been closed except for an air or hydrostatic test. However, certain evolutions involving hazardous substances in or near confined spaces may require testing on a shift basis or more often. A time limit imposed on "initial entry" is unnecessarily restrictive and reduces the employer's flexibility in providing a safe and healthful work environment in an effective, cost-efficient manner. [Ex. 6–6]

Two commenters maintained that the certificate issued by a Marine Chemist would control whether or not a space had to be retested beyond a certain period (Ex. 6–8, 6–18). They believed that retesting was unnecessary unless conditions changed or unless the Marine Chemist's certificate required it. Sound Testing, Inc., expressed this position as follows:

> It should be made clear that a Marine Chemist's certificate is voided not by the passage of time, but by the change of conditions. Therefore, if a competent person can ascertain that conditions have not drastically changed, the chemist's certificate remains in force, regardless of how long between competent person inspections. The corollary of this is that there should be no explicit time limit on the chemist's certificate unless the chemist himself sees a reason for such a limit. [Ex. 6–8]

Other rulemaking participants argued that the regulation should clarify what constitutes initial entry or when additional testing is required before the first entry into the space (Ex. 6–4, 6–5, 6–10, 6–13, 6–21, 6–22, 6–24, 6–27, 6–28, 6–33, 6–34, 6–37, 6–38). Several of these commenters stated that the standard should specify the maximum interval permitted before additional testing would have to be performed (Ex. 6–4, 6–5, 6–10, 6–24, 6–27). The intervals suggested ranged from immediately before the entry (Ex. 6–24) to 24 hours (Ex. 6–27). For example, the U.S. Coast Guard stated:

> It has been our experience that if a minimum is not set the retesting is not done or is done infrequently because of the competent person's other work obligations.

Our policy does not prohibit the inspector from requiring additional testing if he feels the conditions warrant. We have required additional retesting because of rises in temperature, excess quantity of cargo residues, and lack of confidence in the competent person. [Ex. 6–4]

Other commenters thought that a definition of "initial entry" would clarify the standard (Ex. 6–21, 6–22, 6–23, 6–28, 6–33, 6–34, 6–37, 6–38). Four of them recommended that "initial entry" refer to the first entry after testing and that additional testing be required for entry on subsequent days to ensure that safe conditions are still present (Ex. 6–21, 6–22, 6–37, 6–38). Two of them suggested that it refer to the time immediately after the initial opening of a space, when the tests and inspections performed to determine whether or not the space is safe for entry are conducted (Ex. 6–28, 6–34). The American Waterways Shipyard Conference (AWSC) maintained that "initial entry" should be defined as the first entry by shipyard personnel after the space has been certified by the Marine Chemist (Ex. 6–23). They explained the reasons for their position as follows:

The United States Coast Guard has interpreted the term to mean "more than 24 hours have elapsed since a tank has been determined safe for entry and/or hot work." If that time period has elapsed then the tank must be recertified. However, this interpretation does not take into account the shipyard facility's requirements to maintain conditions. The shipyard facility must commence work on the vessel within 24 hours, after the certificate has been issued or the Marine Chemist certificate becomes invalid. As long as the conditions listed on the certificate are maintained, then the certificate is valid. However, if the conditions, as specified on the certificate change, then the Marine Chemist is recalled to recheck the space.

Including the definition for initial entry recommended by AWSC will eliminate confusion within the industry and impose a standard practice around the country. [Ex. 6–23]

OSHA believes that it is important to clarify the term "initial entry" so that employers and employees understand clearly what OSHA means by the term. With respect to spaces that require certification by a Marine Chemist, it is OSHA's intent that "initial entry" means the first entry into a certificated space after the Marine Chemist's certificate has been posted. The period of time during which the Marine Chemist's certificate is valid is established by the Marine Chemist and is logged on the certificate as posted. OSHA believes that the Marine Chemist performing the tests and inspection of a space to be entered is in the best position to determine the duration of the permit's validity. With respect to spaces that must be tested but need not be certificated by a Marine Chemist, the Agency will interpret the "initial entry" to be the very first entry into the space after testing is performed. (No entry is allowed before those tests have been performed.) In addition, the tests must be performed close enough to the time of entry to ensure that they accurately reflect conditions in the spaces. To meet this standard, testing will nearly always be done just prior to entry by employees; seldom will tests be performed prior to an hour before employees are to enter a space.

There are also requirements in § 1915.15 for periodic monitoring and maintaining atmospheric conditions within a space as found by the Marine Chemist, Coast Guard authorized person, or competent person. Tests must be repeated as often as necessary to ensure that the required atmospheric conditions within the space are maintained (paragraphs (c) and (e)). Additionally, when a change occurs that could alter conditions within a tested space, work in the space must stop and employees must exit, and the area must be retested (paragraphs (b), (d), and (f)).

OSHA believes it is unnecessary to establish within the regulatory text of § 1915.12 a specific time limit beyond which the initial entry is not permitted after pre-entry testing. As noted in several comments, periods longer than 24 hours may be appropriate if a confined or enclosed space or other dangerous atmosphere does not contain a hazardous substance, is not connected to a piping or exhaust ventilation system that contains a hazardous substance, and has not been closed except for an air or hydrostatic test (Ex. 6–3, 6–6). OSHA has determined that the need for testing is directly related to the potential for change to occur within spaces. The duty to test as conditions warrant is imposed by § 1915.12 and § 1915.15, in combination. These two sections require that, in all cases, testing of the space must be conducted before employees enter the space and as often as necessary to monitor conditions within the space as work progresses. Obviously, any change in conditions that could affect the designation of a space as "Safe for Workers" require reinspection, retesting, and recertification of the space by the competent person or Marine Chemist.

Therefore, for the purposes of this rule, the term "initial entry" is interpreted by OSHA to mean the first entry into a space. The time period between pre-entry testing and initial entry may vary. However, the space must be reinspected, retested, and recertified any time conditions in the space might have become unsafe for employees.

As noted earlier, in paragraph (a)(1), OSHA is continuing the previous requirement (in § 1915.12(c)(1)) for competent persons to test atmospheres of specific spaces that may contain oxygen-deficient atmospheres. The following paragraphs describe each of the spaces itemized in paragraph (a)(1).

Paragraph (a)(1)(i) of final § 1915.12 lists spaces that have been sealed, e.g., those that have been coated and closed up and those that have been painted and that lack ventilation. OSHA has combined the spaces listed in paragraphs (c)(1) (ii), (iii), and (iv) of the previous § 1915.12 into one paragraph because OSHA considers the hazards within these spaces to be similar. The primary hazard of these spaces is the lack of proper ventilation and the resultant possible lack of oxygen. OSHA considers the consolidation of the previous paragraphs into one paragraph to be an editorial change for clarity because none of the spaces currently listed have been deleted nor have any been added.

Paragraph (a)(1)(ii) lists spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases. Paragraphs (a)(1)(iii) and (a)(1)(iv) list spaces and adjacent spaces that contain or have contained liquids, gases, or solids that are toxic, corrosive, or irritant or that have been fumigated. These three paragraphs refer to spaces that were included under the previous § 1915.12(c)(1)(i), which reads as follows:

(i) Spaces in which the test[s] required by paragraphs (a) and (b) of this section indicate that no flammable or toxic contaminants are present in the atmosphere.

Under this previous provision, spaces that require flammability and toxicity testing must also be tested for oxygen deficiency. In revised subpart B, OSHA has simply named the spaces that are covered under the previous § 1915.12 (a) and (b) in lieu of specifying them by reference. Additionally, the final rule requires these spaces to be tested for oxygen regardless of whether they are found to be safe with respect to the hazards of flammable and toxic substances. Under the previous standard, which implied that the flammability and toxicity tests were performed before the oxygen test, once a space was found to be unsafe due to the presence of flammable gases or vapors or toxic air contaminants, further testing for oxygen deficiency was unnecessary. Under the final rule, tests

for oxygen content are conducted first and must always be performed.

Paragraph (a)(1)(v) lists spaces containing materials or residues that could create an oxygen-deficient atmosphere. The previous § 1915.12(c)(1)(v) covers only cargo spaces containing cargoes or residues that can create an oxygen-deficient atmosphere. The corresponding paragraph in the proposal (proposed § 1915.12(a)(viii)) also addressed only cargo spaces. The proposed and previous language also provide examples of cargos that can absorb oxygen and create an oxygen-deficient atmosphere (scrap iron, fresh fruit and molasses, and various vegetable drying oils).

As noted in the summary and explanation of final § 1915.11(a), earlier in this preamble, the scope of subpart B is being expanded to address all confined and enclosed spaces and other dangerous atmospheres throughout shipyard employment. While the previous standard recognizes that the hazard of oxygen deficiency may be found in cargo spaces, many other confined and enclosed spaces in shipyard employment also pose this hazard. OSHA believes that it is essential that all such spaces be tested for oxygen content before entry to assure their safety. Therefore, the Agency is eliminating the reference to cargo spaces and is requiring all spaces containing materials or residues that could create an oxygen deficiency to be tested.

Paragraph (a)(2) requires spaces that have been tested and found to contain oxygen-deficient atmospheres to be labeled "Not Safe for Workers." Spaces found to be oxygen-enriched are required to be labeled "Not Safe for Workers—Not Safe for Hot Work." If employees are to enter a space that has an oxygen-enriched or oxygen-deficient atmosphere, then ventilation must be provided to maintain the oxygen content of the atmosphere at or above 19.5 percent and below 22.0 percent by volume. After the ventilation produces an acceptable level of oxygen, the warning signs may be removed.

The previous § 1915.12(c)(2) only requires ventilation for spaces containing less than 16.5 percent oxygen by volume. It does not require spaces with oxygen-deficient or oxygen-enriched atmospheres to be labeled, nor does it address oxygen-enriched atmospheres. Additionally, it requires ventilation to be provided only when the oxygen content in the space is below 16.5 percent by volume, rather than below 19.5 percent.

Unlike either the proposal or the previous rule, the final rule addresses hazards associated with oxygen-enriched atmospheres. Oxygen-enriched atmospheres create significant risks to employees entering confined and enclosed spaces and other dangerous atmospheres, and precautions must be taken before entry into such atmospheres. The proposal would have required atmospheres to be tested for oxygen content rather than for oxygen deficiency alone. No rulemaking participant objected to this requirement. NFPA 306, in Section 2–3.1, sets the criteria for compartments and spaces to be found "Safe for Workers." The first criterion listed in this section is that the oxygen content of the space be "at least 19.5 percent and not greater than 22 percent by volume." Thus, OSHA is consistent with the existing national consensus standard which has adopted provisions restricting entry into oxygen-enriched atmospheres.

The hazards of working in an oxygen-enriched atmosphere are widely recognized. The presence of greater than normal amounts of oxygen increases the flammability of materials and lowers the flash point of flammable materials. An ignition source, such as a spark, that would ordinarily be of insufficient energy to ignite a flammable mixture may ignite such mixture in oxygen-enriched atmospheres. The presence of greater than normal amounts of oxygen can also increase the chances of spontaneous combustion of flammable materials. Thus, an oxygen-enriched atmosphere in a confined or enclosed space or other dangerous atmosphere can place employees at an unacceptable risk of injury due to fire or explosion. Employers must take measures to find the source of oxygen and then eliminate that source and ventilate the space in order to control the hazards involved.

For the foregoing reasons, OSHA has adopted requirements in final § 1915.12(a) that are intended to eliminate the hazards posed by oxygen-enriched atmospheres. The Agency has adopted NFPA's criterion for oxygen enrichment (that is, an oxygen concentration of 22 percent or more by volume). Thus, the final rule sets a standard that protects employees to a level equal to that provided by the relevant national consensus standard for the work involved.

The proposed rule, under § 1915.12(a)(4) and (a)(5), would have required labeling spaces with oxygen-deficient (that is less than 19.5 percent oxygen) atmospheres, but would have permitted employees to enter such spaces provided they were wearing respirators.

The final rule raises the minimum acceptable concentration of oxygen from 16.5 percent to 19.5 percent by volume. As noted earlier, the NPRM proposed raising the minimum acceptable level of oxygen, and several rulemaking participants commented on this issue (Ex. 6–3, 6–6, 6–10, 6–11, 6–15, 6–18, 6–24, 6–28, 6–33). All of them agreed with the proposed minimum oxygen level. For example, the Shipbuilders Council of America (Ex. 6–3) stated:

> Routine entry should be allowed only if the oxygen level is at least 19.5 percent.

Northwest Marine Chemist (Ex. 6–18) maintained that the existing minimum acceptable concentration of oxygen in § 1915.12(c)(1) was outdated, as follows:

> The use of 16.5% oxygen by OSHA is archaic, and not used in the industry in my area.

Additionally, OSHA's generic confined space standard, in § 1910.146(b), defines "oxygen-deficient atmosphere" as "an atmosphere containing less than 19.5 percent oxygen by volume."

OSHA has previously concluded that permitting employees to work in atmospheres in which the concentration of oxygen is below 19.5 percent by volume presents an unacceptable risk of acute adverse health effects. In the preamble to final § 1910.146, OSHA described the possible results of exposure to oxygen-deficient atmospheres as: dizziness, tiredness, difficulty in breathing, confusion, unconsciousness, and death (58 FR 4476). Considering these possible consequences, the Agency continues to believe that the minimum acceptable concentration of oxygen, in the absence of control measures, is 19.5 percent by volume.

As noted earlier, § 1915.12(a)(2) requires spaces containing oxygen-deficient and oxygen-enriched atmospheres to be labeled "Not Safe for Workers" or "Not Safe for Workers—Not Safe for Hot Work," respectively. The previous standard does not require such labeling. The proposed rule would have required labeling only for oxygen deficiency, under § 1915.12(a)(5). No one objected to the labeling requirement proposed in § 1915.12(a)(5), and OSHA believes that this labeling is necessary to warn employees to keep out of spaces containing insufficient oxygen to work safely. Therefore, the Agency is carrying forward the proposed provision that spaces with oxygen-deficient atmospheres be labeled "Not Safe for Workers." Because OSHA has found it necessary and appropriate to prohibit entry into oxygen-enriched atmospheres, the Agency also believes that it is necessary to label spaces containing such atmospheres. Because

of the increased risk of fire and explosion associated with these atmospheres, the final rule requires them to be labeled as "Not Safe for Hot Work" as well as "Not Safe for Workers."

Final § 1915.12(a)(2) requires ventilation to be provided to maintain the oxygen content of the atmosphere in a safe range. Paragraph (c)(2) of the previous § 1915.12 contains the same requirement, except that it applies only when an oxygen deficiency is found. The proposed revision of Subpart B would not have required ventilation but would have permitted employees to enter oxygen-deficient atmospheres if they were wearing respirators (proposed § 1915.12(a)(4)).

OSHA has decided not to allow employees to enter confined or enclosed spaces or other dangerous atmospheres that are designated "Not Safe for Workers," except under tight restriction. (See the summary and explanation of final § 1915.12(c)(3), later in this preamble, for a discussion of issues related to employee entry into such spaces.) Therefore, the final rule adopts a requirement, similar to the one in the previous § 1915.12(c)(2), for ventilation to be provided any time a space is hazardous because of oxygen deficiency or oxygen enrichment. Once the ventilation brings the oxygen content to a safe level, signs labeling the space as "Not Safe for Workers" or "Not Safe for Workers—Not Safe for Hot Work" may be removed.

Paragraph (a)(3) of final § 1915.12 prohibits employees from entering any confined or enclosed space or other dangerous atmosphere that is oxygen-deficient or is oxygen-enriched. Exceptions are granted for emergency rescue and for entries of short duration to install ventilation equipment, provided that the atmosphere is continuously monitored for oxygen content and that respiratory protection and other personal protective equipment and clothing are provided in accordance with Subpart I of part 1915.

The previous § 1915.12 prohibits entry into IDLH atmospheres. Paragraph (d) of that section presents exceptions to the general prohibition which recognize emergency entries and short duration entries performed for the purpose of installing ventilation equipment or starting operations, provided the work is performed in accordance with paragraphs (a) and (b) of the previous § 1915.152 (contained in Subpart I) relating to respiratory protection.

Proposed § 1915.12(d) presented the same exceptions as the previous rule, but with three additional provisos:

(1) That no ignition sources are present, and

(2) That the atmosphere in the space is maintained above the upper explosive limit, and

(3) That the atmosphere is monitored continuously.

The reference to the Subpart I requirements was placed in a note following the proposed paragraph. As noted earlier, proposed § 1915.12(a)(4) would also have allowed entry into oxygen-deficient atmospheres by employees wearing respirators in accordance with Subpart I of part 1915. No restrictions on the purpose or length of entry were proposed.

The NPRM requested comments on the issues of whether or not work in IDLH atmospheres should ever be permitted and on what control measures are necessary for the protection of employees working in IDLH atmospheres. In the preamble to the NPRM, OSHA recognized that atmospheres containing flammable vapor concentrations greater than the UEL for a particular vapor do not present a fire or explosion hazard to employees because the atmosphere is too rich in flammable vapors or gases to burn. However, OSHA expressed concern about employees who work in such atmospheres because such atmospheres may contain chemical exposures from the flammable vapor that are above the permissible exposure limit (PEL) for the particular chemical creating the vapors.

Only one commenter supported OSHA's proposal to allow work in IDLH atmospheres. The American Waterways Shipyard Conference (Ex. 6–23) stated that OSHA should not put a time limit on "short duration" and that the proposal was appropriate, as follows:

> Due to the vast differences in vessel design, it would be extremely difficult to define an "emergency work" situation. Similarly, a time limit for "brief duration" would be difficult to ascertain since the work to be performed differs in every situation. By instituting a time factor for work of brief duration, shipyard employees may be required to skip safety steps in order to finish the work in the required time frame.
>
> Work in atmospheres in the Upper Explosive Limit (UEL) should not be prohibited. The work done in an UEL atmosphere is done on a very infrequent basis, but it is work that could not be done otherwise such as entry of a cargo tank during tank cleaning operations to set a cargo suction hose.

By contrast, many other rulemaking participants believed that work in IDLH atmospheres is unnecessary and should be prohibited, either under all conditions (Ex. 6–4, 6–15, 6–18, 6–24, 6–31) or under all but emergency conditions (Ex. 6–7, 6–8, 6–10, 6–12, 6–21, 6–22, 6–28, 6–33, 6–34, 6–37, 6–38). Independent Testing and Consultation, Inc. (Ex. 6–24), presented the following arguments against work in atmospheres above the upper explosive limit for a flammable gas or vapor:

> The paragraph 1915.12(d) should be deleted for the following reasons.
>
> (a) There is no way to keep the atmosphere above the upper explosive limit (UEL). If entry to the tank is required, it follows that there must be a region where the tank atmosphere mixes with the outside atmosphere. In this region the concentration of gas will be in the explosive range.
>
> (b) The equipment used to measure gas concentrations above the UEL is not usually available.
>
> (c) All ignition sources cannot easily be eliminated. There remains possible ignition due to static electricity. It has been my experience that owners and operators would rather clean or otherwise make safe a tank or compartment even if the work required in the compartment is of the briefest duration.

NFPA (Ex. 6–10) addressed work in IDLH atmospheres as follows:

> NFPA does not believe that work in IDLH atmospheres should be encouraged, except for the purposes of emergency rescue. NFPA does not support the proposal of working in UEL atmospheres. The potential hazards associated with ignition sources, such as static electricity, and the introduction of air to bring an atmosphere above the UEL within the flammable range, are significant and difficult to control. The additional testing requirements would also be significant. NFPA 306 only permits such a practice in the case of inerting for flammable compressed gas as described in 2–3.8. In this case now work is permitted on the tank or pipelines.

OSHA agrees with the commenters who stated that working in IDLH atmospheres or in atmospheres containing concentrations of flammable gases or vapors above their UEL is very hazardous. The limitations on maintaining an atmosphere above a gas's or vapor's UEL, as noted by Independent Testing and Consultation, Inc., are severe indeed. If a mistake is made in such an atmosphere, an explosion will almost certainly result. Atmospheres that are IDLH because of toxicity also present a very serious danger to employees. A failure of the respiratory protective equipment protecting an employee in this type of atmosphere could quickly lead to his or her death.

OSHA further believes that conditions somewhat less hazardous than those posed by IDLH atmospheres pose unnecessary dangers for shipyard employees. The generic permit-required confined space standard, in § 1910.146(b), defines a hazardous atmosphere, in part, as follows:

Hazardous atmosphere means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from one or more of the following causes:

(1) Flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit (LFL);

* * * * *

(3) Atmospheric oxygen concentration below 19.5 percent or above 23.5 percent;

OSHA has already determined that these conditions constitute serious hazards, ones that are tightly regulated in the generic permit-space standard in § 1910.146. These conditions can also be found in confined and enclosed spaces and in other dangerous atmosphere in shipyard work. In order for Subpart B to be as protective as the general industry permit-space standard, which permits employees to work in hazardous atmospheres using a system of permits and attendants not required by Subpart B, OSHA believes that Subpart B must require measures that ensure that employees are not exposed to such hazardous conditions. For this reason, the Agency is adopting requirements in final Subpart B that prohibit employee entry into confined and enclosed spaces and other dangerous atmospheres presenting an oxygen-deficient or oxygen-enriched atmosphere or containing concentrations of flammable gases or vapors greater than or equal to 10 percent of the gas's or vapor's lower explosive limit.

OSHA concludes, however, that entry into such spaces can safely be permitted under certain conditions. First, in emergencies, where persons are endangered, entry might be necessary to save the life of an entrant or the lives of every person on that transport. Second, because these spaces will have to be ventilated to make the atmosphere safe for employees, entry might be necessary to set up the proper ventilation equipment. For these reasons, final Subpart B permits entry into IDLH and other hazardous atmospheres for emergency rescue and for periods of short duration to install ventilation equipment necessary for normal entry.

During such emergency or short duration entries, however, additional precautions must be taken to protect the entrants. The additional precautions to be taken must be appropriate for the hazards presented by the particular space involved. Thus, the final rule treats oxygen enrichment and deficiency, the presence of flammable gases and vapors, and atmospheres containing toxic contaminants at IDLH levels separately. For oxygen-enriched and oxygen-deficient atmospheres, the space must be continuously monitored for oxygen content (so that appropriate control measures can be taken if it changes), and respiratory protection and other personal protective equipment and clothing must be provided in accordance with Subpart I (so that appropriate personal protective equipment is provided and so that an attendant will be present if the oxygen content makes the space IDLH). The hazards of flammable atmospheres and toxicity are treated separately in their respective paragraphs (final § 1915.12 (b)(3) and (c)(4)).

Paragraph (b) of final § 1915.12 sets precautions to be taken before employees enter areas that present hazards related to flammable atmospheres. Paragraph (b)(1) applies to spaces that contain or have contained combustible or flammable liquids or gases and to spaces (called, appropriately, "adjacent spaces") that are adjacent to those spaces. These spaces must be: (1) inspected by a competent person to determine whether or not combustible or flammable liquids are present, and (2) tested by a competent person before entry by any employee to determine the concentration of flammable gases and vapors within the space. These precautions also apply to adjacent spaces.

Previous § 1915.12(a)(1) requires the same spaces to be tested by a competent person to determine the concentration of flammable gases and vapors.

The proposed rule contained requirements equivalent to the previous standard in paragraphs (b)(1), (b)(2), and (b)(3) of proposed § 1915.12.

The final rule differs from the previous and proposed rules only in that § 1915.12(b)(1) includes a requirement for the competent person to inspect the space, as well as test it, for the presence of combustible or flammable liquids. The inspection is necessary so that the competent person will be more likely to be made aware of any malfunction in the testing instrument. Obviously, if the inspection reveals the presence of a flammable liquid, a flammability test can be expected to result in some detectable concentration of flammable gases or vapors. The lack of any such reading from the test instrument would be an indication that the device might be defective and should lead to further investigation of the problem. The inspections will also be necessary if a hazardous concentration of flammable gases or vapors is found so that the proper precautions can be taken to eliminate the hazard. Although in the previous § 1915.12(a) does not specify that an inspection is to take place, in the previous § 1915.7(c), which requires tests *and inspections* to be entered into the "Log of *Inspections* and Tests," implies that the competent person is to perform inspections in addition to any tests that are required.

Paragraph (b)(2) requires spaces that have been tested and found to contain concentrations of a flammable gas or vapor greater than or equal to 10 percent of the gas's or vapor's lower explosive limit (LEL) are required to be labeled "Not Safe for Workers—Not Safe for Hot Work." If employees are to enter a space that has flammable gases or vapors in such concentrations, then ventilation must be provided to ensure that the concentration of these gases or vapors is maintained below 10 percent of their LELs. After the ventilation produces an acceptable atmosphere, the warning signs may be removed.

Paragraph (a)(2) of the previous § 1915.12 requires spaces containing hazardous concentrations of flammable gases or vapors to be ventilated until the concentration drops below 10 percent of the gas's or vapor's LEL before workers are permitted to enter the space. No labeling of these spaces is required under the previous standard.

Paragraph (b)(5) of proposed § 1915.12 would have required labeling of spaces in a manner equivalent to that required under the final rule. Paragraph (b)(4) of proposed § 1915.12 would have prohibited entry when the concentration of flammable gases or vapors was at or above 10 percent of the LEL, but the proposal did not specifically require ventilation in § 1915.12. Ventilation requirements related to flammable atmospheres were proposed in § 1915.13(b)(8).

No rulemaking participant objected to the proposed labeling requirement. Therefore, OSHA has carried it forward into the final rule. The final rule, unlike the proposal, continues to require spaces that are hazardous because of the presence of flammable gases or vapors to be labeled even when employees are permitted to enter for emergency purposes or for short durations to install ventilation. The proposal did not require the spaces to be labeled during these entries (in effect permitting employers to remove the signs at these times). However, such entries require the adoption of special precautions (see the summary and explanation of final § 1915.12(b)(3), later in this preamble). OSHA believes that the labeling must be maintained during these entries so that unauthorized, unprotected entry is prevented.

Paragraph (b)(3) of final § 1915.12 prohibits employees from entering spaces containing concentrations of flammable gases or vapors at or above their LELs. However, employees may enter these spaces for emergency rescue or for a short duration for the installation of ventilation equipment provided that:

(1) No ignition sources are present,

(2) The atmosphere in the space is monitored continuously;

(3) The concentrations of flammable gases and vapors in the atmosphere in the space are maintained above their upper explosive limits (UEL), and

(4) Respiratory protection and other personal protective equipment and clothing must be provided in accordance with Subpart I of part 1915.

Previous § 1915.12(a)(2) prohibits workers from entering areas containing concentrations of flammable gases or vapors at or above 10 percent of their LELs. The only exception to this rule is contained in the previous § 1915.13(a)(2) for highly volatile residues. (This provision has not been carried forward into the final rule. See the summary and explanation of final § 1915.13, later in this preamble, for a discussion of the reasons why this exception has been dropped.)

The proposal also contained a general prohibition against employees entering spaces containing hazardous concentrations of flammable gases or vapors. However, as noted earlier, proposed § 1915.12(d) also provided exceptions for emergencies and for brief duration entries. The proposal would have required the same precautionary measures required by the final rule, except that respiratory equipment and other personal protective equipment was identified as being required, under Subpart I, through means of a note following proposed § 1915.12(d)(3).

As explained earlier, OSHA has decided to permit entries for emergency rescue and for short duration entries to install ventilation equipment even if the space contains a hazardous atmosphere. No one objected to the precautionary measures proposed in § 1915.12(d), and they have been carried forward into the final rule. The proposed note regarding the use of respiratory protection and other personal protective equipment has been converted into a requirement (§ 1915.12(b)(3)(iv)). Even though employers are already obligated to comply with these requirements under Subpart I, OSHA believes that providing a mandatory reference in the text of the regulation will serve to emphasize the importance of the required personal protective equipment.

The Agency has concluded that entry made following the requirements contained in the exception to § 1915.12(b)(3) will protect employees by controlling and minimizing the hazards involved. No ignition sources may be present in the space so that, if the atmosphere becomes flammable, there will be no energy source to ignite it. The atmosphere in the space must be maintained above the UEL, and the atmosphere must be continuously monitored to minimize the possibility that a flammable atmosphere could develop. Lastly, personal protective equipment must be worn to protect the employee from exposure to the hazardous materials involved.

Paragraph (c) of final § 1915.12 sets precautions to be taken before employees enter areas that present hazards related to toxic atmospheres. Paragraph (c)(1) of final § 1915.12 requires spaces and adjacent spaces that contain or have contained gases, liquids, or solids that are toxic, corrosive, or irritant to be:

(1) Inspected visually by a competent person to determine whether or not toxic, corrosive, or irritant residue contaminants are present, and

(2) Tested by a competent person before initial entry by any employee, to determine the concentration of toxics, corrosives, and irritants in the air within the space.

The previous § 1915.12(b)(1) requires the following spaces to be inspected and tested by a Marine Chemist, industrial hygienist, or other qualified person:

(1) Cargo spaces and other spaces containing or having last contained bulk gases, liquids, or solids of a toxic, corrosive, or irritant nature,

(2) Spaces that have been fumigated, and

(3) Spaces immediately adjacent to these two types of spaces.

Paragraphs (c)(1), (c)(2), and (c)(3) of proposed § 1915.12 would have continued the previous language without change, except that the proposal specified that the tests had to be performed by a Marine Chemist, a certified industrial hygienist, or a U.S. Coast Guard authorized person. Although this may have appeared to be a departure from the previous standard, the NPRM explained that the proposal simply codified OSHA interpretation of the previous standard. The NPRM also requested comments on the proposed definition of "certified industrial hygienist."

Most commenters agreed that a Marine Chemist or a Certified Industrial Hygienist was qualified to perform the toxicity tests required under § 1915.12(c) (Ex. 6–10, 6–12, 6–13, 6–20, 6–23, 6–24, 6–28, 6–33). They noted that the intensive training in toxicology and in appropriate control measures these persons receive makes them uniquely qualified to test and inspect confined and enclosed spaces and other dangerous atmospheres.

OSHA agrees with these comments, and the final rule recognizes that tests and inspections for the presence of toxic, corrosive, or irritant substances may be performed by Marine Chemists and Certified Industrial Hygienists.

The rulemaking participants expressed some disagreement, however, over whether or not a Coast Guard authorized person had the proper qualifications to test and inspect areas for hazards related to the toxicity of various chemicals. Some believed that a Coast Guard authorized person would be qualified to perform the required tests and inspections (Ex. 6–24, 6–28, 6–33). These commenters stated that the use of a Coast Guard authorized person would be limited to situations in which a Marine Chemist or certified industrial hygienist was not available. Several other commenters argued that a Coast Guard authorized person is not required to receive training in hazards related to the toxicity of various chemicals (Ex. 6–13, 6–15). In fact, the U.S. Department of Transportation (Ex. 6–13), which administers requirements in Title 46 of the Code of Federal Regulations related to Coast Guard authorized persons, stated:

> Testing required by 46 CFR 35.01, 71.60, and 91.50 is primarily concerned with oxygen deficiency and combustibility prior to conducting hot work. "Coast Guard authorized persons" who would be expected to conduct such testing under Coast Guard regulations should not be considered equivalent to a Marine Chemist or Industrial Hygienist for the purpose of evaluating toxic hazards in shipyards.
>
> These persons would be acting under authority of a Coast Guard license or document for compliance with regulations contained in 46 CFR, but it is not clear that they could be effectively held accountable for their performance related to OSHA regulations.

Coast Guard authorized persons do not typically have training in hazards related to the toxicity of various chemicals. Since such training is necessary so that the required tests and inspections are performed safely and appropriately, OSHA concludes that the final rule should not automatically permit these persons to perform tests and inspections under § 1915.12(c).

Three commenters urged OSHA to include language permitting any qualified person to perform the tests and inspections required under § 1915.12(c) (Ex. 6–3, 6–6, 6–12). They argued that

requiring these tests to be performed by a Marine Chemist or a certified industrial hygienist would unnecessarily restrict an employer's means of complying with the standard. The Shipbuilders Council of America (Ex. 6–3) stated this position as follows:

SCA recommends that OSHA utilize performance-oriented language and require a "qualified person" perform the testing.

The required testing has been performed in the Shipbuilding, Ship Repairing and Shipbreaking Industry for years without incident. With proper training, competent or other qualified persons can test and inspect for toxic substances and provide for safe entry into confined spaces. The proposed wording will require shipyards to utilize either a Marine Chemist or Certified Industrial Hygienist (CIH) for all confined spaces entries or a competent person and a Marine Chemist or CIH for confined space entry. This requirement is overly restrictive and unnecessarily expensive on the declining Shipbuilding, Ship Repairing and Shipbreaking Industry without adding any additional degree of safety. SCA recommends that OSHA delete all references to Marine Chemists and Certified Industrial Hygienists and specify that a "qualified person" perform all required tests (see Issue #2).

OSHA has concluded that a two-pronged approach is necessary for the protection of employees working in confined and enclosed spaces and other dangerous atmospheres from hazards related to the toxicity of various chemicals. First, the initial tests and inspections must be performed by a competent person (paragraph (c)(1)). Using the results provided by the competent person, the employer can then install ventilation, if necessary, to render the space safe for entry (paragraph (c)(2)). Second, if ventilation fails to bring concentrations of air contaminants to acceptable levels, a Marine Chemist or Certified Industrial Hygienist must be brought in to develop and implement control measures to protect employees entering the space (paragraph (c)(4)).

Under final § 1915.7, competent persons have the following skills and knowledge (among others):

(1) The ability to understand and carry out instructions of Marine Chemists and certified industrial hygienists,

(2) Knowledge of the requirements of Subpart B,

(3) Knowledge of the structures, locations, and designations of spaces where work is to be performed,

(4) Ability to calibrate and use test instruments, including carbon monoxide and carbon dioxide indicators,

(5) Ability to perform all required tests and inspections required of competent persons by Subpart B, and

(6) Ability to inspect, test, and evaluate spaces to determine the need for further testing by a Marine Chemist or a Certified Industrial Hygienist.

These skills and this knowledge provide the competent person the ability to perform the initial tests and inspections necessary to determine whether or not a space contains hazardous quantities of toxic substances, as required by final § 1915.12(c)(1). Once the space has been determined to contain hazardous quantities of toxic substances, it is then the employer's responsibility to make the space safe for entry through ventilation under final § 1915.12(c)(2). If the space cannot be made safe for entry through the use of ventilation, OSHA believes that it is necessary to require a Marine Chemist or certified industrial hygienist to develop and implement appropriate control measures to protect employees from the hazards involved. On the basis of the record, OSHA has concluded that these two groups of persons are the only ones capable of establishing appropriate control measures to protect shipyard employees under these circumstances. Considering the complexity of the hazards involved and the protective techniques that need to be applied, the Agency believes that other, less qualified, individuals cannot be relied on to take all the steps necessary to protect employees fully.

Paragraph (c)(2) of final § 1915.12 requires spaces containing a concentration of any substance exceeding its permissible exposure limit (PEL) or, if the substance has no PEL, its IDLH value, to be labeled "Not Safe for Workers". Ventilation must then be provided to ensure that air concentrations of these substances are maintained within their PELs or below their IDLH values. After the ventilation renders the atmosphere safe for entry, paragraph (c)(2) permits the signs to be removed.

The previous § 1915.12(b)(2) requires spaces to be ventilated if they contain a substance in concentrations above a level that is IDLH. The ventilation is required to bring the concentration below that level.

The NPRM proposed to continue these previous requirements in § 1915.12(c)(4). Requirements for labeling spaces containing concentrations of toxic substances above their PELs were proposed in § 1915.12(c)(6). The previous standard contains no labeling requirement.

OSHA received no objection to the proposed labeling requirement, and it has been incorporated into the final rule.

The final rule, unlike the previous standard, permits competent persons to test and inspect confined and enclosed spaces and other dangerous atmospheres for the presence of toxic substances. The previous standard requires these tests and inspections to be performed by a Marine Chemist or by an industrial hygienist.

Entry into a confined or enclosed space or other dangerous atmosphere for the performance of work is permissible only as long as concentrations of toxic materials are maintained below their PELs. As noted earlier, OSHA has concluded that a competent person is capable of testing and inspecting spaces for hazards related to the toxicity of various chemicals. Thus, the competent person can make a determination based on these observations and tests that a space is or is not safe for entry. If ventilation is necessary, the competent person can make this threshold determination, as well. However, the competent person is not normally capable of developing the specific control measures necessary to protect employees from exposure to any substance above its PEL. If a confined or enclosed space or other dangerous atmosphere exposes an employee to a substance at concentrations above the permissible exposure limit, a Marine Chemist or a Certified Industrial Hygienist is required to establish the procedures to be used to protect employees. The final rule makes this concept mandatory.

For spaces in which ventilation cannot maintain an acceptable atmosphere, paragraph (c)(3) of final § 1915.12 requires a Marine Chemist or certified industrial hygienist to retest the space until it can be certified as "Enter with Restrictions" or "Safe for Workers."

The previous standard, under § 1915.12(b)(3), requires employers to comply with the respiratory protection requirements of Subpart I whenever concentrations of toxic substances are above their PELs but below IDLH levels. The NPRM proposed to continue this requirement in § 1915.12(c)(5). However, OSHA believes, as noted in the summary and explanation of final § 1915.11(a), that employees should not enter, on a routine basis, any confined or enclosed space or other dangerous atmosphere containing a serious hazard. Atmospheres containing concentrations of toxic substances above their permissible exposure limits can pose serious hazards, especially to employees working in the exposure area for extended periods of time. As noted earlier, many of the rulemaking participants asserted that shipyard

employees are better protected by industry practice, under which routine entry is permitted only if the space involved is certified safe for workers, than by the general industry permit space standard. OSHA agrees that the shipyard approach provides safety for employees, and is codifying that practice in final § 1915.12(c)(3) and (c)(4) (discussed next).

Paragraph (c)(4) of final § 1915.12 prohibits entry into spaces that are "Not Safe for Workers" (under paragraph (c)(1)), except for emergency rescue or for a short duration for the installation of ventilation equipment provided that:

(1) The atmosphere in the space is monitored continuously, and

(2) Respiratory protection and other necessary and appropriate personal protective equipment and clothing are provided in accordance with Subpart I of part 1915.

As explained earlier, OSHA has decided to permit entries for emergency rescue and for short duration entries to install ventilation equipment even if the space contains a hazardous atmosphere, which in this case refers to toxic substances. The procedures required will protect employees from hazards associated with exposure to these toxic substances. The atmosphere must be monitored continuously during this limited entry to ensure that the control measures are working as intended and that the entrant is aware of any changes in conditions in the space. Final § 1915.12(c)(4) requires personal protective equipment to protect employees from the adverse effects of exposure to toxic substances. This control measure is already required by existing Subpart I. However, OSHA believes that providing a mandatory reference in the text of the regulation will serve to emphasize the importance of the required personal protective equipment.

The Shipyard Employment Standards Advisory Committee (SESAC) reviewed OSHA's proposal and made several recommendations concerning new areas of shipyard employment that should be regulated in § 1915.12 (Tr. 79–80, 90, 99; 4/25/90). These recommendations included adding requirements to address the training and duties of employees entering confined and enclosed spaces and other dangerous atmospheres, rescue teams, and exchanging hazard information between employers. SESAC voted unanimously to include training, and overwhelmingly supported provisions for rescue teams and exchanging hazard information between employers. As noted earlier in this preamble, the notice reopening the record on Subpart B published the text of the recommended provisions and requested public comment on them.

Paragraph (d) of final § 1915.12 contains requirements for the training and duties of employees entering confined and enclosed spaces and other dangerous atmospheres.

The rulemaking participants overwhelmingly approved the adoption of the training requirements listed in the notice reopening the record (Ex. 11–2, 11–3, 11–4, 11–5, 11–6, 11–9, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–29, 11–30, 11–35, 11–37, 11–39, 11–41, 11–45, 11–47, 11–49, 11–50, 11–51). These rulemaking participants advocated that the SESAC recommendations be incorporated in their entirety. They stated that training was essential in preventing accidents and in promoting self-rescue. The Norfolk Shipbuilding and Drydock Corporation (Ex. 11–6) expressed this view as follows:

> We feel that training is essential to employees understanding the potential dangers in entering confined spaces which have not been checked and verified as being safe. We support the SESAC recommendations.

No commenter objected to any of SESAC's recommended requirements. Therefore, these provisions have been incorporated into the final rule.

A few rulemaking participants suggested that the final standard also include some requirements in addition to those proposed by SESAC. Three commenters recommended the inclusion of provisions requiring the training of shipyard competent persons (Ex. 11–10, 11–11, 11–44). Marine and Environmental Testing, Inc. (Ex. 11–10), best represented the arguments of these commenters as follows:

> Lack of training was evident in all of the confined space accidents which I have investigated. The current 1915 standard is not adequate when addressing training requirements. While the 1915 standards state that the SCP [shipyard competent person] must have certain abilities it does not require formal training. There are also no formal training requirements for personnel working in confined spaces. These deficiencies should be addressed.
>
> The SCP should receive formal training on testing, ventilation, fire and explosive and toxic hazards as is being currently covered by NFPA SCP courses. General workers do not require the same level of training but should be instructed as to the hazards associated with confined spaces and the employer's testing, entry, hot work and space labeling or identification program. [Ex. 11–10]

OSHA's requirements for shipyard competent persons are contained in final § 1915.7, which is discussed earlier in this preamble. The employer is responsible for ensuring that these designated individuals have knowledge and skills appropriate for determining whether or not a confined or enclosed space or other dangerous atmosphere is safe to enter. The employer cannot have the necessary information to designate a person as a competent person unless that employer either provides the necessary training or ensures that the person has already received it. In addition, if the competent person is not an employee, the employer will not usually be the source of that person's training. Therefore, rather than specifying shipyard competent person training this final rule focuses on the abilities and skills of the competent person and holds the employer responsible for determining that the competent person meets those requirements.

Other commenters suggested that OSHA require all exposed shipyard employees to receive training as outlined in the SESAC recommendation (Ex. 11–19, 11–30, 11–50). They argued that all workers that work in areas containing confined or enclosed spaces or other dangerous atmospheres should be aware of the hazards of unrestricted entry into those spaces. For example, the U.S. Department of the Navy (Ex. 11–30) stated:

> All workers except those who will never be involved with confined space entry/work should be trained. Minimum knowledge should be a well understood concept of what a confined or enclosed space is, what the potential hazards are, and the need for space evaluation by a knowledgeable individual and, in some cases, certification by a "qualified person" prior to entry and work.

One commenter, the International Brotherhood of Electrical Workers (IBEW) (Ex. 11–51), suggested that the standard specify that employees receive classroom-type training. They were concerned that employees would receive a simple briefing rather than actual training. They stated their concerns as follows:

> The ability to have specific directions to train and provide annual review with classroom type instruction, and where the instructor has direct inter-play with the employee, is the most desirable, as well as preferred. One of the big problems that we have always felt has been the issue in training is the addressing of specific training. In the training of employees at our facility, stand-up safety briefings are used for training in Haz Com. The employee is asked to sign the back of this briefing to show they have attended and received the training. In the briefings given, the person giving the briefing has had little or no formal training on the subject material, making it a perfect "paper program". The only way we know it does not work is through interviews with the employees. It is therefore imperative that the

recommendations of SESAC be followed, as they are most inclusive and specific, and that the instructors be knowledgeable of the subject material.

OSHA has not adopted the IBEW's suggestion. Employers may use classroom or "on-the-job" instruction or a combination of the two in complying with final § 1915.12(d). The primary objective of final § 1915.12(d) is to ensure that employees will be familiar with the subjects listed under paragraphs (d)(1) through (d)(3). There may be wide variations in the combinations of classroom and on-the-job training that may be necessary for different work sites, configurations, and control measures. On the other hand, OSHA shares IBEW's concern that some employers might try to comply with the standard through simple briefings that impart little knowledge to employees. In enforcing final revised Subpart B, the Agency will determine whether employees have learned the subject matter addressed by the standard by interviewing employees and reviewing the employer's procedures for dealing with communicating hazard information and ensuring employees have the skills necessary to do their jobs. In addition the Agency will examine the employer's certification that the training has been provided as required by final § 1915.12(d)(5). It should be noted that, whatever the method of training that is provided, it must be provided before an employee enters a confined or enclosed space or other dangerous atmosphere, as required by final § 1915.12(d)(4).

The requirements adopted in final § 1915.12(d) are based on the recommendations of SESAC as presented in the notice reopening the record on Subpart B. The purpose of these requirements, along with an explanation of any differences between the final rule and SESAC's proposed language, is presented in the following discussion.

In paragraph (d)(1), OSHA is requiring employers to ensure that employees who must enter confined or enclosed spaces or other dangerous atmospheres are trained to perform their duties safely. This provision is intended to ensure that employees are familiar with the duties imposed by final revised Subpart B so that the work practices they use will conform to the standard and will protect them from hazards posed by these spaces.

In paragraph (d)(2), OSHA is requiring employers to ensure that each employee who must enter confined or enclosed spaces or other dangerous atmospheres is trained to recognize and understand the hazards or hazardous conditions he or she may encounter during entry. The specific hazards or hazardous conditions that OSHA addresses are found in paragraphs (d)(2)(i) through (d)(2)(vii) and they include the following:

(1) Recognition of the characteristics of the space,

(2) Anticipation and awareness of the hazards that may be encountered during entry,

(3) Recognition of the signs, symptoms, or other adverse health effects that may be caused by exposure to hazards,

(4) Understanding of the physical signs and reactions of exposure to hazards,

(5) Knowledge of the types of personal protective equipment that may be needed for safe entry into and exit from the space,

(6) Knowledge of how to use personal protective equipment, and

(7) When necessary, awareness of the presence and proper use of barriers or other devices that may be needed to protect an entrant from hazards.

The final rule combines SESAC's proposed paragraphs (e)(1) and (e)(2) to present all the general topics in which employees should be instructed in one place. Additionally, the SESAC proposal addressed confined spaces only. Because final revised Subpart B covers enclosed spaces and other dangerous atmospheres, as well as confined spaces, OSHA has applied the training requirements to all employees that enter confined and or enclosed spaces or other dangerous atmospheres.

In paragraph (d)(3), OSHA is requiring the employer to ensure that an employee who must enter confined or enclosed spaces or other dangerous atmospheres is trained to exit the space under certain conditions. The specific conditions for which an entrant must be trained to exit include:

(1) Upon order of the employer,

(2) Upon the sounding of an evacuation signal, or

(3) Whenever the entrant perceives that there is a danger or threat to his or her safety.

In paragraph (d)(4), OSHA is requiring employers to ensure that employees who must enter confined or enclosed spaces or other dangerous atmospheres receive their training:

(1) Before they begin work addressed by this section and

(2) Whenever there is a change in operations or in an employee's duties that present a hazard about which the employee has not been trained previously. This provision was not included in SESAC's recommendations on training. Their recommendation specified that "appropriate training" be provided to confined space entrants. OSHA believes that it is essential to spell out when the training required under paragraph (d)(1) through (d)(3) must be provided and that employees must receive this instruction before they are exposed to the working conditions and operations covered by the training. To address this issue, the Agency has incorporated language based on § 1910.146(g)(2) (i) through (iii) of the generic permit-space standard, so that the final rule ensures that employees will be trained before exposure to the hazards posed by confined or enclosed spaces or other dangerous atmospheres.

In paragraph (d)(5), OSHA is requiring that the employer certify that the training required by paragraphs (d)(1) through (d)(4) has been accomplished. The rule also lists the information that must be provided on the certification: the employee's name, the name of the trainer, and the date or dates of the training. Paragraph (d)(5) requires the certification of training to be available for inspection by the Assistant Secretary, the Director of NIOSH, the employees, and their representatives.

A certification requirement was not included in SESAC's recommendations. However, OSHA believes that its inclusion in the final rule is necessary for several reasons. Certification of employee training provides a valuable record to employers who need to be able to keep track of who has been trained. Also, the certification enables employees to determine whether or not the employer has accurately recorded their training. Lastly, the certification facilitates OSHA's enforcement of the standard. Standards on employee training routinely incorporate requirements for the certification of training, and OSHA has found that such requirements ensure that employees are indeed trained in accordance with these standards.

Paragraph (e) of final § 1915.12 contains requirements for rescue teams.

The rulemaking participants overwhelmingly approved the adoption of the rescue team requirements listed in the notice reopening the record (Ex. 11–1, 11–2, 11–3, 11–4, 11–5, 11–6, 11–9, 11–13, 11–14, 11–15, 11–18, 11–19, 11–20, 11–24, 11–25, 11–26, 11–29, 11–35, 11–37, 11–39, 11–41, 11–45, 11–47, 11–49, 11–50, 11–51). These rulemaking participants advocated that the SESAC recommendations be incorporated in their entirety. They stated that training was essential in preventing accidents and in promoting self-rescue.

Paragraph (e) requires that employers either make provisions for a shipyard rescue team or make an arrangement under which an outside rescue team

will respond promptly to a request for rescue service.

Some commenters urged OSHA to consider addressing the response time of rescue teams (Ex. 11–10, 11–28, 11–30, 11–51). These commenters realized the difficulty involved in specifying an exact response time; however, they felt that it was important for rescue efforts to begin promptly. For example, Con-Space Communications Ltd. (Ex. 11–28) stated their recommendations as follows:

> This could be a difficult thing to regulate but, minimum requirements should be set to ensure that trained personnel and equipment are available in the event of an incident. Response time is the hard item to determine. Obviously the faster the better for the person in difficulty, but if OSHA allows outside rescue services to be used, response time would be longer than if the rescue team was in-house.
>
> Response time of an outside rescue service would be totally dependant on its distance from the problem site.
>
> * * * * *
>
> Proposed paragraph 1915.12(f) is a practical solution to a difficult problem. Plant rescue teams should be able to respond more quickly than outside teams but the cost of maintaining an in-plant [shipyard] team could be excessive. We are left with a simple question, "is the risk of slow response higher than the possible risk to the life of the person waiting for help?"
>
> If the outside rescue team receives more calls for help than it can handle, who waits and who gets penalized, the employer or the contracted rescue team or more important—who dies?
>
> Consideration should be given to a two tier rescue system where the employer is required to have a small rescue unit (two man team) trained by the outside rescue team for immediate response to a problem. Their level of involvement could be dictated by the rescue contractor who could also determine what rescue equipment should be maintained on-site.

Most commenters argued that response times should not be addressed in the standard (Ex. 11–6, 11–9, 11–11, 11–14, 11–15, 11–18, 11–19, 11–22, 11–24, 11–26, 11–29, 11–31, 11–36, 11–38, 11–39, 11–40, 11–41, 11–43, 11–44, 11–50). These commenters argued that there were too many variables involved in shipyards for OSHA to be able to specify an appropriate response time. Mr. Joseph J. Ocken (Ex. 11–31) went further, suggesting that stressing the importance of rescue would lead to even more deaths, as follows:

> This entire issue focuses on rescue teams: inside and outside teams, team procedures, response times, and protocols/planning. I have strong reservations about regulating or mandating rescue operations in this manner. There are numerous confined space entries made on a daily basis while there are very few rescue attempts made. Even so, most confined space deaths are associated with rescue attempts. Intentionally or unintentionally the tone of the proposed language seems to communicate very dangerous messages:
>
> RESCUE ATTEMPTS ARE MANDATORY. This may not be intended by OSHA but the language could be misconstrued to suggest it. Many concerned safety professionals have devoted a lot of energy to communicate the opposite message! These teams should not even be referred to as "rescue teams" but rather "recovery or retrieval teams" in order to avoid any confusion on this point.
>
> HURRY! OSHA's intent is important in that employers need to be reasonable in designating outside rescue resources. The response time message however, is that rescuers must hurry. Given the poor effectiveness statistics for rescue attempts the emphasis should be placed on QUALITY OF RECOVERY rather than SPEED OF RESCUE. Employers should be most concerned with selecting a qualified team and supporting their familiarization with the shipyard, training and drills to avoid further tragedies.
>
> RELIANCE ON RESCUE. It might be argued that the proposed rescue provisions require such attempts to be quite different from the haphazard rescue attempts that are notorious for additional fatalities (rather than the desired "rescue"). This argument needs to be considered in the context of the environment where it will be applied. The very need for a confined space rescue implies that a FAILURE HAS ALREADY OCCURRED IN THE PROGRAM. Objectively we should be concerned that such a demonstrated failure to ensure safe entry in the first place also calls into question the ability to safely conduct a much more dangerous rescue attempt. A confined space entry standard is being proposed specifically to address a grim body of statistics which also tells us that rescue in confined spaces is even more dangerous. Rescue teams will be made up of workers needing protection too. We should be looking to improve other backups rather than emphasizing rescue.

OSHA has concluded that it is important for rescue attempts to be initiated as soon after an accident occurs as possible. If rescue attempts are delayed too long, the rescue team could become a body retrieval team instead. OSHA also believes that rescue teams must be properly equipped and trained so that the dangers noted by Mr. Ocken are minimized. Fatalities involving rescuers typically have involved untrained or poorly trained individuals who are not properly equipped for entry into confined or enclosed spaces or other dangerous atmospheres. Final revised Subpart B, generic general industry permit-space standard, § 1910.146, ensures that rescue personnel are properly equipped and fully trained to perform rescue. To address the issue of timeliness in responding to requests for emergency services, the introductory text to final § 1915.12(e) requires employers to provide a shipyard rescue team or to arrange for an outside rescue service that can respond promptly. OSHA believes that this requirement places a responsibility on employers to take whatever actions are necessary to rescue entrants (rather than retrieve bodies) from spaces covered by Subpart B. Employers must consider such factors as the response time, equipment, and state of training for rescue services not composed of the host employer's own employees when he or she chooses to arrange for such services. The rescue service selected by the employer must be able to arrive at the worksite quickly enough to perform rescue and must be equipped to perform rescue for the employer to be in compliance with the standard.

In paragraph (e)(1), OSHA is requiring that shipyard rescue teams meet certain criteria. These criteria are intended to ensure that shipyard rescue teams are properly trained and equipped to perform rescue. Outside rescue services are already covered under the generic permit-space standard in § 1910.146(k)(1). Employers providing these services are general industry employers (not shipyard employers) who will be covered under the general industry standards for the vast majority of their work. Therefore, the Agency believes that it is reasonable and appropriate to apply existing § 1910.146(k)(1) to these employers rather than to adopt separate requirements for outside rescue services in the shipyard standards.

Paragraph (e)(1)(i) requires each employee assigned to the shipyard team to be provided with and trained to use the personal protective equipment they will need to perform their function safely, including respirators and any rescue equipment necessary for making rescues from confined or enclosed spaces or other dangerous atmospheres.

Paragraph (e)(1)(ii) requires that employees assigned to the shipyard rescue team be trained to perform their rescue functions safely including entry into confined and enclosed spaces and other dangerous atmospheres.

Paragraph (e)(1)(iii) requires that shipyard rescue teams practice their skills at least once every 12 months. This provision also requires practice drills that include the use of mannequins and rescue equipment during simulated rescue operations involving physical facilities that approximate closely those facilities from which rescue may be needed. OSHA has included a note following this paragraph to explain that the standard recognizes the performance of an actual

rescue as an acceptable substitute for practice drills.

Paragraph (e)(1)(iv) requires that at least one employee on each rescue team maintain current certification in basic first aid skills that include maintenance of an airway, control of bleeding, maintenance of circulation and cardiopulmonary resuscitation (CPR) skills.

Paragraph (e)(2) requires the employer to inform outside rescue services of the hazards that their teams may encounter when called to perform rescues from confined or enclosed spaces or other dangerous atmospheres at the employer's facility. The outside rescue service can then use this information to train and equip their rescue teams appropriately. This will help to ensure the protection of the rescue service's employees and to minimize the time needed to rescue an injured employee. OSHA has included a note following final § 1915.12(e)(2) to encourage employers to use the criteria listed in paragraph (e)(1) to evaluate the skills of the outside rescue service and to determine what in-house hazard information would be most helpful to that service.

In the notice reopening the record on Subpart B, OSHA requested comments on whether or not the standard should require the use of any protocols (such as preplanning with local rescue services) to accompany the use of an outside rescue service.

The rulemaking participants agreed that, while preplanning with outside rescue services was necessary, the standard should not specify any particular protocol (Ex. 11–3, 11–6, 11–13, 11–14, 11–15, 11–18, 11–20, 11–22, 11–24, 11–25, 11–29, 11–35, 11–37, 11–47). For example, the Shipbuilders Council of America (Ex. 11–29) stated:

> We believe that the inclusion of this subject matter will not contribute significantly to an increase in the quality or response time of a rescue team. Furthermore, such protocols, may be inconsistent with ensuring that shipyards have the flexibility to independently work out joint efforts that are compatible with local conditions.

Several commenters, however, believed that the standard should require cooperation and planning between the shipyard employer and the rescue service (Ex. 11–30, 11–39, 11–49, 11–50). These commenters argued that this cooperation and planning was necessary, if an employer chooses an outside rescue service, in order to ensure effective rescue. The U.S. Department of the Navy (Ex. 11–30) presented this view as follows:

> In those cases where the employer does not have an in-house rescue team, OSHA should require the employer to preplan with the outside authority who is expected to provide the rescue services. The outside authority must be familiar with the employer's facility so that delays in performing a rescue will be avoided or minimized. It is recommended that OSHA require periodic drills to document that a rescue by an outside authority can be performed in a meaningful time frame.

OSHA agrees with these commenters that planning and cooperation is necessary between employers and outside rescue services. Without planning, the rescue service will be hindered in getting to the rescue site and in equipping their rescue teams. Without cooperation, the outside service's rescue team will be on their own when an emergency arises. Several commenters stated their belief that the language in SESAC's recommendation already required employers to plan for rescue by outside services and to cooperate with these services to ensure that the rescue teams are properly trained and equipped (Ex. 11–9, 11–26, 11–39). OSHA agrees with these commenters, and final § 1915.12(e)(2) adopts the SESAC recommended language with only minor editorial changes.

Paragraph (f) of final § 1915.12 contains requirements for exchanging hazard information between employers. This paragraph requires that each employer whose employees work in confined or enclosed spaces or other dangerous atmospheres ensure that all available information on the hazards, safety rules, and emergency procedures concerning those spaces is exchanged with other employers whose employees may occupy the same spaces. The purpose of this new rule is to assure that knowledge of the hazards in the place of employment, particularly those hazards that may change daily or with each new contractor or subcontractor, has been communicated to all employees.

The rulemaking participants overwhelmingly approved the adoption of the requirements related to exchanging hazard information between employers as listed in the notice reopening the record (Ex. 11–1, 11–2, 11–3, 11–4, 11–5, 11–9, 11–13, 11–15, 11–19, 11–20, 11–24, 11–26, 11–29, 11–35, 11–37, 11–39, 11–47, 11–49, 11–50, 11–52, 11–53). These rulemaking participants advocated that the SESAC recommendations be incorporated in their entirety. They maintained that cooperation and the exchange of information between contractor and employer was essential for the protection of all workers involved. Dreadnought Marine, Inc. (Ex. 11–52), expressed this view as follows:

> It is essential that contractors who perform work in confined spaces be provided this information by the employer. Contractor personnel who work near [confined] spaces need to understand and adhere to the signs, placards, or other warnings posted by the employer. DMI agrees with SESAC's proposed additions entitled "(g) Duty to other employers."

A few commenters believed that OSHA should also require contractors to inform the shipyard employer of any hazard the contractor introduces into the space (Ex. 11–30, 11–51). They argued that, because the contractor can bring hazards into confined or enclosed spaces or other dangerous atmospheres that endanger all employees in the space, the standard should impose duties on the contractor which correspond to those imposed on the employer. The IBEW (Ex. 11–51) expressed their recommendations as follows:

> We concur with the statements made in paragraph (C) noting the last statement, "Contractors working on a job site can endanger not only their employees, but other employers' employees as well." With this in mind, we feel that a contractor is also obligated to inform the host employer of the hazards they will introduce into the work area or confined space.

OSHA agrees with the IBEW. Contractors create hazards or bring hazards into the space which affect the safety of all employees working in the space. Therefore, the final rule incorporates the SESAC recommendation modified as necessary to obligate all employers to exchange necessary hazard information.

3. § 1915.13 Cleaning and Other Cold Work

This section sets forth locations and further testing and precautions that must be observed before and during cleaning and cold work.

In paragraph (a) of the final rule, OSHA describes the spaces to which this section applies. The old standard referred to those spaces in § 1915.12(a)(1) (i) and (ii) and (b)(1) (i) through (iii). The Agency proposed minor editorial changes, the most important of which involved listing the spaces that must be tested, and ventilated if necessary, before cleaning and cold work is begun. OSHA believes that specifying the spaces that will be affected by § 1915.13 in the first paragraph will enable the employer to easily determine the scope of the section. This listing, which replaces the reference to locations, is an editorial revision of the previous requirements.

Paragraph (b)(1) provides that liquid residues in the tanks shall be removed as thoroughly as practicable before manual cleaning starts. As in the previous standard, special care is required to be taken to prevent the spilling or the draining of these materials into the water surrounding the vessel. For consistency with the expanded scope, OSHA has added the requirement to take special care to prevent spills onto the surrounding work area. If liquid residues were allowed to contaminate the surrounding water or worksite, employees would be endangered.

Paragraph (b)(2) requires that tests to determine the concentration of flammable, combustible, toxic, corrosive, or irritant vapors must be done by a competent person prior to starting cold work. This provision has been brought forward from previous § 1915.13(a)(3), which required tests to maintain flammable vapors below 10 percent of the LEL. OSHA believes that simply requiring tests does not give the employer enough guidance about what tests are necessary to protect workers during cleaning and other cold work. Therefore, OSHA is specifying that tests be done for flammable, combustible, toxic, corrosive, or irritant vapors.

Paragraph (b)(3)(i) of the final rule requires that when the concentration of flammable or combustible vapors is equal to or greater than 10 percent of the LEL, ventilation must be provided at flow rates sufficient to keep the concentration of flammable vapors at a level less than 10 percent of the LEL. Toxic, corrosive, or irritant vapors are required to be maintained within the permissible exposure limits and below IDLH levels by paragraph (b)(3)(ii).

The previous rule at § 1915.13(a)(2) and the proposed rule at § 1915.13(a)(8) (53 FR 48108) allowed employers to ventilate only major portions of a compartment when, due to the high volatility of residues, concentration of flammable or combustible vapors of less than 10 percent LEL could not be achieved. In these circumstances, employers had to continually monitor the major portion of the space as pockets of hazardous vapor could shift into the work area thereby putting workers at risk. OSHA does not believe such an approach to the monitoring provides adequate protection for employees. The Agency believes that a compartment in which any portion is above 10 percent of the LEL is unsafe. In addition, conditions at or above 10 percent of the LEL could result in air concentrations which exceed the OSHA PEL or IDLH. This was clearly illustrated by Marine Chemists, Inc. (Ex. 7–24FF):

> Many flammable products are also toxic or contain toxic ingredients and in many cases 10 percent of LEL is well above the recommended PEL and in some cases may exceed the IDLH, for example:
>
> *STYRENE* The LEL is 1% Styrene=10,000 ppm, 10% LEL=0.1% Styrene=1,000 ppm, PEL for Styrene=100 ppm
>
> In other words 10 percent for Styrene is 10 times the recommended PEL.

Ventilating only portions of a compartment can mean that pockets of hazardous atmospheres containing a variety of unknown levels of flammable vapors can remain within a compartment providing a significant potential for fire or explosion. Ignition could occur through scraping or blasting. For example, the National Fire Protection Association (Ex. 6–10) noted that ignition may occur from static electricity.

> NFPA does not believe that work in IDLH atmospheres should be encouraged, except for the purposes of emergency rescue. NFPA does not support the proposal of working in UEL atmospheres. The potential hazards associated with ignition sources, such as static electricity, and the introduction of air to bring an atmosphere above the UEL within the flammable range, are significant and difficult to control. The additional testing requirements would also be significant.

This concern was also expressed by Independent Testing and Consultation, Inc. (Ex. 6–24).

> All ignition sources cannot easily be eliminated. There remains possible ignition due to static electricity. It has been my experience that owners and operators would rather clean or otherwise make safe a tank or compartment even if the work required in the compartment is of the briefest duration.

The Department of the Navy (Ex. 6–31) stated that the possibility of an explosion could still be present when only the major portions of a compartment are required to be ventilated. They noted that ventilation should be used to alleviate a hazardous atmosphere and that continuous monitoring alone will not prevent the possibility of an explosion.

One commenter, Sound Testing, Inc. (Ex. 6–8), questioned OSHA's acceptance of the 10 percent LEL level.

> It distresses me that even today we are still using the 10% LEL in helping to determine whether a space is "Safe for Workers". I have written about 10,000 Marine Chemist certificates, involving tens of thousands of compartments and I cannot recall a single instance where I wrote "Safe for Workers" about a tank reading even 2% LEL. Why, then, is OSHA giving a "reference point" significance to 10% LEL as "Safe for Workers" criterion?

OSHA agrees with NFPA, Independent Testing and Consultation, Inc. and the Navy and is therefore, persuaded that an entire compartment must be ventilated sufficiently to bring the level of flammable and combustible materials below 10 percent of the LEL. Because the ventilation to maintain conditions in the major portion of a compartment would already be in place, increasing or redirecting the ventilation so that it now adequately ventilates the entire compartment would put little or no additional burden on employers.

As to the use of the "less than 10 percent LEL" as the level to be achieved before employees may work in a space, that level is adopted from the applicable national consensus standard (NFPA 306, Appendix A), which reflects current practices and sampling technology. The shipyard industry has followed this standard for the past 23 years, and OSHA believes that it provides a sufficient margin of safety. Of course, employers are free to use a lower level in their workplaces for additional margins of safety.

Paragraph (b)(4) of the final rule requires that the flammability tests be conducted by a competent person "as often as necessary" during cleaning or cold work to determine the concentration of flammable or combustible vapors present in the work space. This provision in the final rule is based on the proposal (53 FR 48098, 48102; Specific Issue 7). The previous standard required a competent person to test prior to commencement of cold work and with sufficient frequency thereafter, in accordance with temperature, volatility of the residues, and other existing conditions in and about the spaces to ensure that the concentrations of flammable vapors were below ten (10) percent of the LEL. As explained in the preamble to the proposal, some interested parties requested clarification of the term "frequently" contained in the previous § 1915.13(a)(3). (53 CFR 48098) They asked OSHA to specify in the regulation how often tanks should be checked. However, many more commenters (Ex. 6–3, 6–5, 6–10, 6–12, 6–13, 6–15, 6–24, 6–28, 6–33, 6–34) urged the Agency to keep the standard flexible enough to enable employers and employees to take into consideration all the factors which may influence the need to recheck space conditions, including temperature, work being performed in the space, time elapsed, unattended tanks, work breaks, and ballasting or trimming. For example, Bay Shipbuilding Corp. (Ex. 6–15) stated:

Frequency of testing must be based on the area conditions and complexity of the hazard. Ventilation capability is also a major factor in hazard control. Once an area has been made safe, and air quality can be maintained with natural or mechanical ventilation, there are no further steps needed unless the condition is modified by some events such as a spill, leak, or injection of an environmentally altering element. Otherwise, the only thing to do is to continue monitoring (which is cost prohibitive); or base the checks on the HMIS scale for health, flammability, and reactivity of the product. The higher the HMIS rating, the more frequent the checks.

The Department of the Navy (Ex. 6–31) commented:

The term frequently is too vague and should be redefined to specify that, re-testing should be dependent on alteration of specific atmospheric conditions, manipulation of valves, or opening of manholes at the worksite.

Another commenter, Bath Iron Works Corporation (Ex. 6–28), also in support of flexibility, stated:

No easy definition exists for all circumstances requiring additional "frequent" testing. This is a situation which requires the judgment of the Marine Chemist, based on his knowledge of the last three cargoes, their properties and the effectiveness of the cleaning procedures used. Some cargoes, such as alcohols, light fuel oils, etc., leave no harmful residues after adequate tank cleaning and ventilation. Under such situation, testing every 24 hours is adequate. Other cargoes leave residues, or, particular tank coatings partially absorb cargo residues, only to release vapors slowly over time, regardless of how the cleaning operations were conducted. These conditions require atmospheric testing more frequently.

OSHA agrees with the commenters' views that the frequency of testing an atmosphere is best determined by the specific situation encountered and that a requirement to recheck a tank at specified intervals would not necessarily raise the level of safety. However, it is imperative that the atmosphere be checked often enough to ensure that it is safe for workers. To that end, Appendix A to Subpart B in the final rule provides supplementary information to assist employers and employees in determining the frequency with which a tank must be tested in order to ensure atmospheric conditions are being maintained. The six most common factors (temperature, work in the tank, period of time elapsed, unattended tanks, work breaks, and ballasting or trimming) are discussed, and examples are provided as guidance. Appendix A is unchanged from the proposal (53 FR 48110).

Paragraph (b)(5) requires releases of flammable, combustible, toxic, corrosive, irritant, and fumigant materials to be cleaned up as work progresses. The requirement that liquid residues of flammable and toxic materials, which includes all of the contaminants described above, were to be cleaned up as work progresses was brought forward from the previous provision § 1915.13(a)(1). In this final rule, OSHA has listed additional materials, corrosive, and irritant, that must be cleaned up as work progresses because they can be dangerous to employees working in these hazardous atmospheres.

Paragraph (b)(6) prohibits entry into spaces where the concentration of flammable or combustible vapors equals or exceeds 10 percent of the lower explosive limit and specifies the limited exceptions under which an employee may enter or work in such spaces. The exception is unchanged from the previous rule, § 1915.12(d), but has been placed in the cleaning and other cold work section for clarification. An employee may enter the space for emergency rescue or for a short duration to install the ventilation required to start operations. In those instances there must be no ignition sources present, the space must be monitored continuously, the atmosphere in the space must be maintained above the UEL, and appropriate personal protective equipment must be provided. A note has been added as a reminder that other provisions for work in IDLH and other dangerous atmospheres are located in Subpart I, Personal Protective Equipment, of this part.

Paragraph (b)(7) of the final rule requires that a competent person test ventilation discharge for possible accumulation in concentrations that may be hazardous to employees.

Paragraph (b)(8) requires that when the test required in paragraph (b)(7) above indicates that concentrations of exhaust vapors that are hazardous to employees are accumulating, all work in the contaminated area shall be stopped and the employees evacuated until the vapors have dissipated or been removed. These two requirements are the same as the existing requirements in § 1915.13(a)(5). OSHA has separated these two requirements for clarity, redesignating them as proposed paragraphs (b)(9) and (b)(10) and as paragraphs (b)(7) and (b)(8) of the final rule.

Paragraph (b)(9) of the final rule requires that only approved explosion-proof, self-contained portable lamps shall be used in spaces described in paragraph (a) of this section before the spaces have been certified as "Safe for Workers." The previous rule, § 1915.13(b), had the same requirement. Paragraphs (b)(7), (b)(8) and (b)(9) of the final rule are being promulgated with several editorial changes for clarity.

Paragraph (b)(10) of the final rule requires that signs that can be understood by all employees and that prohibit sources of ignition be posted. Sources of ignition include smoking and open flames that were specified in the previous § 1915.13(c). This requirement merely states what was implicit before; that is, that signs must be clearly understood by all employees. Numerous comments were received on the subject of signs (Ex. 6–3, 6–4, 6–6, 6–8, 6–10, 6–12, 6–15). A common concern was expressed by the U.S. Coast Guard who said that in their area, most shipyard workers possessed a limited command of the English language. They noted that these workers tended to avoid reading long or confusing documents and that for them, a simple statement at each space would be most effective (Ex. 6–4). OSHA is addressing this problem by requiring that the sign be understood by all employees.

The previous standards required signs prohibiting smoking and the use of open flames to be posted on the open deck adjacent to the access to spaces described in § 1915.14(a). With the expansion of the scope to include land-side operations, the final rule deletes the reference to decks and substitutes directions for posting that apply to the entire shipyard. Signs must now be prominently posted at the entrance to those spaces, in adjacent spaces, and in the open area adjacent to those spaces. Signs must be "prominently posted," i.e., clearly visible to affected employees. For example, signs posted behind a door do not effectively advise or warn employees of the working conditions. The purpose and intent of the language in paragraph (b)(10) of the final rule is to ensure that all employees are made aware of the danger of ignition sources in the workplace.

Paragraph (b)(11) of the final rule requires that all air moving equipment and component parts that are capable of generating a static electrical charge of sufficient energy to create a source of ignition be bonded electrically to the structure of a vessel or vessel section or, in the case of land-side spaces, grounded to prevent unintentional discharge of a static charge. This requirement is the same as the previous rule, § 1915.13(d), except that land-side operations are now covered.

Paragraph (b)(12) of the final rule requires that fans have non-sparking blades and that portable air ducts be of non-sparking materials. This requirement is unchanged from the previous rule, § 1915.13(e). In its effort

to make regulatory text more concise, OSHA has combined proposed paragraphs § 1915.13(b)(14) and (15) as paragraph (b)(12) of the final rule.

The Note OSHA proposed to include at the end of this section has been rewritten in note format and is carried forward into this final rule as follows:

> Note: See § 1915.12(c) of this part and applicable requirements of 29 CFR part 1915, subpart Z for other provisions affecting cleaning or cold work.

By including this final note in § 1915.13, OSHA is reminding employers of other Subparts of part 1915 as well as paragraphs of this Subpart that may apply.

4. § 1915.14 Hot Work

This section addresses the safety precautions that must be taken prior to starting hot work in or on spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases, related piping and accessories. The requirement that certain spaces must be certified "Safe for Hot Work" by a Marine Chemist or a Coast Guard authorized person before hot work is permitted is retained from the previous standard. This section also clearly identifies those locations within shipyard employment where a shipyard competent person is allowed to approve hot work.

The scope has been expanded to cover land-side confined and enclosed spaces and other dangerous atmospheres in the shipyard as well as vessels and vessel sections, in other words, all of shipyard employment. The original section covered employees engaged in shiprepairing, with certain sections covering only shipbreaking. OSHA proposed to expand coverage to all shipbuilding, shipbreaking, and ship repair (53 FR 48094) and with the reopening of the record OSHA sought comment on expanding the scope to all shipyard employment.

OSHA requested public comment on whether permits should be required for hot-work in all of shipyard employment, and, if so, whether the permits need to be posted (57 FR 28155, June 24, 1992). Over 30 commenters responded (Ex. 11–2, 11–3, 11–6, 11–14, 11–15, 11–18, 11–19, 11–20, 11–21, 11–24, 11–25, 11–26, 11–27, 11–28, 11–30, 11–36, 11–37, 11–38, 11–39, 11–40, 11–41, 11–43, 11–44, 11–29, 11–30, 11–31, 11–34, 11–35, 11–45, 11–47, 11–49, 11–50, 11–51, 11–53). Most of the comments set forth the steps that must be taken before hot work may be done, regardless of whether a formal permit is issued. They noted that the spaces must be evaluated and tested to determine their conditions before entry or hot work can begin. For confined spaces determined to be "safe for hot work," they said a certificate is issued by a Marine Chemist and posted at the work site. They asserted that this practice is followed throughout the maritime industry. Most indicated that requiring hot work permits in addition to the certificate would not increase the safety of hot work.

The need for hot work permits in shipyards was considered and unanimously rejected by SESAC at their September 3, 1992, meeting (Tr. 470). Chairman Linwood Temple, CMC, argued that a permit system would be useless and less protective (SESAC, Tr. September 3, 1992, 468–469). Lt. Commander Joe Ocken from the 5th Coast Guard District testified that OSHA "should not * * * take the general industry standard language [on permits] and carry that over into 1915.12" (SESAC Tr. September 3, 1992, 461). Captain Lawrence Reed, representing NIOSH, stated that he shared:

> * * * The concern of Lt. Commander Joe Ocken * * * that some [of the provisions of the permit required confined space standard] * * * are less protective than the existing language of 1915.14 and [that he] would propose we go with the existing 1915.14. (SESAC Tr. September 3, 1992, 467–468)

Mr. Charles Klein, representing Newport News Shipbuilding, stated:

> * * * What the shipbuilding industry and shiprepairing industry is doing right now with respect to confined spaces is working fine. The number of explosions that you see, the number of fatalities that you see, are virtually nil, and that would suggest that the existing language that's found in 1915 is more than adequate, and, in fact, probably would be better taken over to the general industry than what is proposed for general industry. (SESAC Tr. September 3, 1992, 465–466)

Mr. Lou D'Ambrosio, representing the Washington and Northern Idaho District Council of Laborers' International Union of North America, agreed that the permit system would be less protective (SESAC Tr. September 3, 1992, 469).

OSHA has considered the evidence and agrees with the SESAC consensus that workers in shipyard employment are adequately protected by the current hot work standards, without the need for a permit system. Shipyards are unique in that they rely on Marine Chemist and competent persons to oversee confined and enclosed spaces and other dangerous atmospheres. In many locations, a Marine Chemist is required to issue a certificate before any hot work can be done. The Marine Chemist Certificate can only be issued when conditions within and adjacent to spaces which have contained a flammable or combustible gas or material have been cleaned and inspected and found to be safe (gas free). Moreover, the certificate specifies other requirements for entry and work such as ventilation, fire watch placement, and personal protective equipment, and requires a competent person to reinspect and test the space as directed in order to maintain the conditions of the Marine Chemist certificate. Similarly, the competent person cannot grant permission for hot work in those locations that he or she is allowed to test and certify until the conditions are safe for hot work. In addition, both the Marine Chemist and the competent person are required to produce written certifications that must be posted, as required in §§ 1915.14(a)(2) and 1915.7(d) (1) and (2) respectively. As added protection, the Marine Chemist requires a competent person to recheck the space to ensure that conditions do not change. If there is a change in the space, the competent person must stop work and recall the Marine Chemist to recertify that the space is safe for hot work before work can restart. These certifications and recordings are comparable to permits, in that an employee may not perform hot work in a confined or enclosed space or other dangerous atmosphere until a certificate is issued. OSHA is persuaded that the current requirements, modified for clarity, provide protection comparable to § 1910.146 to employees in the shipyard. Therefore, OSHA is not requiring hot work permits in subpart B.

OSHA also requested comment on whether hot work should be prohibited on insulated bulkheads and if so, whether all the insulation needed to be removed. The Agency asked whether there have been situations where toxic vapors have evolved from heated insulation, and whether fires have broken out during and after hot work operations. (53 FR 48102) A number of parties filed comments on this issue (e.g., 6–8, 6–12, 6–15, 6–18, 6–21, 6–22, 6–23, 6–24, 6–26, 6–31, 6–33, 6–34, 6–36, 6–37). These comments provided a wide range of views and some anecdotal information, but contained insufficient evidence to indicate that hot work on insulated bulkheads should be prohibited. Therefore, OSHA is not addressing this issue in subpart B.

Paragraph (a)(1) requires a Marine Chemist or a U.S. Coast Guard authorized person to certify certain spaces as "Safe for Hot Work" before hot-work may be done on or in them. Other than the expansion of coverage to land-side, the requirements for hot work are the same as in the previous standard. However, § 1915.14 has been

reorganized and editorial changes have been made to add clarity.

Paragraph (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) list the confined and enclosed spaces and other dangerous atmospheres along with their adjacent spaces within shipyard employment that must be inspected and tested by a Marine Chemist or Coast Guard authorized person prior to hot work. OSHA has deleted all references to tank vessels and dry cargo, miscellaneous and passenger vessels because the scope now includes all vessels and vessel sections and land-side hot work activities. The requirements are unchanged from the previous requirements of 1915.14 (a)(1)(i), (a)(1)(ii), and (a)(1)(iii), but editorial changes have been made to add clarity.

Paragraph (a)(1)(iv) has been changed and relocated for clarity and consistency. In the previous rule, a Marine Chemist certificate was not necessary for hot work on dry cargo, miscellaneous, and passenger vessels when the work was performed on spaces adjacent to cargo tanks, as long as the gas or liquid in the tanks had a flash point below 150° Fahrenheit and the work was performed at least 25 feet (7.5 m) away from the tank. This exception has been expanded to any work in shipyards where the criteria are met, because the criteria are equally applicable to land-side operations.

Paragraph (a)(2) carries forth the requirement that the certificate issued by the Marine Chemist or the Coast Guard authorized person be posted in the immediate vicinity of the affected area and kept on file for a period of at least 3 months from the date of completion of the operation for which the certificate was generated.

Paragraph (b) covers those areas of the vessel and land-side spaces within the shipyard where a competent person can give permission for hot work to proceed after he or she has inspected and tested the space or area for flammability. The substantive requirements of this paragraph remain unchanged from the previous requirements except that land-side confined and enclosed spaces and other dangerous atmospheres are now included.

Paragraph (b)(1) states that hot work is not permitted in or on any of the listed spaces or adjacent spaces in § 1915.14(b)(1) (i) through (v) until the spaces have been tested for flammability and found to contain no concentrations of flammable vapors equal to or greater than 10 percent of the lower explosive limit. These spaces are: Dry cargo holds; the bilges; the engine or boiler room where a Marine Chemist's or a Coast Guard's authorized person's certificate is not required; vessels and vessel sections where a Marine Chemist or Coast Guard authorized person's certificate is not required under paragraph (a)(1)(i) of this section; and land-side enclosed or confined spaces or other dangerous atmospheres not covered in § 1915.14(a). The previous rule, in § 1915.14 (b) and (c), contains the same requirements found in § 1915.14(b)(1) (i) through (iv). Section 1915.15(b)(1)(v) extends the coverage to land-side operations within shipyard employment.

In paragraph (b)(2), requires a space or adjacent space that has been tested and found to contain a concentration of flammable vapors equal to or greater than 10 percent of the lower explosion limit to be labeled Not Safe for Hot Work. The space or adjacent space must than be ventilated at volumes and flow rates sufficient to ensure that the vapor concentration is below 10 percent of the lower explosive limit. This requirement is unchanged from the previous § 1915.14 (b) and (c).

Section 1915.14 (c) and (d) of the previous rule have been deleted because their contents have been moved to other places in subpart B. For example, hot work performed in engine and boiler rooms is now covered by paragraph (b)(1)(iii), and the hot work from open decks and tanks without overheads previously addressed by § 1915.14(d) is now covered in § 1915.14 (a) and (b).

The previous rule allowed the employer to inert spaces with non-flammable gas or water in shipbreaking operations. This provision was not included in the 1988 proposal and no commenters addressed this issue. OSHA is not carrying forth inerting as a specific provision because hot work on an inerted space must be approved by a Marine Chemist or Coast Guard authorized person. Work requiring a Marine Chemist's certificate is thoroughly covered in paragraph 1915.14(a) above. Finally § 1915.14 ends with a note referring users to Appendix A. Appendix A refers users to various other sections of part 1915 regulations that are directly relevant to hot work. Those sections, especially Subpart D, Welding, need to be reviewed carefully prior to starting hot work.

5. § 1915.15 Maintenance of Safe Conditions

The principal substantive change to this section continues to reflect OSHA's general decision to expand the scope of Subpart B to cover all phases of shipyard employment as defined in the final rule. Operations covered by the previous requirements in § 1915.15 were limited to ship repairing and shipbreaking. Under the previous rule, only employers engaged in ship repairing operations needed to comply with paragraph (a) of § 1915.15 and only employers engaged in shipbreaking operations needed to comply with paragraph (b) of § 1915.15. Because of the expansion of the scope of Subpart B to include all phases of shipyard employment, the final rule consolidates the requirements of § 1915.15 paragraphs (a) and (b) into one section of requirements that apply to all phases of shipyard employment.

OSHA raised two issues in the proposal that are related to the maintenance of safe conditions as regulated in this section. These issues concern the frequency of retesting and the need for testing to be accompanied by visual inspections.

Proposed §§ 1915.13(b)(4) and 1915.15 addressed the requirement to conduct atmospheric tests frequently. Proposed § 1915.13(b)(4) would have required that factors which influence the frequency of rechecking, such as air temperature and residue volatility, be considered when determining how often to retest, while proposed paragraphs (d) and (f) addressed the need for frequent atmospheric tests in order to maintain the initial working conditions in a tank.

Neither OSHA's previous standard nor the proposal specified how frequently a tank should be rechecked. Public comment was solicited as to whether OSHA should specify the frequency of testing in the standard, and if so, what that frequency should be and why. OSHA also asked if the factors which influence the need to check tanks frequently should be addressed directly in the standard. Finally, the Agency sought comment on whether OSHA should change the term "frequently" to "as often as necessary" and if so, why.

Many commenters addressed this issue and most favored requiring testing "as often as necessary" and setting forth the conditions that determine the actual frequency. For example, the U.S. Navy's Environmental Health Center (Ex. 6–31) commented,

> The term frequently is too vague and should be redefined to specify that re-testing should be dependent on alteration of specific atmospheric conditions, manipulation of valves, or opening of manholes at the work site.

Shipbuilders Council of America, (Ex. 6–3) indicated that OSHA should not attempt to define "frequently." SCA stated that,

> If an attempt is made to define the term "frequently," it may create more problems than it would solve. Illustrative is defining "frequently" as every two hours. There may

be some tanks that only need monitoring three times a shift instead of four. There are also some tanks that may require continuous monitoring. Using the terminology "as often as necessary" solves these problems, and allows the individuals monitoring the areas a little more discretion at utilizing their precious time wisely.

NFPA (Ex. 6–10) agreed that requiring testing "as often as necessary" would be appropriate,

The standard is intended to provide minimum requirements. Establishing a predetermined specified frequency for testing spaces through regulations may not allow for the various factors which may alter conditions * * * Once the initial entry has been authorized, retesting is necessary at some frequency to ensure that conditions are not changing thus endangering the safety of the workers in the space. The frequency of retesting must be determined by the individual conditions and circumstances of the work activity. Various factors as described in Appendix A to Subpart B may affect the initial conditions. Confined spaces need to be prepared on the basis of initial entry, subsequent work, and safe exit. Most often where accidents have resulted, there was either no testing for initial entry or no consideration of the change in conditions which might occur due to the work process or other factors. NFPA supports the concept * * * that frequency of follow-up testing be expressed in terms of "as often as necessary".

On the other hand the Commandant of the U.S. Coast Guard recommended OSHA specify a 4 hour retesting minimum, although he also acknowledged that Marine Chemists and competent persons must exercise their judgment on frequency of testing.

* * * A minimum frequency should be specified * * * In general spaces should be tested "as often as necessary". This phrasing implies that relevant factors have been considered and a judgment made about the need for retesting. Testing "frequently" does not imply any judgment. * * *

This period should not exceed 4 hours for an occupied space or 24 hours for an unoccupied space. No person should be allowed to enter an unoccupied space unless it has been tested/retested within 4 hours. The 24 hour requirement is an extension of NFPA 306–1988 2–6.1 which states that "Work authorized by the Certificate must commence within 24 hours unless otherwise noted on the Certificate." This should be extended to competent person testing as well as Marine Chemist testing, especially since the role of the competent person is one of monitoring conditions of spaces. Even if a space is unoccupied it represents a hazard from explosion or unauthorized entry.

The 4 hour requirement for occupied spaces is needed to ensure that spaces are not entered unless the on-duty competent person has first hand knowledge that the conditions of a tank have remained unchanged from those of initial testing and entry authorization.

NIOSH recommended OSHA set the frequency of testing, but rather than specifying as a minimum time interval, they listed the factors that should be considered in determining how often an atmosphere must be tested (Ex. 6–14),

NIOSH suggests that OSHA specify the frequency of atmospheric testing. The frequency of atmospheric testing depends upon a number of factors. These factors should be listed in the standard (such as nature of hazard, temperature within tank, type of work in tank, elapsed time, unattended tanks, work breaks, residue volatility, etc.). Testing intervals should be established according to these factors as determined by the following NIOSH-recommended hierarchy: (1) Marine Chemist, (2) Certified Industrial Hygienist (CIH) or Certified Safety Professional (CSP), or (3) Coast Guard Authorized Person [§ 1915.11]. Furthermore, NIOSH suggests that 'competent person' [§ 1915.7], as defined by OSHA, is not trained sufficiently to determine testing frequency. At a minimum, NIOSH suggests that testing be done at 'time of entry' and continuously or periodically during occupancy, particularly if conditions are changing.

Bay Shipbuilding (Ex. 6–15) commented,

Frequency of testing must be based on the area conditions and complexity of the hazard. Ventilation capability is also a major factor in hazard control. Once an area has been made safe, and air quality can be maintained with natural or mechanical ventilation, there are no further steps needed unless the condition is modified by some events such as a spill, leak, or injection of an environmentally altering element. Otherwise, the only thing to do is to continue monitoring (which is cost prohibitive); or base the checks on the HMIS scale for health, flammability, and reactivity of the product. The higher the HMIS rating, the more frequent the checks.

The American Waterways Shipyard Conference (AWSC) (Ex. 6–23) commented,

The requirement to frequently test the confined spaces is already defined by the nature of the work, i.e., the changing of work shifts, etc. There is no need to further define the term in the regulation.

Independent Testing and Consultation (Ex. 6–24) commented,

There is no way to define all of the parameters which will decide how often a tank or compartment should be tested. The Marine Chemist or Coast Guard authorized person can indicate on the certificate, how often the space is to be tested. The wording in 1915.15 (d) and (f) should therefore be changed to 'as frequently as necessary to ensure. * * *

Bath Iron Works Corporation (Ex. 6–28) commented,

No easy definition exists for all circumstances requiring additional 'frequent' testing. This is a situation which requires the judgment of the Marine Chemist, based on his knowledge of the last three cargoes, their properties and the effectiveness of the cleaning procedures used. Some cargoes, such as alcohols, light fuel oils, etc., leave no harmful residues after adequate tank cleaning and ventilation. Under such situations, testing every 24 hours is adequate. Other cargoes leave residues, or, particular tank coatings partially absorb cargo residues, only to release vapors slowly over time, regardless of how the cleaning operations were conducted. These conditions require atmospheric testing more frequently. Long term experience at Bath Iron Works dealing with Diesel Fuel Marine (DFM), JP–5, and several preservative coatings have shown no changes in atmospheric conditions from one 24 hour period to another. In these cases, the Coast Guard guidelines of testing once each 24 hours is adequate.

OSHA has taken reasonable measures of increasing the awareness of the dangers of sealed or confined spaces by providing guidelines and situations which could create hazardous atmospheres in the discussion presented in Appendix A of the Proposed Rule. This information, together with the knowledge that the Marine Chemist has of the previous cargoes and his judgment, when passed on to the Competent Person via instructions on his Marine Chemist Certificate, should be adequate to define testing frequency under specific conditions.

Pacific Marine Testing (Ex. 6–33) stated,

Frequency of testing atmosphere is determined by the specific situation encountered. There are many variables which must be taken into account before frequency of testing may be prescribed.

Finally, the Marine Chemist Association, whose members set the frequency of retesting, (Ex. 6–34) commented,

The frequency of testing cannot be specified. There are too many variables that may govern the frequency of testing. Please note Appendix A Subpart B to the standard. The term 'frequency' should not be used and 'as often as necessary' should be substituted.

OSHA agrees with those commenters who suggested that OSHA use the performance language "as often as necessary" rather than cite a specific frequency for retesting. As the majority of commenters suggest, spaces vary and conditions within a space are subject to change at different time intervals. Therefore, a specific schedule for retesting all spaces could lead to unnecessary testing in some instances and inadequate testing that may not identify hazardous conditions as they arise in others. OSHA has concluded that those individuals who test an atmosphere must have the flexibility to determine the precise frequency of testing. However, OSHA is specifying that the testing be done "as often as necessary," in order to ensure that changes in conditions are detected for

each atmosphere. It is imperative that the atmosphere be checked often enough to ensure that it is safe for workers. To that end, Appendix A provides supplementary information to assist employers and employees in determining the frequency with which a tank must be monitored in order to ensure atmospheric conditions are being maintained. OSHA's decision to use performance language such as "as often as necessary" is also consistent with the Agency's continuing position to use performance-based standards where practicable.

Therefore, OSHA has amended the language of those requirements in this section that previously required "frequent" testing to require the testing of atmospheres "as often as necessary" in order to provide flexibility to Marine Chemists and competent persons who test spaces to determine the time and need for testing of atmospheres based on the conditions in each dangerous atmospheres.

OSHA sought public comment on whether the shipyard competent person should be required to conduct a physical examination of the tank and pipelines when making a follow-up inspection.

The majority of comments on this issue discussed it in terms of retesting to maintain safe conditions within all types of work spaces. However, because OSHA believes that a visual inspection is an integral part of any testing the reasoning in this discussion also pertains to initial testing required in § 1915.12, *Precautions before entering.*

Most commenters (e.g., Exs. 6–3, 6–4, 6–10, 6–14, 6–18, 6–31) indicated it would be appropriate for competent persons to conduct physical inspections of spaces they are checking during periodic retesting of atmospheres. Some of them and others (Exs. 6–10, 6–18, 6–31, 6–33, and 6–34) also indicated that it is currently industry practice for well trained individuals who conduct follow-up testing to physically inspect spaces during these follow-up inspections.

NIOSH (Ex. 6–14) commented,

The shipyard 'competent person' should be required to conduct a physical examination of the tank and pipelines during follow-up inspections. Original conditions and intended purposes of tanks and pipelines change continually in ship construction and repair. These new uses can only be detected by physically examining them during follow-up inspections.

The U.S. Coast Guard MIONY (Ex. 6–4) states,

Shipyard competent persons should be required to make physical examination of each space retested. During ship repair, vessels are often listed or trimmed for various reasons. This can cause flammable, toxic, and corrosive residues to leak out of pipelines. In practice these are rarely blanked and the isolation valves may have been opened or leak. These residues may ignite during hot work, harm workers on contact, or produce a hazardous atmosphere if there is a temperature increase.

NFPA (Ex. 6–10) agreed, and noted that,

NFPA strongly supports the inclusion of a requirement that in addition to atmospheric tests the shipyard competent person should also be required to conduct a physical examination of the spaces and associated pipelines. NFPA 306, 2–1 requires the Marine Chemist to conduct a physical inspection and to conduct tests within the spaces. For high flash point, low vapor pressure products such as diesel, a test for flammable or combustible vapors is not sufficient, since at atmospheric temperatures there are not enough vapors being evolved for the combustible gas indicator to detect. It is essential that physical inspections be conducted.

The Navy's Sea Systems Command (Ex. 6–12) commented,

The purpose of the follow-up check is to ensure conditions have not deteriorated. The requirement [for a physical inspection] is endorsed for hot work rechecks.

Similarly, the Commandant of the U.S. Coast Guard commented,

Because it is important for a Marine Chemist to make such examinations, it is even more important that the competent person also conducts such examinations.

By making a physical examination of the confined space the competent person understands the tank conditions better, and it helps to stress the importance of looking for other potential problems in a confined space. For example, paraffinic residues on bulkheads are sometimes partially cleaned in areas where minor welding jobs will be done on the opposite side of the bulkhead (in the adjacent space). Welders are unable to determine if they are welding outside the cleaned area, but the competent person would have the opportunity to detect a problem.

The Marine Chemist Association (Ex. 6–34) commented,

The shipyard competent person should definitely conduct physical examinations of the interior of tanks and pipelines. Instrumentation used to test the atmosphere of these structures do not always reveal the presence of flammable or combustible materials. If these persons are required to maintain safe conditions in enclosed and confined spaced they must evaluate conditions other than atmosphere.

Northwest Marine Chemist (Ex. 6–18) asserted that,

There is no way to properly determine the condition of a space without physically entering.

Independent Testing and Consulting, Inc. (Ex. 6–24) commented,

The shipyard competent person should be required to conduct a physical examination of the tank (provided it is safe to enter) and make any necessary tests of piping provided that the piping has been approved for hot work on the Marine Chemists certificate.

Chemical Engineering Service, Inc. (Ex. 6–25A) commented,

The original intent for the position of shipyard competent person was to detect conditions where, for some reason, there was a decrease in oxygen or an accumulation of combustible gas. Left undetected, these situations could develop into acute hazards for shipyard personnel. While these conditions are relatively rare, their occurrence could easily lead to catastrophic loss of life and property.

A much more chronic problem is fire hazards in the shipyard resulting from the introduction of flammable or combustible material subsequent to the initial internal inspection for hot work. This could be the result of leaking piping, accidental or intentional contamination, or gradual buildup of trash and other combustible materials. With the exception of liquids with a reasonably high vapor pressure, these fairly common conditions can only be detected with an internal inspection.

If it is the intent of OSHA to utilize the shipyard competent person to control fire hazards in addition to atmospheric hazards, internal inspection of all spaces must be required.

Atlantic Environmental & Marine Services (Ex. 6–27) commented,

* * * Shipyard Competent Persons should be required to conduct an on-site survey of tanks and pipelines when making follow up inspections.

The U.S. Navy's Environmental Health Center (Ex. 6–31) commented,

Yes, the shipyard competent person should be required to conduct a physical examination of the tank and pipelines when making a follow-up inspection. The current foundation of the NAVSEA Technical Manual lists a requirement in Section 23.4 of reference (c) for conducting a physical examination of the tank and pipelines upon reinspection. The condition for entry must be defined, such as, use of ventilation, PPE, non-sparking tools, and whether there is to be continuous or periodic testing.

Pacific Marine Testing (Ex. 6–33) commented,

The shipyard competent person, when trained properly by a sanctioned training such as the one developed and presented by NFPA and its supporters, is taught to conduct a physical examination of the tank and pipelines when making a follow-up inspection. A determination of a safe condition can be made only when the shipyard competent person has conducted a physical examination.

Only the Shipbuilders Council of America (Ex. 6–3, pg. 3) and the Newport News Shipbuilding (Ex. 6–6, pg. 4) urged OSHA to allow a qualified

person to decide whether a physical examination is necessary.

The qualified person should not be required to conduct a full physical examination of the tank and pipelines when making a follow-up inspection. . . . the qualified person should be given appropriate flexibility when making this determination based on all available data, *including* a physical inspection, where necessary.

OSHA agrees with the majority of commenters on this issue and has concluded that, because of changing conditions, appropriate retesting must include a physical inspection of a tank or pipelines for leaks or other build-ups of hazardous substance within a certified space. Physical inspection of a space is an integral part of an effective follow-up inspection or monitoring program. For example, an actual physical examination is crucial in eliminating housekeeping debris that could be fire hazards such as rags, insulation, or heavy oil residues in the tank deep spot. Therefore, OSHA is requiring physical inspections be conducted during follow-up inspections of tested spaces.

In paragraph (a) of the final rule OSHA continues the requirement that was found in the first sentence of paragraph (a)(1) in the previous text. The employer is required to disconnect, blank off, or otherwise block by a positive method all pipelines that could carry hazardous materials into spaces that have been tested and found safe for work. There were no substantive comments addressing this provision. Although OSHA has clarified the language with this rule, the substance remains the same.

The second sentence of paragraph (a)(1) in the previous text required that manholes and other closures of a space that were secured during the testing of the space remain secured afterwards to prevent alteration of the tested space atmosphere. OSHA has eliminated this requirement from the final rule. OSHA has decided that it would be more appropriate to recognize that closures of tested spaces may be opened safely for various reasons during work operations and that a requirement for them to remain secured was unnecessary. What is critical for safety is that the atmospheric conditions within the space remain within permissible levels. Therefore, OSHA will continue to recognize the need to test and monitor spaces as necessary. This will assure that safe work atmospheres are maintained and if they are not, work must be stopped regardless of how the atmosphere becomes contaminated.

Paragraph (b) of the final rule (as was the third sentence of paragraph (a)(1) of the previous rule) is intended to ensure that a safe working environment is maintained within a previously tested space, even if outside contaminants may have been introduced into the space after initial testing. The final rule says that when any changes occur that could alter conditions within the space or other dangerous atmospheres, work shall be stopped until the space is visually inspected, retested and found to comply with §§ 1915.12, 1915.13 and 1915.14 of this part, as applicable. To provide guidance to employers on what changes would require work be stopped, OSHA has included a note with examples.

Paragraph (c) of the final rule requires a competent person to test atmospheric conditions within a previously tested space as often as necessary to maintain conditions as specified on certificates issued by a Marine Chemist or Coast Guard authorized person. The Agency has changed the format of the final rule and this new paragraph (c) addresses only the language that was found in paragraph (a)(4) of the previous rule. The requirements that were found in paragraphs (a)(2) and (a)(3) of the previous text are not addressed in this section because they are covered elsewhere in OSHA's requirements or they have been moved to a more appropriate section of the final rule. For example, previous paragraph (a)(3) required employers to ensure that employees understand and obey all warning signs, tags, and the language of Marine Chemists' certificates. The requirement addressing employee understanding of the warning labels is found in § 1915.16 of this Subpart. OSHA considers paragraph (c) of the final rule to be an editorial change to the language that was found in the first sentence of paragraph (a)(4) in the previous rule and therefore, non-substantive.

In paragraph (d) of the final rule, OSHA requires that if a competent person finds that atmospheric conditions within a space fail to meet the applicable requirements of §§ 1915.12, 1915.13 and 1915.14 of Subpart B, work in the space must be stopped, the space retested by a Marine Chemist or Coast Guard authorized person and a new certificate issued in accordance with § 1915.14(a) before work may resume. The language found in paragraph (d) is similar to that found in the second sentence of paragraph (a)(4) of the previous standard and the basic requirement remains the same. Modifications to the previous language have changed references to the maintenance of gas-free conditions to the maintenance of conditions meeting §§ 1915.12, 1915.13, and 1915.14. These sections address not only gas-free conditions but also other hazardous atmospheric conditions to which an employee may be exposed, which are also within the scope of the certificate. OSHA believes that separating the two requirements found in paragraph (a)(4) of the previous rule into separate paragraphs (c) and (d) of the final rule will improve compliance by making the rule easier to understand.

Paragraph (e) of the final rule requires a competent person to continue to test as necessary those spaces he or she has tested previously to ensure that the atmospheric conditions within the tested space are maintained. This is consistent with both NFPA 306 and industry practice. The substance of the final rule is similar to the language proposed in 1988 and the first sentence of paragraph (b)(2) of the previous rule except that, like paragraph (c) above, tests are to be conducted for all relevant atmospheric conditions.

In paragraph (f) of the final rule, OSHA requires that all work be stopped in those spaces tested previously by a competent person when a competent person finds that the conditions within the space no longer meet the requirements set forth elsewhere in this subpart. The language in paragraph (f) of the final rule is similar to the language proposed in paragraph (g) of the 1988 proposal and is parallel to the language contained in paragraph (d) above.

Like paragraph (d) above, paragraph (f) of the final rule drops the list of specific atmospheric conditions and instead references §§ 1915.12, 1915.13 and 1915.14. The substantive requirement for stopping work until a space found to be hazardous has been retested and found safe for workers has not changed from the previous language.

6. § 1915.16 Warning Signs and Labels

The substantive change OSHA has made to this section involves the expansion of the scope of the previous requirements to all phases of shipyard employment. The previous language limited the scope of § 1915.16 to ship repairing operations only. The reasons for the expansion in scope of this section are discussed above in § 1915.11, Scope and Application.

The provisions in final § 1915.16 require that signs and labels that are posted to meet the specific requirements contained in other sections of Subpart B be presented in a manner that can be understood by all employees. Like the previous standard, an individual tank or other space need not be labeled separately if the whole area has been

tested and all means of access to the area are labeled with a warning sign.

OSHA solicited public comment on whether § 1915.16 should require that all conditions be labeled on tanks. The majority of responders who considered this issue (Ex. 6–8, 6–15, 6–21, 6–22, 6–23, 6–24, 6–36, 6–37, 6–38) supported the continuation of the previous requirement that only tanks containing unsafe work conditions need to be labeled. Other commenters (Ex. 6–4, 6–12, 6–28, 6–31) supported labeling all locations that had been tested, whether safe or unsafe. Still other commenters (Ex. 6–3, 6–6) suggested that only tanks containing safe work environments be labeled.

Those commenters who supported continued use of the previous requirement of posting only unsafe tanks are best represented by the following comments. The American Waterways Shipyard Conference, (Ex. 6–23) commented,

> Current shipyard operations only provide warning signs for unsafe tanks. If both conditions are marked with warning signs, then it ceases to be an instant hazard recognition.

This was further emphasized by a comment from Sound Testing, Inc., (Ex. 6–8):

> I have always found the present standard's section on warning signs to be very workable. Not much is gained by labeling safe places as such, for three reasons: 1. This practice would be very costly; 2. The very idea of using a warning sign on a safe place is illogical; and 3. Signs would proliferate. The more signs there are, the less is the effect of any single sign. Signs should be used as sparingly as possible, so that when we really need them they will be effective.

On the other hand, the National Fire Protection Association (NFPA) (Ex. 6–10) supported the placing of warning signs on only those tanks that have been tested and found to be safe. NFPA states:

> NFPA would support a requirement for placing warning signs on tanks if the signs were specifically restricted to indicating spaces which have been tested and suitably designated as "SAFE." If signs are required for all tanks which are "SAFE" then any tank which does not have a sign is then interpreted by all employees to be "NOT SAFE."

OSHA has concluded that requiring only unsafe spaces to be labeled as specified in §§ 1915.12, 1915.13, or 1915.14 will provide the most effective notice of atmospheric conditions that could endanger employees. The Agency believes that the identification of hazardous conditions is the most efficient means of utilizing signs or labels. OSHA agrees with commenters who noted that warning signs should be used only when necessary so that when they are posted, employees will take notice of them. Shipyard employees are familiar with the labeling of tanks that have been tested and found to be unsafe. On the other hand, OSHA is not prohibiting the posting of other signs and labels an employer may find appropriate for that employer's workplace, but the Agency cautions employers about the overuse of signs and labels, which could lead to decreased effectiveness. Moreover, in response to the NFPA and other commenters who supported labeling "safe" spaces, OSHA notes that spaces that have been tested and found to be safe are required to be identified by the Marine Chemist's certificate or the competent person's record of testing and recommendations. These certificates and records provide the appropriate notice of safe working conditions. There is insufficient evidence in the record to show that changes to the labeling requirements would increase safety. For all these reasons, OSHA is requiring that all tanks and other spaces that fail to meet the requirements of §§ 1915.12, 1915.13, or 1915.14, as applicable, be posted with hazard warning signs or labeled with hazard warning messages as required in those sections.

OSHA deleted paragraph (a) of the old and proposed rules which required employers to notify employees of dangerous work areas. The reason for this is that the posting requirements for various atmospheric conditions are specifically addressed in their respective sections.

The final rule text and the proposed rule text differ in that OSHA proposed that employers be responsible for ensuring that all employees "obey" all warning signs. One commenter, Bay Shipbuilding Corp., (Ex. 6–15) addressed the issue of employee compliance with safety regulations.

> The employee must share the responsibility to obey and observe proper practices along with the employer. Every employee must be held accountable for their actions.

In this regard, OSHA notes that under the OSH Act, employers are responsible for compliance with standards issued under Section 6, and enforcement is directed at the employer and not the employee.

In this final rule, OSHA has revised the previous rule by providing two basic requirements addressing hazard warning messages to employees.

In paragraph (a), OSHA is requiring that all hazard warning messages that are posted to comply with respective paragraphs of §§ 1915.12, 1915.13, and 1915.14 be presented in a manner or format that can be perceived and understood by all employees.

OSHA proposed in paragraph (a) that the employer ensure that employees understand all warning signs and limitations provided by Marine Chemists and the OSHA Form 74. OSHA has dropped the reference to the OSHA Form 74 since it is no longer required, and has added new language to clarify that the employer must present warning materials in a manner that can be understood by all of his or her employees. There are many methods such as dual language signs or pictorial graphics that an employer may use to ensure that employees can and do understand all warning signs and instruction addressing dangerous working conditions. This is consistent with the position OSHA has taken on other rulemakings that address signs, tags, and labels. For example, in 29 CFR § 1910.145, OSHA permits the use of accident prevention tags using graphic or second language text where necessary. Moreover, the obligation to present signs and labels in a manner that can be perceived by all employees also means that the label or sign must be posted in a place where employees will see it in the course of their work. Other factors the employer must consider are size, material, and methods of attachment. In short, this new performance-oriented language requires that employers provide adequate notice to all employees of dangerous working conditions, but leaves the method of presentation up to the employer.

In paragraph (b) of the final rule, OSHA continues to allow employers to post the warning signs or labels at all means of access rather than requiring each tank or space to be labeled, as long as the entire space has been tested and certified. This is the same as paragraph (c) of the previous standard.

III. Statutory Considerations

A. Introduction

OSHA has described the hazards found in confined and enclosed spaces and other dangerous atmospheres in shipyard employment and the measures required to protect affected employees from those hazards in Section I, *Background*, and in Section II, *Summary and Explanation of the Final Rule*, earlier in this preamble. The Agency is providing the following discussion of the statutory mandate for OSHA rulemaking activity to explain the legal basis for its determination that the Confined and Enclosed Spaces and Other Dangerous Atmospheres standard,

as promulgated, is reasonably necessary to protect affected employees from significant risks of injury and death.

Section 2(b)(3) of the Occupational Safety and Health Act authorizes "the Secretary of Labor to set mandatory *occupational safety and health standards* applicable to businesses affecting interstate commerce", and section 5(a)(2) provides that "[e]ach employer shall comply with *occupational safety and health standards* promulgated under this Act" (emphasis added). Section 3(8) of the OSH Act (29 U.S.C. 652(8)) provides that "the term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

In two recent cases, reviewing courts have expressed concern that OSHA's interpretation of these provisions of the OSH Act, particularly of section 3(8) as it pertains to safety rulemaking, could lead to overly costly or under-protective safety standards. In *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), the District of Columbia Circuit rejected substantive challenges to OSHA's lockout/tagout standard and denied a request that enforcement of that standard be stayed, but it also expressed concern that OSHA's interpretation of the OSH Act could lead to safety standards that are very costly and only minimally protective. In *National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717 (5th Cir. 1989), the Fifth Circuit concluded that Congress gave OSHA considerable discretion in structuring the costs and benefits of safety standards but, concerned that the grain dust standard might be under-protective, directed OSHA to consider adding a provision that might further reduce significant risk of fire and explosion.

OSHA rulemakings involve a significant degree of Agency expertise and policy-making discretion to which reviewing courts must defer. (See for example, *Building & Constr. Trades Dep't, AFL–CIO v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988); *Industrial Union Dep't, AFL–CIO v. American Petroleum Inst.*, 448 U.S. 607, 655 n. 62 (1980).) At the same time, the Agency's technical expertise and policy-making authority must be exercised within discernable parameters. The lockout/tagout and grain handling standard decisions sought clarification of the Agency's view of the scope of its expertise and authority. In light of those decisions, the preamble to this safety standard states OSHA's views regarding the limits of its safety rulemaking authority and explains why the Agency is confident that its interpretive views have in the past avoided regulatory extremes and continue to do so in this rule.

Stated briefly, the OSH Act requires that before promulgating any occupational safety standard, OSHA demonstrate based on substantial evidence in the record as a whole that: (1) The proposed standard will substantially reduce a significant risk of material harm; (2) compliance is technologically feasible in the sense that the protective measures being required already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be developed; (3) compliance is economically feasible in the sense that industry can absorb or pass on the costs without major dislocation or threat of instability; and (4) the standard is cost-effective in that it employs the least expensive protective measures capable of reducing or eliminating significant risk. Additionally, proposed safety standards must be compatible with prior Agency action, must be responsive to significant comment in the record, and, to the extent allowed by statute, must be consistent with applicable Executive Orders. These elements limit OSHA's regulatory discretion for safety rulemaking and provide a decision-making framework for developing a rule.

B. Congress Concluded That OSHA Regulations Are Necessary To Protect Workers From Occupational Hazards And That Employers Should Be Required To Reduce or Eliminate Significant Workplace Health and Safety Threats

At section 2(a) of the OSH Act (29 U.S.C. 651(a)), Congress announced its determination that occupational injury and illness should be eliminated as much as possible: "The Congress finds that occupational injury and illness arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." Congress therefore declared "it to be its purpose and policy * * * to assure so far as possible every working man and woman in the Nation safe * * * working conditions [29 U.S.C. 651(b)]."

To that end, Congress instructed the Secretary of Labor to adopt existing Federal and consensus standards during the first 2 years after the OSH Act became effective and, in the event of conflict among any such standards, to "promulgate the standard which assures the greatest protection of the safety or health of the affected employees [29 U.S.C. 655(a)]." Congress also directed the Secretary to set mandatory occupational safety standards (29 U.S.C. 651(b)(3)), based on a rulemaking record and substantial evidence (29 U.S.C. 655(b)(2)), that are "reasonably necessary or appropriate to provide safe * * * employment and places of employment." When promulgating permanent safety or health standards that differ from existing national consensus standards, the Secretary must explain "why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard [29 U.S.C. 655(b)(8)]." Correspondingly, every employer must comply with OSHA standards and in addition, "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [29 U.S.C. 654(a)]."

"Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment. Congress viewed the costs of health and safety as a cost of doing business. * * * Indeed, Congress thought that the *financial costs* of health and safety problems in the workplace were as large as or larger than the *financial costs* of eliminating these problems [*American Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 519–522 (1981) (*ATMI*); emphasis was supplied in original]." "[T]he fundamental objective of the Act [is] to prevent occupational deaths and serious injuries [*Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980)]." "We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America [S. Rep. No. 91–1282, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 91–1291, 91st Cong., 2d Sess. (1970), *reprinted in* Senate Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, (Committee Print 1971) ("Leg. Hist.") at 444 (Senator Yarborough)]." "Of course, it will cost a little more per item to produce a washing machine. Those of us who use washing machines will pay for the increased cost, but it is worth it, to stop the terrible death and injury rate in this country [*Id.* at 324; see also 510–511, 517]."

[T]he vitality of the Nation's economy will be enhanced by the greater productivity realized through saved lives and useful years of labor.

When one man is injured or disabled by an industrial accident or disease, it is he and his family who suffer the most immediate and personal loss. However, that tragic loss also affects each of us. As a result of occupational accidents and disease, over $1.5 billion in wages is lost each year [1970 dollars], and the annual loss to the gross national product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation and medical expenses. * * *

Only through a comprehensive approach can we hope to effect a significant reduction in these job death and casualty figures. [*Id.* at 518–19 (Senator Cranston)]

Congress considered uniform enforcement crucial because it would reduce or eliminate the disadvantage that a conscientious employer might experience where inter-industry or intra-industry competition is present. Moreover, "many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so [Leg. Hist. at 144, 854, 1188, 1201]."

Thus, the statutory text and legislative history make clear that Congress conclusively determined that OSHA regulation is necessary to protect workers from occupational hazards and that employers should be required to reduce or eliminate significant workplace health and safety threats.

C. As Construed by the Courts and by OSHA, the OSH Act Sets Clear and Reasonable Limits for Agency Rulemaking Action

OSHA has long followed the teaching that section 3(8) of the OSH Act requires that, before it promulgates "*any* permanent health or safety standard, [it must] make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices [*Industrial Union Dep't, AFL–CIO v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality) (*Benzene*); emphasis was supplied in original]." Thus, the national consensus and existing federal standards that Congress instructed OSHA to adopt summarily within two years of the OSH Act's inception provide reference points concerning the least an OSHA standard should achieve (29 U.S.C. 655(a)). As a result, OSHA is precluded from regulating insignificant safety risks or from issuing safety standards that do not at least lessen risk in a significant way.

The OSH Act also limits OSHA's discretion to issue overly burdensome rules, as the agency also has long recognized that "any standard that was not economically or technologically feasible would *a fortiori* not be reasonably necessary or appropriate' under the Act. See *Industrial Union Dep't v. Hodgson*, [499 F.2d 467, 478 (D.C. Cir. 1974)] (Congress does not appear to have intended to protect employees by putting their employers out of business.') [*American Textile Mfrs. Inst. Inc.*, 452 U.S. at 513 n. 31 (a standard is economically feasible even if it portends disaster for some marginal firms,' but it is economically infeasible if it threaten[s] massive dislocation to, or imperil[s] the existence of,' the industry)]."

By stating the test in terms of "threat" and "peril," the Supreme Court made clear in *ATMI* that economic infeasibility begins short of industry-wide bankruptcy. OSHA itself has placed the line considerably below this level. (See for example, *ATMI*, 452 U.S. at 527 n. 50; 43 FR 27360 (June 23, 1978). Proposed 200 μg/m³ PEL for cotton dust did not raise serious possibility of industry-wide bankruptcy, but impact on weaving sector would be severe, possibly requiring reconstruction of 90 percent of all weave rooms. OSHA concluded that the 200 μg/m³ level was not feasible for weaving and that 750 μg/m³ was all that could reasonably be required. See also 54 FR 29245–29246 (July 11, 1989); *American Iron & Steel Institute*, 939 F.2d at 1003. OSHA raised engineering control level for lead in small nonferrous foundries to avoid the possibility of bankruptcy for about half of small foundries even though the industry as a whole could have survived the loss of small firms.)

All OSHA standards must also be cost-effective in the sense that the protective measures being required must be the least expensive measures capable of achieving the desired end (*ATMI*, at 514 n. 32; *Building and Constr. Trades Dep't AFL–CIO v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988)). OSHA gives additional consideration to financial impact in setting the period of time that should be allowed for compliance, allowing as much as 10 years for compliance phase-in. (See *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1278 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).) Additionally, OSHA's enforcement policy takes account of financial hardship on an individualized basis. OSHA's Field Operations Manual provides that, based on an employer's economic situation, OSHA may extend the period within which a violation must be corrected after issuance of a citation (CPL 2.45B, Chapter III, paragraph E6d(3)(a), Dec. 31, 1990).

To reach the necessary findings and conclusions, OSHA conducts rulemaking in accordance with the requirements of section 6 of the OSH Act. The rulemaking process enables the Agency to determine the qualitative and, if possible, the quantitative nature of the risk with (and without) regulation, the technological feasibility of compliance, the availability of capital to the industry and the extent to which that capital is required for other purposes, the industry's profit history, the industry's ability to absorb costs or pass them on to the consumer, the impact of higher costs on demand, and the impact on competition with substitutes and imports. (See *ATMI* at 2501–2503; *American Iron & Steel Institute* generally.) Section 6(f) of the OSH Act further provides that, if the validity of a standard is challenged, OSHA must support its conclusions with "substantial evidence in the record considered as a whole," a standard that courts have determined requires fairly close scrutiny of agency action and the explanation of that action. (See *Steelworkers*, 647 F.2d at 1206–1207.)

OSHA's powers are further circumscribed by the independent Occupational Safety and Health Review Commission, which provides a neutral forum for employer contests of citations issued by OSHA for noncompliance with health and safety standards (29 U.S.C. 659–661; noted as an additional constraint in *Benzene* at 652 n. 59). OSHA must also respond rationally to similarities and differences among industries or industry sectors. (See *Building and Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1272–73 (D.C. Cir. 1988).)

OSHA rulemaking is thus constrained first by the need to demonstrate that the standard will substantially reduce a significant risk of material harm, and then by the requirement that compliance is technologically capable of being done and not so expensive as to threaten economic instability or dislocation for the industry. Within these bounds, further constraints such as the need to find cost-effective measures and to respond rationally to all meaningful comment militate against regulatory extremes.

D. The Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment Standard Complies With the Statutory Criteria Described Above and Is Not Subject to the Additional Constraints Applicable to Section 6(b)(5) Standards

Standards which regulate hazards that are frequently undetectable because they are subtle or develop slowly or after long latency periods, are frequently referred to as "health" standards. Standards that regulate hazards, like explosions or electrocution, that cause immediately noticeable physical harm, are called "safety" standards. (See *National Grain & Feed Ass'n v. OSHA (NGFA II)*, 866 F.2d 717, 731, 733 (5th Cir. 1989). As noted above, section 3(8) provides that *all* OSHA standards must be "reasonably necessary or appropriate." In addition, section 6(b)(5) requires that OSHA set health standards which limit significant risk "to the extent feasible." OSHA has determined that the Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment standard is a safety standard, because the standard addresses hazards, such as asphyxiation, explosions, and fires, that are immediately dangerous to life or health, not the longer term, less obvious hazards subject to section 6(b)(5).

The OSH Act and its legislative history clearly indicate that Congress intended for OSHA to distinguish between safety standards and health standards. For example in section 2(b)(6) of the OSH Act, Congress declared that the goal of assuring safe and healthful working conditions and preserving human resources would be achieved, in part:

> * * * by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety.

The legislative history makes this distinction even clearer:

> [The Secretary] should take into account that anyone working in toxic agents and physical agents which might be harmful may be subjected to such conditions for the rest of his working life, so that we can get at something which might not be toxic now, if he works in it a short time, but if he works in it the rest of his life might be very dangerous; and we want to make sure that such things are taken into consideration in establishing standards. [*Leg. Hist.* at 502–503 (Sen. Dominick), quoted in *Benzene* at 648–49]

Additionally, Representative Daniels distinguished between "insidious silent killers' such as toxic fumes, bases, acids, and chemicals" and "violent physical injury causing immediate visible physical harm" (*Leg. Hist.* at 1003), and Representative Udall contrasted insidious hazards like carcinogens with "the more visible and well-known question of industrial accidents and on-the-job injury" (*Leg. Hist.* at 1004). (See also, for example, S. Rep. No. 1282, 91st Cong., 2d Sess. 2–3 (1970), U.S. Code Cong. & Admin. News 1970, pp. 5177, 5179, reprinted in Leg. Hist. at 142–143, discussing 1967 Surgeon General study that found that 65 percent of employees in industrial plants "were potentially exposed to harmful physical agents, *such as severe noise or vibration*, or to toxic materials"; Leg. Hist. at 412; *id.* at 446; *id.* at 516; *id.* at 845; *International Union, UAW* at 1315.)

In reviewing OSHA rulemaking activity, the Supreme Court has held that section 6(b)(5) requires OSHA to set "the most protective standard consistent with feasibility" (*Benzene* at 643 n. 48). As Justice Stevens observed:

> The reason that Congress drafted a special section for these substances * * * was because Congress recognized that there were special problems in regulating health risks as opposed to safety risks. In the latter case, the risks are generally immediate and obvious, while in the former, the risks may not be evident until a worker has been exposed for long periods of time to particular substances. [*Benzene*, at 649 n. 54.]

Challenges to the grain dust and lockout/tagout standards included assertions that grain dust in explosive quantities and uncontrolled energy releases that could expose employees to crushing, cutting, burning or explosion hazards were harmful physical agents so that OSHA was required to apply the criteria of section 6(b)(5) when determining how to protect employees from those hazards. Reviewing courts have uniformly rejected such assertions. For example, the Court in *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) rejected the view that section 6(b)(5) provided the statutory criteria for regulation of uncontrolled energy, holding that such a "reading would obliterate a distinction that Congress drew between health and safety risks." The Court also noted that the language of the OSH Act and the legislative history supported the OSHA position (*International Union, UAW* at 1314). Additionally, the Court stated: "We accord considerable weight to an agency's construction of a statutory scheme it is entrusted to administer, rejecting it only if unreasonable" (*International Union, UAW* at 1313, citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)).

The Court reviewing the grain dust standard also deferred to OSHA's reasonable view that the Agency was not subject to the feasibility mandate of section 6(b)(5) in regulating explosive quantities of grain dust (*National Grain & Feed Association v. OSHA (NGFA II)*, 866 F.2d 717, 733 (5th Cir. 1989)). It therefore applied the criteria of section 3(8), requiring the Agency to establish that the standard is "reasonably necessary or appropriate" to protect employees.

As explained in Section I, *Background*, and Section II, *Summary and Explanation of the Final Rule*, earlier in this preamble, and Section IV, *Summary of Final Regulatory Analysis*, below, OSHA has determined that confined and enclosed spaces and other dangerous atmospheres in shipyard employment pose significant risks to employees and that the provisions of the final rule are reasonably necessary to protect affected employees from those risks. OSHA believes that compliance is economically feasible, because, as documented in the Regulatory Impact Analysis, all regulated sectors can readily absorb or pass on compliance costs.

As presented in Section IV, *Summary of Final Regulatory Analysis*, later in this preamble, and in Table 1, the standard's costs, benefits, and compliance requirements are consistent with those of other OSHA safety standards, such as the Hazardous Waste Operations and Emergency Response (HAZWOPER) standard.

OSHA assessed employee risk by evaluating exposure to the hazards associated with confined and enclosed spaces and other dangerous atmospheres in shipyard employment. Section IV, *Summary of Final Regulatory Analysis*, later in this preamble, presents OSHA's estimate of the costs and benefits of the Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment standard. OSHA has set the scope of the Confined and Enclosed Spaces and Other Dangerous Atmospheres standard to address situations in which employees are exposed to these hazards, regardless of the location, shipboard vs. land-side. The Agency believes, based on analysis of the elements of the hazards identified, that there is sufficient information for OSHA to determine that employees in the covered sectors face significant risks related to confined and enclosed spaces and other dangerous atmospheres in shipyard employment. Therefore, the Agency has determined that all employees within the scope of the Confined and Enclosed Spaces and

Other Dangerous Atmospheres in Shipyard Employment standard face a significant risk of material harm and that compliance with these standards is reasonably necessary to protect affected employees from that risk.

OSHA has considered and responded to all substantive comments regarding the proposed Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment on their merits in Section II, *Summary and Explanation of the Final Rule*, earlier in this preamble. In particular, OSHA evaluated all suggested changes to the proposed rule in terms of their impact on worker safety, their feasibility, their cost effectiveness, and their consonance with the OSH Act.

IV. Final Regulatory Impact Analysis, Regulatory Flexibility Certification, and Environmental Impact Assessment

A. Summary

The Agency has concluded that the final Subpart B standard for confined spaces in shipyards is technologically and economically feasible. Subpart B incorporates the approach of the previous standard and subpart A (as it applies to subpart B) while mandating new, comprehensive program elements such as training, duty to other employers, and rescue.

The Agency estimates that the final rule will result in no new significant costs for the industry. In addition, the Agency finds that the final Subpart B is the most cost-effective approach. The Agency agrees with its Shipyard Employment Standards Advisory Committee (SESAC) that the current approach of making confined and enclosed spaces and other dangerous atmospheres safe before entry and using Marine Chemists and competent persons to test and certify spaces has succeeded well and will continue to provide a safe working environment for employees.

TABLE I.—SUMMARY OF BENEFITS AND COSTS OF RECENT OSHA SAFETY STANDARDS

Standard (CFR cite)	Final rule date (FR cite)	Number of deaths prevented annually	Number of injuries prevented annually	Annual costs first 5 yrs (mill)	Annual cost next 5 yrs (mill)
Grain handling (§ 1910.272)	12–31–87 (52 FR 49622)	18	394	5.9–33.4	5.9–33.4
HAZWOPER (§ 1910.120)	3–6–89 (54 FR 9311)	32	18,700	153	153
Excavations (Subpart P)	10–31–89 (54 FR 45,954)	74	800	306	306
Process safety Mgmt (§ 1910.119)	2–24–92 (57 FR 6356)	330	1,917	880.7	470.8
Permit-required confined spaces (§ 1910.146).	1–14–93 (58 FR 4462)	54	5,041	202.4	202.4

In addition, extending the scope of Subpart B to land-side activities will benefit the industry and its workers by ensuring that land-side work activities are covered by a protective standard. Most of the industry has been following Subpart B for confined space work on land-side for some time. Because workers and the tasks and hazards are essentially the same whether on vessels or land-side, employing separate standards for each would have the potential to create confusion and actually increase the risk of an incident occurring. The full regulatory impact analysis is in docket S–050.

B. Introduction

Executive Order 12866 requires the Agency to perform an analysis of the costs, benefits, and regulatory alternatives of its "significant regulatory actions." A significant regulatory action is one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. This final rule directly affects one well-defined industry, the shipbuilding and ship repair industry, but there are no new costs of compliance. Accordingly, the promulgation of the confined and enclosed spaces and other dangerous atmospheres standard for shipyard employment is not a "significant regulatory action" for the purposes' of E.O. 12866.

As required by the OSH Act and its judicial interpretations, the Agency must demonstrate that this regulation is both technologically and economically feasible for the shipyard industry. The Agency has concluded that this standard meets both tests of feasibility.

In addition, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires Federal agencies to determine whether a regulation will have a significant economic impact on a substantial number of small entities. The Assistant Secretary certifies that this rule will not have such an impact, as the rule imposes no new cost on firms.

The Agency must also review this standard in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Guidelines of the Council of Environmental Quality (CEQ)(40 CFR part 1500), and OSHA's DOL NEPA Procedures (29 CFR part 11).

This summary of the Agency's analysis includes an overview of affected industries and employees, estimated benefits, the technological feasibility of the standard, estimated compliance costs, regulatory flexibility analysis, economic and environmental impacts, a discussion of the regulatory and non-regulatory alternatives to this final standard, and the existence of significant risk. The full text of the regulatory analysis has been placed in the shipyard confined space's Docket S–050.

OSHA created the Shipyard Employment Standards Advisory Committee (SESAC) in 1988 to advise the Agency in consolidating the shipyard standards. The committee was made up of representatives from industry, labor, government, and professional organizations. Besides making recommendations to the Agency about its regulations, the committee also provided information about current industry practices and the costs and benefits of various rules and alternatives. This information has been reviewed carefully by the Agency in developing the Regulatory Analysis of the final rule.

C. Industry Profile

The American shipyard industry has been in a long-term decline since 1981 when the Federal government ended subsidy programs for commercial ship construction. In the period 1976–1980, the industry built an average of 64 merchant vessels per year. Only five commercial ships have been built since 1988. The decline in merchant vessel construction in the 1980s was partially offset by a large increase in military ship construction. However, the end of the military competition with the former U.S.S.R. has resulted in a sharp drop in military ships on order. The recently completed "bottom-up" review of the armed forces has called for a major reduction in the number of active combat ships, and consequently a drop in the number of future orders. U.S. Navy orders, which averaged 19 per year in the 1980s, is estimated to fall to 8 per year during the period 1994–1999. Ship repair and construction of inland vessels and barges has remained constant during the past 5 years.

Employment in the shipbuilding industry had fallen from 177,000 in 1984 to about 125,000 by 1987 and remained near that level until 1992. The Bureau of Labor Statistics estimates that employment in the industry had fallen to 106,000 by late 1993. It is likely that employment will continue to fall to below 100,000 in the next few years. In 1992 the value of output from American shipyards was approximately $9.9 billion. Based on Dun & Bradstreet's estimated mean return for the shipyard industry of 2.9 percent, the industry earned approximately $287 million.

The Agency estimates that there are approximately 500 firms in SIC 3731, and a majority of these have fewer than 50 employees. Employment in the shipyard industry is highly concentrated. The ten largest shipyards employ approximately 70 percent of all shipyard workers, and only the 100 largest firms have as many as 100 employees. The Agency estimates that approximately 200 firms engaged in ship repair employ fewer than 11 employees.

D. Population at Risk

Based on data in the 1987 Census of Manufacturers, 75 percent of shipyard employees are production employees. Data from CONSAD Research Corporation's 1986 report to OSHA estimated that 76.6 percent of shipyard workers were production workers. Relying on the 1987 Census of Manufacturers, the Agency concludes that there are approximately 79,500 production workers (75 percent of 106,000 total employees) who are potentially involved in confined space entry in shipyard employment and are therefore exposed to confined space hazards.

E. Technological Feasibility

The shipyard industry has been applying the previous Subpart B on vessels for approximately 30 years—and to some extent on land-side activities. While the revised final standard mandates new elements such as training, rescue, and duty to other employers, it makes no fundamental change in the way shipyards perform confined spaces' work. Technologies such as atmospheric testing instruments, ventilation equipment, and respirators have been in use for many years throughout the industry. As the new standard does not require any new technology or engineering or other controls, the Agency concludes that this new confined space standard is technologically feasible. The performance-oriented criteria of the standard should also allow technological innovation to achieve compliance.

F. Costs and Benefits

Several elements in the final rule could impose costs on the shipyard industry: requirements for training of production workers; duty to other employers (contractors and subcontractors); extending the scope to land-side operations; and specifications for self-rescue and rescue teams. The Shipyard Employment Safety Advisory Committee (SESAC) recommended that all of these provisions be included in the final confined spaces standard to make the rule comprehensive. Submissions to the docket by the shipyard industry, unions, and professionals in the maritime industry indicate that these elements would not impose new costs on shipyards but would in essence codify current industry practice. Testimony at SESAC's meetings also consistently indicated that the elements of the new standard would impose no new costs on the industry (SESAC transcript Sept. 3, 1992, pp. 471–503). The Agency therefore concludes that the new Subpart B is economically feasible, and will have no effect on profits or the cost of output of the shipyard industry.

A benefit of the final rule is to eliminate a paperwork requirement of reporting the identity of shipyard competent persons to the Agency on two forms and to clarify the duties of the competent person, Certified Industrial Hygienist, and Marine Chemist. The Agency believes that full compliance with existing Subpart B would eliminate the average of one to two annual fatalities. However, the Agency also concludes that mandating the new comprehensive elements of the final standard (for training, duty to other employers, and rescue) will contribute to compliance and discipline in applying Subpart B and will reduce the number of fatalities. The Agency also concludes that increasing the oxygen content to 19.5 percent by volume, specifying the order of atmospheric testing, and limiting oxygen to no more than 22 percent by volume reduces significant risk relative to the requirements of existing Subpart B. The shipyard industry largely conforms to these practices at the present time.

G. Regulatory Alternatives

The Agency also believes that the proposed rule is the most cost-effective regulatory alternative for this industry. If the general industry "permit-entry confined spaces" standard (29 CFR 1910.146) were applied to land-side activities—or all shipyard work—costs would be incurred to re-train shipyard production workers in a second procedure for entering and working in confined spaces, for attendants, and for establishing a written program. The Agency estimates that this would cost the industry approximately $104 million annually. These costs are not as high as estimates found in the comments to the docket because the final general industry permit spaces rule differed significantly from the proposed rule, especially on the number of attendants that would be required. Adopting the general industry confined spaces for only land-side shipyard operations could also result in increased risk of accidents if shipyard workers had to apply two distinct standards to their work. Confined space work is routine in shipyards and employees frequently shift back and forth between land-side and vessels.

A second regulatory alternative would be to apply the general industry standard to all shipyard work. Here the program costs would be as great as the first alternative but the Agency has concluded that there would not be additional benefits. The shipyard confined space standard is in many ways a more restrictive subset of the general industry standard. The additional program-based elements of § 1910.146 would not improve the safety of confined space entry in shipyards because the shipyard standard is even more comprehensive in its coverage of hazardous atmospheres. Further, its approach to inspection, testing, and ventilating spaces has become an

integral part of the routine work activity in shipyard employment.

Confined and enclosed space and other dangerous atmosphere work in shipyards is unique: it is routine; hazardous atmospheres are common; and the work activity itself frequently introduces or creates hazards. The confined spaces of each ship are different. A ship's interior structure may consist of a series of nested confined spaces, one within the other, each of which may be irregular and accessible through small hatches. Safety procedures based on attendants or quick rescue are not a safe or a practical solution.

Evidence in the record from the industry attests to the success of the shipyard industry in protecting employees during work in confined spaces (Docket S–050: 11–3, 11–6, 11–12, 11–13, 11–17, 11–30). However, fatalities and injuries do occur: OSHA recorded 20 deaths between 1983–1992 in its Fatality Investigation Reports for the shipyard and boat-building industries combined. In every case, OSHA's evaluation indicated that the fatality was caused by a failure to follow the requirements of the previous Subpart B. Although accidents are relatively few given the large number of confined space entries and the hazards involved, the continuing number of fatalities and injuries indicates that a regulation is necessary to maintain safe work practices.

H. International Trade

In accordance with Executive Order 12866, OSHA assessed the effects of the final standard on international trade. The shipyard industry actively competes with foreign shipyards for ship repair and shipbuilding orders. If this OSHA regulation significantly increased the price of products and services of domestic shipyards, foreign shipyards could benefit. OSHA believes, however, that there will be no significant effect on products or services as a result of this regulation.

I. Environmental Impact

The confined spaces standard has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR Part 1500), and DOL NEPA Procedures (29 CFR Part 11). This rule will not result in a significant incremental increase release of hazardous substances into the ambient air. Releases of substances regulated under EPA's SARA Title III or EPA NESHAP standards are subject to reporting and control requirements in those rules.

J. References

1. U.S. Department of Commerce. International Trade Administration. *1993 U.S. Industrial Outlook*. 30th Annual Edition.

2. U.S. Department of Transportation. Maritime Administration. *Report on Survey of U.S. Shipbuilding and Repair Facilities, 1990*.

3. U.S. Department of Commerce. Bureau of the Census. Preliminary Report Industry Service 1987 Census of Manufacturers: Shipbuilding and Repairing (Industry 3731). Washington, D.C.: Government Printing Office, 1990.

4. U.S. Department of Commerce. Bureau of the Census. Preliminary Report Industry Service 1987 Census of Manufacturers: Shipbuilding and Repairing (Industry 3731). Washington, D.C.: Government Printing Office, 1989.

5. CONSAD Research Corp. Data to Support a Regulatory Analysis of the Proposed Standard for Shipbuilding and Repairing. Final Report. Prepared for the U.S. Department of Labor, Occupational Safety and Health Administration, under Contract No. J–9–F–4–0024. Pittsburgh: CONSAD, November 1985.

6. CONSAD Research Corp. Data to Support a Regulatory Analysis of the Proposed Standard for Shipbuilding and Repairing: Subpart B. Prepared for the U.S. Department of Labor, Occupational Safety and Health Administration, under Contract No. J–9–F–4–0024. Pittsburgh: CONSAD, June 1986.

7. Commission on Merchant Marine and Defense. First Report of the Commission of Merchant Marine and Defense, Appendices. Washington, D.C., September 30, 1987.

8. Dun and Bradstreet Financial Data. 1989, 1991.

9. Bureau of Labor Statistics, Employment and Earnings, Nov., 1993.

10. Executive Office of the President. OMB. *Standard Industrial Classification Manual*. 1987.

11. Main Hurdman/KGM. Profile of the Shipbuilding and Repairing Industry. Prepared for the U.S. Department of Labor, Occupational Safety and Health Administration. Washington, D.C., October 1984. 62 Pp.

12. Shipyard Council of America. "Merchant Shipbuilding" September, 1987; "Naval Shipbuilding" January, 1992; "Ship Construction Report" July, 1991.

13. American Waterways Shipyard Conference. 1989 and 1992 Annual Shipyard Survey. Arlington, Va.

14. Bureau of Labor Statistics, Occupational Injuries and Illnesses in the U.S. by Industry 1992.

15. *Selected Occupational Fatalities Related to Ship Building and Repairing as Found in Reports of OSHA Fatality/Catastrophe Investigations*, U.S. Dept. of Labor, OSHA, 1990.

V. Effective Date

In developing the final rule, OSHA has considered whether a delayed effective date is necessary for any of the provisions of the standard. Employers will need time to integrate their procedures for complying with the provisions in this standard as applied to land-side confined and enclosed spaces and other dangerous atmospheres. Although the record indicates that the new provisions (training, rescue, and duties to other employers) being used on board vessels and vessel sections are current industry practice, under this standard they also have been expanded to include land-side operations. OSHA believes that a period of 90 days will be adequate for this purpose, since most of the requirements in the final rule do not require extensive training or major modifications of existing work practices. This amount of time will be adequate for employers to ensure that their work practices conform to the requirements of the revised standard.

VI. Information Collection Requirements

5 CFR part 1320 sets forth procedures for agencies to follow in obtaining OMB clearance for information collection requirements under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The final Confined and Enclosed Spaces and Other Dangerous Atmospheres standard requires the employer to allow OSHA access to the competent person roster, testing and inspection results, and training records. In accordance with the provisions of the Paperwork Reduction Act and the regulations issued pursuant thereto, OSHA certifies that it has submitted the information collection to OMB for review under section 3504(b) of that Act.

Public reporting burden for this collection of information is estimated to average five minutes per response to allow OSHA compliance officers access to the employer's records. Send comments regarding this burden estimate, or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, room N–1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Management and Budget, Paperwork Reduction Project (Confined and Enclosed Spaces and Other Dangerous Atmospheres). Washington, DC 20503.

VII. Federalism

This final rule has been reviewed in accordance with Executive Order 12612 (52 FR 41685, October 30, 1987), regarding Federalism. This Order requires that agencies, to the extent possible, refrain from limiting state

policy options, consult with states before taking any actions which would restrict state policy options, and take such actions only if there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of state law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health Act (OSH Act) expresses Congress' clear intent to preempt state laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. Under the OSH Act, a state can avoid preemption only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Occupational safety and health standards developed by such Plan-States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Where such standards are applicable to products distributed or used in interstate commerce, they may not unduly burden commerce and must be justified by compelling local conditions. (See section 18(c)(2) of the OSH Act.)

The Federal standards on confined and enclosed spaces and other dangerous atmospheres address hazards which are not unique to any one state or region of the country. Nonetheless, states with occupational safety and health plans approved under section 18 of the OSH Act will be able to develop their own state standards to deal with any special problems which might be encountered in a particular state. Moreover, because these standards are written in general, performance-oriented terms, there is considerable flexibility for state plans to require, and for affected employers to use, methods of compliance which are appropriate to the working conditions covered by the standard.

In brief, this final rule addresses a clear national problem related to occupational safety and health in shipyard employment. States which have elected to participate under section 18 of the OSH Act are not preempted by this standard and will be able to address any special conditions within the framework of the Federal Act, while ensuring that the state standards are at least as effective as this standard.

VIII. State Plan Standards

The 23 states and 2 territories with their own OSHA-approved occupational safety and health plans must adopt a comparable standard within 6 months of the publication date of the final standard. These states and territories are: Alaska, Arizona, California, Connecticut,[4] Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York,[5] North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a state standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate, in these states.

IX. Authority

This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210.

List of Subjects in 29 CFR Part 1915

Confined spaces, Emergency medical services, Hazardous substances, Marine safety, Occupational Safety and Health, Signs and Symbols, Vessels, Welding.

Accordingly, pursuant to section 41 of LHWCA (33 U.S.C. 941), sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 1–90 (55 FR 9033), and 29 CFR part 1911, 29 CFR part 1915 is amended as set forth below.

Signed at Washington, DC, this 8th day of July 8, 1994.

Joseph A. Dear,

Assistant Secretary of Labor.

Part 1915 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 1915—[AMENDED]

1. The authority citation for part 1915 continues to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Sec. 4 of the Administrative Procedure Act (5 U.S.C. 553); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), or 1–90 (55 FR 9033) as applicable; 29 CFR Part 1911.

Subpart A—General Provisions

2. Section 1915.7 is revised to read as follows:

§ 1915.7 Competent person.

(a) *Application.* This section applies to shipyard employment.

(b) *Designation.* (1) One or more competent persons shall be designated by the employer in accordance with the applicable requirements of this section, unless the requirements of Subparts B, C, D and H of this part are always carried out by a Marine Chemist. *Exception:* The employer may designate any person who meets the applicable portions of the criteria set forth in paragraph (c) of this section as a competent person who is limited to performing testing to the following situations:

(i) Repair work on small craft in boat yards where only combustible gas indicator tests are required for fuel tank leaks or when using flammable paints below decks;

(ii) Building of wooden vessels where only knowledge of the precautions to be taken when using flammable paints is required;

(iii) The breaking of vessels where there is no fuel oil or other flammable hazard; and

(iv) Tests and inspections performed to comply with §§ 1915.35(b)(8) and 1915.36(a)(5).

(2)(i) The employer shall maintain either a roster of designated competent persons or a statement that a Marine Chemist will perform the tests or inspections which require a competent person.

(ii) The employer shall make the roster of designated persons or the statement available to employees, the employee's representative, the Director or the Assistant Secretary upon request.

(iii) The roster shall contain, as a minimum, the following:

(A) The employers' name,

(B) The designated competent person's name(s), and

(C) The date the employee was trained as a competent person.

(c) *Criteria.* The employer shall ensure that each designated competent person has the following skills and knowledge:

(1) Ability to understand and carry out written or oral information or instructions left by Marine Chemist, Coast Guard authorized persons and Certified Industrial Hygienists;

(2) Knowledge of Subparts B, C, D and H of this part;

(3) Knowledge of the structure, location, and designation of spaces where work is done;

(4) Ability to calibrate and use testing equipment including but not limited to, oxygen indicators, combustible gas indicators, carbon monoxide indicators, and carbon dioxide indicators, and to interpret accurately the test results of that equipment;

(5) Ability to perform all required tests and inspections which are or may

[4] Plan covers only State and local government employees.

[5] Plan covers only State and local government employees.

be performed by a competent person as set forth in Subparts B, C, D and H of this part.

(6) Ability to inspect, test, and evaluate spaces to determine the need for further testing by a Marine Chemist or a Certified Industrial Hygienist; and

(7) Ability to maintain records required by this section.

(d) *Recordkeeping.* (1) When tests and inspections are performed by a competent person, Marine Chemist, or Certified Industrial Hygienist as required by any provisions of subparts B, C, D, or H of this part, the employer shall ensure that the person performing the test and inspection records the location, time, date, location of inspected spaces, and the operations performed, as well as the test results and any instructions.

(2) The employer shall ensure that the records are posted in the immediate vicinity of the affected operations while work in the spaces is in progress. The records shall be kept on file for a period of at least three months from the completion date of the specific job for which they were generated.

(3) The employer shall ensure that the records are available for inspection by the Assistant Secretary, Director, and employees and their representatives.

3. Subpart B of part 1915 is revised to read as follows:

Subpart B—Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment

Sec.
1915.11 Scope, application, and definitions applicable to this subpart.
1915.12 Precautions before entering confined and enclosed spaces and other dangerous atmospheres.
1915.13 Cleaning and other cold work.
1915.14 Hot work.
1915.15 Maintenance of safe conditions.
1915.16 Warning signs and labels.

Appendix A to Subpart B—Compliance Assistance Guidelines for Confined and Enclosed Spaces and Other Dangerous Atmospheres

Appendix B to Subpart B—Reprint of U.S. Coast Guard Regulations Referenced in Subpart B, for Determination of Coast Guard Authorized Persons

§ 1915.11 Scope, application and definitions applicable to this Subpart.

(a) *Scope and application.* This Subpart applies to work in confined and enclosed spaces and other dangerous atmospheres in shipyard employment, including vessels, vessel sections, and on land-side operations regardless of geographic location.

(b) *Definitions applicable to this Subpart.*

Adjacent spaces means those spaces bordering a subject space in all directions, including all points of contact, corners, diagonals, decks, tank tops, and bulkheads.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health, or designated representative.

Certified Industrial Hygienist (CIH) means an industrial hygienist who is certified by the American Board of Industrial Hygiene.

Coast Guard authorized person means an individual who meets the requirement of Appendix B to subpart B of this part 1915 for tank vessels, for passenger vessels, and for cargo and miscellaneous vessels.

Dangerous atmosphere means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (i.e., escape unaided from a confined or enclosed space), injury, or acute illness.

Director means the Director of the National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designated representative.

Enter with Restrictions denotes a space where entry for work is permitted only if engineering controls, personal protective equipment, clothing, and time limitations are as specified by the Marine Chemist, Certified Industrial Hygienist, or the shipyard competent person.

Entry means the action by which a person passes through an opening into a space. Entry includes ensuing work activities in that space and is considered to have occurred as soon as any part of the entrant's body breaks the plane of an opening into the space.

Hot work means any activity involving riveting, welding, burning, the use of powder-actuated tools or similar fire-producing operations. Grinding, drilling, abrasive blasting, or similar spark-producing operations are also considered hot work except when such operations are isolated physically from any atmosphere containing more than 10 percent of the lower explosive limit of a flammable or combustible substance.

Immediately dangerous to life or health (IDLH) means an atmosphere that poses an immediate threat to life or that is likely to result in acute or immediate severe health effects.

Inert or inerted atmosphere means an atmospheric condition where:

(1) The oxygen content of the atmosphere in the space is maintained at a level equal to or less than 8.0 percent by volume or at a level at or below 50 percent of the amount required to support combustion, whichever is less; or

(2) The space is flooded with water and the vapor concentration of flammable or combustible materials in the free space atmosphere above the water line is less than 10 percent of the lower explosive limit for the flammable or combustible material.

Labeled means identified with a sign, placard, or other form of written communication, including pictograms, that provides information on the status or condition of the work space to which it is attached.

Lower explosive limit (LEL) means the minimum concentration of vapor in air below which propagation of a flame does not occur in the presence of an ignition source.

Marine Chemist means an individual who possesses a current Marine Chemist Certificate issued by the National Fire Protection Association.

Not Safe for Hot Work denotes a space where hot work may not be performed because the conditions do not meet the criteria for Safe for Hot Work.

Nationally Recognized Testing Laboratory (NRTL) means an organization recognized by OSHA, in accordance with Appendix A of 29 CFR 1910.7, which tests for safety and lists or labels or accepts equipment and materials that meet all the criteria found in § 1910.7(b)(1) through (b)(4)(ii).

Not Safe for Workers denotes a space where an employee may not enter because the conditions do not meet the criteria for Safe for Workers.

Oxygen-deficient atmosphere means an atmosphere having an oxygen concentration of less than 19.5 percent by volume.

Oxygen-enriched atmosphere means an atmosphere that contains 22.0 percent or more oxygen by volume.

Safe for Hot Work denotes a space that meets all of the following criteria:

(1) The oxygen content of the atmosphere does not exceed 22.0 percent by volume;

(2) The concentration of flammable vapors in the atmosphere is less than 10 percent of the lower explosive limit;

(3) The residues or materials in the space are not capable of producing a higher concentration than permitted in paragraph (1) or (2) of the above, under existing atmospheric conditions in the presence of hot work and while maintained as directed by the Marine Chemist or competent person, and

(4) All adjacent spaces have been cleaned, or inerted, or treated sufficiently to prevent the spread of fire.

Safe for Workers denotes a space that meets the following criteria:

(1) The oxygen content of the atmosphere is at least 19.5 percent and below 22 percent by volume;

(2) The concentration of flammable vapors is below 10 percent of the lower explosive limit (LEL);

(3) Any toxic materials in the atmosphere associated with cargo, fuel, tank coatings, or inerting media are within permissible concentrations at the time of the inspection; and

(4) Any residues or materials associated with the work authorized by the Marine Chemist, Certified Industrial Hygienist, or competent person will not produce uncontrolled release of toxic materials under existing atmospheric conditions while maintained as directed.

Space means an area on a vessel or vessel section or within a shipyard such as, but not limited to: cargo tanks or holds; pump or engine rooms; storage lockers; tanks containing flammable or combustible liquids, gases, or solids; rooms within buildings; crawl spaces; tunnels; or accessways. The atmosphere within a space is the entire area within its bounds.

Upper explosive limit (UEL) means the maximum concentration of flammable vapor in air above which propagation of flame does not occur on contact with a source of ignition.

Vessel section means a sub-assembly, module, or other component of a vessel being built, repaired, or broken.

Visual inspection means the physical survey of the space, its surroundings and contents to identify hazards such as, but not limited to, restricted accessibility, residues, unguarded machinery, and piping or electrical systems.

§ 1915.12 Precautions before entering confined and enclosed spaces and other dangerous atmospheres.

(a) *Oxygen content.* (1) The employer shall ensure that the following spaces are visually inspected and tested by a competent person to determine the atmosphere's oxygen content prior to initial entry into the space by an employee:

(i) Spaces that have been sealed, such as, but not limited to, spaces that have been coated and closed up, and non-ventilated spaces that have been freshly painted;

(ii) Spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases;

(iii) Spaces and adjacent spaces that contain or have contained liquids, gases, or solids that are toxic, corrosive, or irritant;

(iv) Spaces and adjacent spaces that have been fumigated; and

(v) Spaces containing materials or residues of materials that create an oxygen-deficient atmosphere.

(2) If the space to be entered contains an oxygen deficient atmosphere, the space shall be labeled "Not Safe for Workers" or, if oxygen-enriched, "Not Safe for Workers—Not Safe for Hot Work." If an oxygen-deficient or oxygen-enriched atmosphere is found, ventilation shall be provided at volumes and flow rates sufficient to ensure that the oxygen content is maintained at or above 19.5 percent and below 22.0 percent by volume. The warning label may be removed when the oxygen content is equal to or greater than 19.5 and less than 22.0 percent by volume.

(3) An employee may not enter a space where the oxygen content, by volume, is below 19.5 percent or above 22.0 percent. Exception: An employee may enter for emergency rescue or for a short duration for installation of ventilation equipment necessary to start work in the space provided:

(i) The atmosphere in the space is monitored for oxygen content, by volume, continuously; and

(ii) Respiratory protection and other appropriate personal protective equipment and clothing are provided in accordance with Subpart I of this part.

Note to paragraph (a): Other provisions for work in IDLH atmospheres are located in Subpart I of this part.

(b) *Flammable atmospheres.* (1) The employer shall ensure that spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases are:

(i) Inspected visually by the competent person to determine the presence of combustible or flammable liquids; and

(ii) Tested by a competent person prior to entry by an employee to determine the concentration of flammable vapors and gases within the space.

(2) If the concentration of flammable vapors or gases in the space to be entered is equal to or greater than 10 percent of the lower explosive limit, the space shall be labeled "Not Safe for Workers" and "Not Safe for Hot-Work." Ventilation shall be provided at volumes and flow rates sufficient to ensure that the concentration of flammable vapors is maintained below 10 percent of the lower explosive limit. The warning labels may be removed when the concentration of flammable vapors is below 10 percent of the lower explosive limit.

(3) An employee may not enter a space where the concentration of flammable vapors or gases is equal to or greater than 10 percent of the lower explosive limit. Exception: An employee may enter for emergency rescue or for a short duration for installation of ventilation equipment necessary to start work in the space, provided:

(i) No ignition sources are present;

(ii) The atmosphere in the space is monitored continuously;

(iii) The atmosphere in the space is maintained above the upper explosive limit; and

(iv) Respiratory protection and other appropriate personal protective equipment and clothing are provided in accordance with Subpart I of this part.

Note 1 to paragraph (b): Additional provisions for work in IDLH atmospheres are located in Subpart I of this part.

Note 2 to paragraph (b): Additional provisions for work in spaces containing a flammable substance which also has a permissible exposure limit, are located in Subpart Z of 29 CFR part 1915, and § 1915.12(c).

(c) *Toxic, corrosive, irritant or fumigated atmospheres and residues.* (1) The employer shall ensure that spaces or adjacent spaces that contain or have contained liquids, gases, or solids that are toxic, corrosive or irritant are:

(i) Inspected visually by the competent person to determine the presence of toxic, corrosive, or irritant residue contaminants; and

(ii) Tested by a competent person prior to initial entry by an employee to determine the air concentration of toxics, corrosives, or irritants within the space.

(2) If a space contains an air concentration of a material which exceeds a part 1915 subpart Z permissible exposure limit (PEL) or is IDLH, the space shall be labeled "Not Safe for Workers." Ventilation shall be provided at volumes and flow rates which will ensure that air concentrations are maintained within the PEL or, in the case of contaminants for which there is no established PEL, below the IDLH. The warning label may be removed when the concentration of contaminants is maintained within the PEL or below IDLH level.

(3) If a space cannot be ventilated to within the PELs or is IDLH, a Marine Chemist or CIH must re-test until the space can be certified "Enter with Restrictions" or "Safe for Workers."

(4) An employee may not enter a space whose atmosphere exceeds a PEL or is IDLH. Exception: An employee may enter for emergency rescue, or for a short duration for installation of ventilation equipment provided:

(i) The atmosphere in the space is monitored continuously;

(ii) Respiratory protection and other necessary and appropriate personal protective equipment and clothing are

provided in accordance with Subpart I of this part.

Note to paragraph (c): Other provisions for work in IDLH atmospheres are located in Subpart I of this part.

(d) *Training of employees entering confined and enclosed spaces or other dangerous atmospheres.* (1) The employer shall ensure that each employee that enters a confined or enclosed space and other areas with dangerous atmospheres is trained to perform all required duties safely.

(2) The employer shall ensure that each employee who enters a confined space, enclosed space, or other areas with dangerous atmospheres is trained to:

(i) Recognize the characteristics of the confined space;

(ii) Anticipate and be aware of the hazards that may be faced during entry;

(iii) Recognize the adverse health effects that may be caused by the exposure to a hazard;

(iv) Understand the physical signs and reactions related to exposures to such hazards;

(v) Know what personal protective equipment is needed for safe entry into and exit from the space;

(vi) Use personal protective equipment; and

(vii) Where necessary, be aware of the presence and proper use of barriers that may be needed to protect an entrant from hazards.

(3) The employer shall ensure that each entrant into confined or enclosed spaces or other dangerous atmospheres is trained to exit the space or dangerous atmosphere whenever:

(i) The employer or his or her representative orders evacuation;

(ii) An evacuation signal such as a alarm is activated ; or

(iii) The entrant perceives that he or she is in danger.

(4) The employer shall provide each employee with training:

(i) Before the entrant begins work addressed by this section; and

(ii) Whenever there is a change in operations or in an employee's duties that presents a hazard about which the employee has not previously been trained.

(5) The employer shall certify that the training required by paragraphs (d)(1) through (d)(4) of this section has been accomplished.

(i) The certification shall contain the employee's name, the name of the certifier, and the date(s) of the certification.

(ii) The certification shall be available for inspection by the Assistant Secretary, the Director, employees, and their representatives.

(e) *Rescue teams.* The employer shall either establish a shipyard rescue team or arrange for an outside rescue team which will respond promptly to a request for rescue service.

(1) Shipyard rescue teams shall meet the following criteria:

(i) Each employee assigned to the shipyard team shall be provided with and trained to use the personal protective equipment he or she will need, including respirators and any rescue equipment necessary for making rescues from confined and enclosed spaces and other dangerous atmospheres.

(ii) Each employee assigned to the shipyard rescue team shall be trained to perform his or her rescue functions including confined and enclosed and other dangerous atmosphere entry.

(iii) Shipyard rescue teams shall practice their skills at least once every 12 months. Practice drills shall include the use of mannequins and rescue equipment during simulated rescue operations involving physical facilities that approximate closely those facilities from which rescue may be needed.

Note to paragraph (e)(1)(iii): If the team preforms an actual rescue during the 12 month period, an additional practice drill for that type of rescue is not required.

(iv) At least one person on each rescue team shall maintain current certification in basic first aid which includes maintenance of an airway, control of bleeding, maintenance of circulation and cardiopulmonary resuscitation (CPR) skills.

(2) The employer shall inform outside rescue teams of the hazards that the team may encounter when called to perform confined and enclosed space or other dangerous atmosphere rescue at the employer's facility so that the rescue team can be trained and equipped.

Note to paragraph (e): The criteria for in-house rescue, listed in paragraph (e)(1) can be used by the employer in evaluating outside rescue services.

(f) *Exchanging hazard information between employers.* Each employer whose employees work in confined and enclosed spaces or other dangerous atmospheres shall ensure that all available information on the hazards, safety rules, and emergency procedures concerning those spaces and atmospheres is exchanged with any other employer whose employees may enter the same spaces.

§ 1915.13 Cleaning and other cold work.

(a) *Locations covered by this section.* The employer shall ensure that manual cleaning and other cold work are not performed in the following spaces unless the conditions of paragraph (b) of this section have been met:

(1) Spaces containing or having last contained bulk quantities of combustible or flammable liquids or gases; and

(2) Spaces containing or having last contained bulk quantities of liquids, gases or solids that are toxic, corrosive or irritating.

(b) *Requirements for performing cleaning or cold work.* (1) Liquid residues of hazardous materials shall be removed from work spaces as thoroughly as practicable before employees start cleaning operations or cold work in a space. Special care shall be taken to prevent the spilling or the draining of these materials into the water surrounding the vessel, or for shore-side operations, onto the surrounding work area.

(2) Testing shall be conducted by a competent person to determine the concentration of flammable, combustible, toxic, corrosive, or irritant vapors within the space prior to the beginning of cleaning or cold work.

(3) Continuous ventilation shall be provided at volumes and flow rates sufficient to ensure that the concentration(s) of:

(i) Flammable vapor is maintained below 10 percent of the lower explosive limit; and

Note to paragraph (b)(3)(i): Spaces containing highly volatile residues may require additional ventilation to keep the concentration of flammable vapors below 10 percent of the lower explosive limit and within the permissible exposure limit.

(ii) Toxic, corrosive, or irritant vapors are maintained within the permissible exposure limits and below IDLH levels.

(4) Testing shall be conducted by the competent person as often as necessary during cleaning or cold work to assure that air concentrations are below 10 percent of the lower explosive limit and within the PELs and below IDLH levels. Factors such as, but not limited to, temperature, volatility of the residues and other existing conditions in and about the spaces are to be considered in determining the frequency of testing necessary to assure a safe atmosphere.

Note to paragraph (b)(4): See Appendix A for additional information on frequency of testing.

(5) Spills or other releases of flammable, combustible, toxic, corrosive, and irritant materials shall be cleaned up as work progresses.

(6) An employee may not enter a confined or enclosed space or other dangerous atmosphere if the concentration of flammable or combustible vapors in work spaces

exceeds 10 percent of the lower explosive limit. Exception: An employee may enter for emergency rescue or for a short duration for installation of ventilation equipment provided:

(i) No ignition sources are present;

(ii) The atmosphere in the space is monitored continuously;

(iii) The atmosphere in the space is maintained above the upper explosive limit; and

(iv) Respiratory protection, personal protective equipment, and clothing are provided in accordance with subpart I of this part.

Note to paragraph (b)(6): Other provisions for work in IDLH and other dangerous atmospheres are located in Subpart I of this part.

(7) A competent person shall test ventilation discharge areas and other areas where discharged vapors may collect to determine if vapors discharged from the spaces being ventilated are accumulating in concentrations hazardous to employees.

(8) If the tests required in paragraph (b)(7) of this section indicate that concentrations of exhaust vapors that are hazardous to employees are accumulating, all work in the contaminated area shall be stopped until the vapors have dissipated or been removed.

(9) Only explosion-proof, self-contained portable lamps, or other electric equipment approved by a National Recognized Testing Laboratory (NRTL) for the hazardous location shall be used in spaces described in paragraph (a) of this section until such spaces have been certified as "Safe for Workers."

Note to paragraph (b)(9): Battery-fed, portable lamps or other electric equipment bearing the approval of a NRTL for the class, and division of the location in which they are used are deemed to meet the requirements of this paragraph.

(10) The employer shall prominently post signs that prohibit sources of ignition within or near a space that has contained flammable or combustible liquids or gases in bulk quantities:

(i) At the entrance to those spaces;

(ii) In adjacent spaces; and

(iii) In the open area adjacent to those spaces.

(11) All air moving equipment and its component parts, including duct work, capable of generating a static electric discharge of sufficient energy to create a source of ignition, shall be bonded electrically to the structure of a vessel or vessel section or, in the case of land-side spaces, grounded to prevent an electric discharge in the space.

(12) Fans shall have non-sparking blades, and portable air ducts shall be of non-sparking materials.

Note to paragraph (b): See § 1915.12(c) of this part and applicable requirements of 29 CFR part 1915, subpart Z for other provisions affecting cleaning and cold work.

§ 1915.14 Hot work.

(a) *Hot work requiring testing by a Marine Chemist or Coast Guard authorized person.* (1) The employer shall ensure that hot work is not performed in or on any of the following confined and enclosed spaces and other dangerous atmospheres, boundaries of spaces or pipelines until the work area has been tested and certified by a Marine Chemist or a U.S. Coast Guard authorized person as "Safe for Hot Work":

(i) Within, on, or immediately adjacent to spaces that contain or have contained combustible or flammable liquids or gases.

(ii) Within, on, or immediately adjacent to fuel tanks that contain or have last contained fuel; and

(iii) On pipelines, heating coils, pump fittings or other accessories connected to spaces that contain or have last contained fuel.

(iv) Exception: Within spaces adjacent to spaces in which the flammable gases or liquids have a flash point below 150° F (65.6° C) and the distance between such spaces and the work is greater than 25 feet (7.5 m).

Note to paragraph (a)(1): The criteria for safe for hot work is located in the definition section of subpart B.

(2) The certificate issued by the Marine Chemist or Coast Guard authorized person shall be posted in the immediate vicinity of the affected operations while they are in progress and kept on file for a period of at least three months from the date of the completion of the operation for which the certificate was generated.

(b) *Hot work requiring testing by a competent person.* (1) Hot work is not permitted in or on the following spaces or adjacent spaces or other dangerous atmospheres until they have been tested by a competent person and determined to contain no concentrations of flammable vapors equal to or greater than 10 percent of the lower explosive limit:

(i) Dry cargo holds,

(ii) The bilges,

(iii) The engine room and boiler spaces for which a Marine Chemist or a Coast Guard authorized person certificate is not required under paragraph (a)(1)(i) of this section, and

(iv) Vessels and vessel sections for which a Marine Chemist or Coast Guard authorized person certificate is not required under paragraph (a)(1)(i) of this section, and

(v) Land-side confined and enclosed spaces or other dangerous atmospheres not covered by paragraph (a)(1) of this section.

(2) If the concentration of flammable vapors or gases is equal to or greater than 10 percent of the lower explosive limit in the space or an adjacent space where the hot work is to be done, then the space shall be labeled "Not Safe for Hot Work" and ventilation shall be provided at volumes and flow rates sufficient to ensure that the concentration of flammable vapors or gases is below 10 percent by volume of the lower explosive limit. The warning label may be removed when the concentration of flammable vapors and gases are below 10 percent lower explosive limit.

Note to § 1915.14: See appendix A for additional information relevant to performing hot work safely.

§ 1915.15 Maintenance of safe conditions.

(a) *Preventing hazardous materials from entering.* Pipelines that could carry hazardous materials into spaces that have been certified "Safe for Workers" or "Safe for Hot Work" shall be disconnected, blanked off, or otherwise blocked by a positive method to prevent hazardous materials from being discharged into the space.

(b) *Alteration of existing conditions.* When a change that could alter conditions within a tested confined or enclosed space or other dangerous atmosphere occurs, work in the affected space or area shall be stopped. Work may not be resumed until the affected space or area is visually inspected and retested and found to comply with §§ 1915.12, 1915.13, and 1915.14 of this part, as applicable.

Note to paragraph (b): Examples of changes that would warrant the stoppage of work include: The opening of manholes or other closures or the adjusting of a valve regulating the flow of hazardous materials.

(c) *Tests to maintain the conditions of a Marine Chemist's or Coast Guard authorized person's certificates.* A competent person shall visually inspect and test each space certified as "Safe for Workers" or "Safe for Hot Work," as often as necessary to ensure that atmospheric conditions within that space is maintained within the conditions established by the certificate after the certificate has been issued.

(d) *Change in the conditions of a Marine Chemist's or Coast Guard authorized person's certificate.* If a competent person finds that the

atmospheric conditions within a certified space fail to meet the applicable requirements of §§ 1915.12, 1915.13, and 1915.14 of this part, work in the certified space shall be stopped and may not be resumed until the space has been retested by a Marine Chemist or Coast Guard authorized person and a new certificate issued in accordance with § 1915.14(a).

(e) *Tests to maintain a competent person's findings.* After a competent person has conducted a visual inspection and tests required in §§ 1915.12, 1915.13, and 1915.14 of this part and determined a space to be safe for an employee to enter, he or she shall continue to test spaces as often as necessary to ensure that the required atmospheric conditions within the tested space are maintained.

(f) *Changes in conditions determined by competent person's findings.* After the competent person has determined initially that a space is safe for an employee to enter and he or she finds subsequently that the conditions within the tested space fail to meet the requirements of §§ 1915.12, 1915.13, and 1915.14, of this part, as applicable, work shall be stopped until the conditions in the tested space are corrected to comply with §§ 1915.12, 1915.13, and 1915.14, as applicable.

§ 1915.16 Warning signs and labels.

(a) *Employee comprehension of signs and labels.* The Employer shall ensure that each sign or label posted to comply with the requirements of this subpart is presented in a manner that can be perceived and understood by all employees.

(b) *Posting of large work areas.* A warning sign or label required by paragraph (a) of this section need not be posted at an individual tank, compartment or work space within a work area if the entire work area has been tested and certified: not safe for workers, not safe for hot work, and if the sign or label to this effect is posted conspicuously at each means of access to the work area.

Appendix A to Subpart B—Compliance Assistance Guidelines for Confined and Enclosed Spaces and Other Dangerous Atmospheres

This Appendix is a non-mandatory set of guidelines provided to assist employers in complying with the requirements of this subpart. This Appendix neither creates additional obligations nor detracts from obligations otherwise contained in the standard. It is intended to provide explanatory information and educational material to employers and employees to foster understanding of, and compliance with, the standard.

Sections 1915.11 through 1915.16. These standards are minimum safety standards for entering and working safely in vessel tanks and compartments.

Section 1915.11(b) Definition of "Hot work." There are several instances in which circumstances do not necessitate that grinding, drilling, abrasive blasting be regarded as hot work. Some examples are:

1. Abrasive blasting of the hull for paint preparation does not necessitate pumping and cleaning the tanks of a vessel.

2. Prior to hot work on any hollow structure, the void space should be tested and appropriate precautions taken.

Section 1915.11(b) Definition of "Lower explosive limit." The terms lower flammable limit (LFL) and lower explosive limit (LEL) are used interchangeably in fire science literature.

Section 1915.11(b) Definition of "Upper explosive limit." The terms upper flammable limit (UFL) and upper explosive limit (UEL) are used interchangeably in fire science literature.

Section 1915.12(a)(4). After a tank has been properly washed and ventilated, the tank should contain 20.8 percent oxygen by volume. This is the same amount found in our normal atmosphere at sea level. However, it is possible that the oxygen content will be lower. When this is the case, the reasons for this deficiency should be determined and corrective action taken.

An oxygen content of 19.5 percent can support life and is adequate for entry. However, any oxygen level less than 20.8 percent and greater than 19.5 percent level should also alert the competent person to look for the causes of the oxygen deficiency and to correct them prior to entry.

Section 1915.12(b)(4) Flammable atmospheres. Atmospheres with a concentration of flammable vapors at or above 10 percent of the lower explosive limit (LEL) are considered hazardous when located in confined spaces. However, atmospheres with flammable vapors below 10 percent of the LEL are not necessarily safe.

Such atmospheres are too lean to burn. Nevertheless, when a space contains or produces measurable flammable vapors below the 10 percent LEL, it might indicate that flammable vapors are being released or introduced into the space and could present a hazard in time. Therefore, the cause of the vapors should be investigated and, if possible, eliminated prior to entry.

Some situations that have produced measurable concentrations of flammable vapors that could exceed 10 percent of the LEL in time are:

1. Pipelines that should have been blanked or disconnected have opened, allowing product into the space.

2. The vessel may have shifted, allowing product not previously cleaned and removed during washing to move into other areas of the vessel.

3. Residues may be producing the atmosphere by releasing flammable vapor.

Section 1915.12(b)(6) Flammable atmospheres that are toxic. An atmosphere with a measurable concentration of a flammable substance below 10 percent of the LEL may be above the OSHA permissible exposure limit for that substance. In that case, refer to § 1915.12(c) (2), (3), and (4).

Section 1915.13(b)(4), § 1915.15(c), and § 1915.15(e). The frequency with which a tank is monitored to determine if atmospheric conditions are being maintained is a function of several factors that are discussed below:

1. *Temperature.* Higher temperatures will cause a combustible or flammable liquid to vaporize at a faster rate than lower temperatures. This is important since hotter days may cause tank residues to produce more vapors and that may result in the vapors exceeding 10 percent of the LEL or an overexposure to toxic contaminants.

2. *Work in the tank.* Any activity in the tank could change the atmospheric conditions in that tank. Oxygen from a leaking oxyfuel hose or torch could result in an oxygen-enriched atmosphere that would more easily propagate a flame. Some welding operations use inert gas, and leaks can result in an oxygen-deficient atmosphere. Manual tank cleaning with high pressure spray devices can stir up residues and result in exposures to toxic contaminants. Simple cleaning or mucking out, where employees walk through and shovel residues and sludge, can create a change in atmospheric conditions.

3. *Period of time elapsed.* If a period of time has elapsed since a Marine Chemist or Coast Guard authorized person has certified a tank as safe, the atmospheric condition should be rechecked by the competent person prior to entry and starting work.

4. *Unattended tanks or spaces.* When a tank or space has been tested and declared safe, then subsequently left unattended for a period of time, it should be retested prior to entry and starting work. For example, when barges

are left unattended at night, unidentified products from another barge are sometimes dumped into their empty tanks. Since this would result in a changed atmosphere, the tanks should be retested prior to entry and starting work.

5. *Work break.* When workers take a break or leave at the end of the shift, equipment sometimes is inadvertently left in the tanks. At lunch or work breaks and at the end of the shift are the times when it is most likely someone will leave a burning or cutting torch in the tank, perhaps turned on and leaking oxygen or an inert gas. Since the former can produce an oxygen-enriched atmosphere, and the latter an oxygen-deficient atmosphere, tanks should be checked for equipment left behind, and atmosphere, monitored if necessary prior to re-entering and resuming work. In an oxygen-enriched atmosphere, the flammable range is severely broadened. This means that an oxygen-enriched atmosphere can promote very rapid burning.

6. *Ballasting or trimming.* Changing the position of the ballast, or trimming or in any way moving the vessel so as to expose cargo that had been previously trapped, can produce a change in the atmosphere of the tank. The atmosphere should be retested after any such move and prior to entry or work.

Section 1915.14 (a) and (b) Hot work. This is a reminder that other sections of the OSHA shipyard safety and health standards in part 1915 should be reviewed prior to starting any hot work. Most notably, Subpart D, Welding, Cutting and Heating, places additional restrictions on hot work: The requirements of §§ 1915.51 and 1915.53 must be met before hot work is begun on any metal that is toxic or is covered by a preservative coating respectively; the requirements of § 1915.54 must be met before welding, cutting, or heating is begun on any structural voids.

Section 1915.12(a)(2). During hot work, more than 20.8 percent oxygen by volume can be unsafe since it extends the normal flammable range. The standard permits the oxygen level to reach 22 percent by volume in order to account for instrument error. However, the cause of excess oxygen should be investigated and the source removed.

Section 1915.16(b). If the entire vessel has been found to be in the same condition, then employers shall be considered to be in compliance with this requirement when signs using appropriate warning language in accordance with § 1915.16(a) are posted at the gangway and at all other means of access to the vessel.

Appendix B to Subpart B—Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment

This Appendix provides a complete reprint of U.S. Coast Guard regulations as of October 1, 1993 referenced in Subpart B for purposes of determining who is a Coast Guard authorized person.

1. Title 46 CFR 35.01–1 (a) through (c) covering hot work on tank vessels reads as follows:

(a) The provisions of "Standard for the Control of Gas Hazards on Vessels to be Repaired," NFPA No. 306, published by National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269, shall be used as a guide in conducting the inspections and issuance of certificates required by this section.

(b) Until an inspection has been made to determine that such operation can be undertaken with safety, no alterations, repairs, or other such operations involving riveting, welding, burning, or like fire-producing actions shall be made:

(1) Within or on the boundaries of cargo tanks that have been used to carry flammable or combustible liquid or chemicals in bulk, or within spaces adjacent to such cargo tanks; or

(2) Within or on the boundaries of fuel tanks; or

(3) To pipe lines, heating coils, pumps, fittings, or other appurtenances connected to such cargo or fuel tanks.

(c) Such inspections shall be made and evidenced as follows:

(1) In ports or places in the United States or its territories and possessions, the inspection shall be made by a Marine Chemist certificated by the National Fire Protection Association; however, if the services of such certified Marine Chemists are not reasonably available, the Officer in Charge, Marine Inspection, upon the recommendation of the vessel owner and his contractor or their representative, shall select a person who, in the case of an individual vessel, shall be authorized to make such inspection. If the inspection indicates that such operations can be undertaken with safety, a certificate setting forth the fact in writing and qualified as may be required, shall be issued by the certified Marine Chemist or the authorized person before the work is started. Such qualifications shall include any requirements as may be deemed necessary to maintain, insofar as can reasonably be done, the safe conditions in the spaces certified, throughout the operation and shall include such additional tests and certifications as considered required. Such qualifications and requirements shall include precautions necessary to eliminate or minimize hazards that may be present from protective coatings or residues from cargoes.

2. Title 46 CFR 71.60(c)(1) covering hot work on passenger vessels reads as follows:

(a) The provisions of "Standard for the Control of Gas Hazards on Vessels to be Repaired," NFPA No. 306, published by National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269, shall be used as a guide in conducting the inspections and issuance of certificates required by this section.

(b) Until an inspection has been made to determine that such operation can be undertaken with safety, no alterations, repairs, or other such operations involving riveting, welding, burning, or like fire-producing actions shall be made:

(1) Within or on the boundaries of cargo tanks which have been used to carry flammable or combustible liquid or chemicals in bulk, or within spaces adjacent to such cargo tanks; or

(2) Within or on the boundaries of fuel tanks; or

(3) To pipe lines, heating coils, pumps, fittings, or other appurtenances connected to such cargo or fuel tanks.

(c) Such inspections shall be made and evidenced as follows:

(1) In ports or places in the United States or its territories and possessions the inspection shall be made by a Marine Chemist certificated by the National Fire Protection Association; however, if the services of such certified Marine Chemist are not reasonably available, the Officer in Charge, Marine Inspection, upon the recommendation of the vessel owner and his contractor or their representative, shall select a person who, in the case of an individual vessel, shall be authorized to make such inspection. If the inspection indicated that such operations can be undertaken with safety, a certificate setting forth the fact in writing and qualified as may be required, shall be issued by the certified Marine Chemist or the authorized person before the work is started. Such qualifications shall include any requirements as may be deemed necessary to maintain, insofar as can reasonably be done, the safe conditions in the spaces certified throughout the operation and shall include such additional tests and certifications as considered required. Such qualifications and requirements shall include precautions necessary to eliminate or minimize hazards that may be present from protective coatings or residues from cargoes.

3. Title 46 CFR 91.50–1(c)(1) covering hot work on cargo and miscellaneous vessels as follows:

(a) The provisions of "Standard for the Control of Gas Hazards on Vessels to be Repaired," NFPA No. 306, published by National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02269, shall be used as a guide in conducting the inspections and issuance of certificates required by this section.

(b) Until an inspection has been made to determine that such operation can be undertaken with safety, no alterations, repairs, or other such operations involving riveting, welding, burning, or like fire-producing actions shall be made:

(1) Within or on the boundaries of cargo tanks which have been used to carry flammable or combustible liquid or chemicals in bulk, or within spaces adjacent to such cargo tanks; or,

(2) Within or on the boundaries of fuel tanks; or,

(3) To pipe lines, heating coils, pumps, fittings, or other appurtenances connected to such cargo or fuel tanks.

(c) Such inspections shall be made and evidenced as follows:

(1) In ports or places in the United States or its territories and possessions the inspection shall be made by a Marine Chemist certificated by the National Fire Protection Association; however, if the services of such certified Marine Chemist are not reasonably available, the Officer in Charge, Marine Inspection, upon the recommendation of the vessel owner and his contractor or their representative, shall select a person who, in the case of an individual vessel, shall be authorized to make such inspection. If the inspection indicated that such operations can be undertaken with safety, a certificate setting forth the fact in writing and qualified as may be required, shall be issued by the certified Marine Chemist or the authorized person before the work is started. Such qualifications shall include any requirements as may be deemed necessary to maintain, insofar as can reasonably be done, the safe conditions in the spaces certified throughout the operation and shall include such additional tests and certifications as considered required. Such qualifications and requirements shall include precautions necessary to eliminate or minimize hazards that may be present from protective coatings or residues from cargoes.

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Monday
July 25, 1994

Part III

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

28 CFR Part 31

Juvenile Justice and Delinquency Prevention Office; Formula Grants; Proposed Rule

DEPARTMENT OF JUSTICE

Office of Justice Programs

Office of Juvenile Justice and Delinquency Prevention

28 CFR Part 31

OJJDP Formula Grants Regulation

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

ACTION: Proposed rule and request for public comment.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is publishing for public comment proposed amendments to the existing Formula Grants Regulation. The Formula Grants Regulation implements Part B of Title II of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, as amended by the Juvenile Justice and Delinquency Prevention Amendments of 1992. The 1992 Amendments reauthorize and modify the Federal assistance program to state and local governments, and private not-for-profit agencies for juvenile justice and delinquency prevention improvements. The proposed amendments to the existing Regulation provides clarification and guidance to States in the formulation, submission and implementation of State Formula Grant plans and determinations of State compliance with plan requirements. It provides additional flexibility and guidance to participating States while strengthening several key provisions related to the mandates of the JJDP Act.

DATES: Interested persons are invited to submit written comments which must be received on or before September 8, 1994.

ADDRESSES: Address all comments to Mr. John J. Wilson, Acting Administrator, Office of Juvenile Justice and Delinquency Prevention (OJJDP), 633 Indiana Avenue NW., room 742, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Ms. Roberta Dorn, Director, State Relations and Assistance Division, Office of Juvenile Justice and Delinquency Prevention (OJJDP), 633 Indiana Avenue NW., room 543, Washington, DC 20531; (202) 307–5924.

SUPPLEMENTARY INFORMATION: The Office of Juvenile Justice and Delinquency Prevention is proposing revisions to the existing Regulation, codified at 28 CFR Part 31, and inviting public comment on the proposed changes. The proposed changes in the regulatory text accomplish the following:

(1) continue the authority citation for the regulation;

(2) revise § 31.3 to establish a mandatory deadline for the submission of State Formula Grant applications;

(3) revise § 31.102 to provide that the State agency must, at a minimum, assign one full-time Juvenile Justice Specialist to manage the Formula Grants Program;

(4) revise § 31.301 to provide for statutory changes in the base allocation for States and Territories;

(5) revise § 31.303(e)(3) to modify the requirements for a facility located within the same building or on the same grounds as an adult jail or lockup to qualify as a separate juvenile detention facility;

(6) delete § 31.303(c)(3) and (e)(4) related to substantial compliance with the deinstitutionalization of status offenders (DSO) and jail and lockup removal requirements respectively, and section 31.303(d)(2) related to progress toward compliance with the separation provision;

(7) revise § 31.303(d)(1) to provide for statutorily required enhanced separation requirements;

(8) revise § 31.303(f)(3)(iv) to provide that a status offender alleged or found in a judicial hearing to have violated a valid court order may be held in a secure juvenile detention or correctional facility and not in an adult jail or lockup. This proposed revision, based on the 1992 Amendments, is effective for, and must be reflected in, State monitoring reports due by December 31, 1994, and subsequent monitoring reports;

(9) revise § 31.303(f)(3) to require that status offenders receive the full due process protections guaranteed by the Constitution prior to the issuance of a court order regulating future behavior, and that prior to a secure dispositional placement of a status offender found to have violated a valid court order, the court must review and consider a report on possible dispositional alternatives for the youth, the report to be prepared by a public agency or organization other than a court or law enforcement agency;

(10) revise § 31.303(f)(4) to provide for expansion of the non-MSA exception to jail and lockup removal to address adverse weather and distance/lack of ground transportation;

(11) revise § 31.303 (f)(5) to require that States must, in completing their annual monitoring report, report as violations of the section 223(a)(12)(A) deinstitutionalization requirement the number of status offenders (including those status offenders accused of violating a valid court order) and nonoffenders held in secure custody in an adult jail or lockup for any length of time. This proposed policy-based revision is effective for, and must be reflected in, State monitoring reports due by December 31, 1995, and subsequent monitoring reports;

(12) delete § 31.303(f)(6)(iii)(A) related to substantial compliance with the jail and lockup removal requirement and redesignate subsequent paragraphs;

(13) revise § 31.303(f)(6)(iii)(C), as redesignated, to allow States that have reduced the number of status and nonoffenders securely detained or confined in jails and lockups to less than 9 per 100,000 juvenile population in the State, and can demonstrate meaningful progress in removing juvenile criminal-type offenders, to qualify for a waiver of termination for annual fund allocations through Fiscal Year 1993, when full compliance with the jail and lockup removal requirement has not been achieved. This section is also revised to require that a State seeking a waiver of termination demonstrate an "unequivocal" commitment to achieving full compliance;

(14) revise § 31.303(f)(6)(iii)(D), as redesignated, to increase the maximum number of waivers that may be granted to a State from three to four;

(15) revise § 31.303(f)(6) to provide that failure to comply with the subsection (a)(12)(A), (13), (14) or (23) mandates for any fiscal year beginning with 1994, will result in the State's Formula Grant allocation being reduced by 25% for each such failure;

(16) revise § 31.303(h) to require the submission of annual performance reports by June 30, beginning with calendar year 1995; and

(17) revise § 31.303(j) to enhance State requirements for demonstrating compliance with the section 223(a)(23) mandate on disproportionate minority confinement, and to establish timelines for compliance.

Application Deadline

Section 31.1 currently requires that Formula Grant applications and related plans or plan updates for each fiscal year should be submitted to OJJDP by August 1st (60 days prior to the beginning of the fiscal year) or within 60 days after States are officially notified of each fiscal year's Formula Grants Program allocation.

A number of States have submitted applications sufficiently late in recent fiscal years to impede orderly and timely application processing by OJJDP. This has resulted in an increased number of special conditions and a need for time consuming follow-up by State Relations and Assistance Division staff.

The submission requirement would be changed to require that Fiscal Year 1995 applications and all subsequent applications shall be submitted to OJJDP no later than March 31 of the fiscal year for which the funds were allocated. This submission date would allow OJJDP adequate time to conduct a full review of each State's plan or plan update, give States the opportunity to address any deficiencies in the application, plan or plan update, or budget prior to award, and assure complete application processing and award of funds prior to the end of the fiscal year.

State Agency Structure—Staffing

In addition to the current "adequate staff" requirement of § 31.102 for the State agency administering Formula Grant funds, the Regulation is revised to provide that a participating State agency must, at a minimum, assign one full-time Juvenile Justice Specialist to manage the Formula Grants Program. OJJDP's experience indicates that the complexity of the Formula Grants program justifies the attention of at least one full-time Juvenile Justice Specialist in each State to perform and oversee required planning and administration activities including: developing, announcing, competing, packaging, awarding, evaluating, and overseeing subawards, developing programs to address disproportionate minority confinement issues and provide for effective use of Indian tribe pass-through funds; providing for program and project monitoring; playing a central role in preparing the three year program plan and annual plan update; providing staff support to the State supervisory board and/or the State advisory group; and overseeing the reporting of State progress in achieving and maintaining compliance with the deinstitutionalization, separation, adult jail and lockup removal, and disproportionate minority confinement requirements.

Funding—Allocation to States

Section 222(a) provides for a "floating minimum" for the allocation of formula grants to States and Territories that is tied to the total appropriation level for Title II in a given fiscal year. For Fiscal Year 1993, the total appropriation for Title II of the JJDP Act (other than Parts D and E) was less than $75 million. As a result, the "floating minimum" formula grant allocation for any State was legislatively established at a minimum of $325,000 and a maximum of $400,000 for States, and $75,000 and $100,000 for Territories, with no State or Territory receiving less than its Fiscal Year 1992 allocation. The Congressionally stated purpose of this formula was to increase the funds available to the minimum allocation States and Territories. In order to ensure that this Congressional intent is maximized, the Fiscal Year 1993 formula grant allocations held the non-minimum States and Territories at their Fiscal Year 1992 funding levels, allocating the increased Fiscal Year 1993 formula grant funds to the minimum States and Territories on a prorata basis.

For Fiscal Year 1994, the total appropriation for Title II (other than Part D) exceeds the $75 million threshold. Consequently, the "floating minimum" formula grant allocation for any State in Fiscal Year 1994 is established at a minimum of $400,000 and a maximum of $600,000. OJJDP proposes to implement the amended language in Section 222(a)(2)(B) to provide for a minimum allocation of $600,000, based on fund availability: "* * * not less than $400,000, or such greater amount, up to $600,000, as is available to be allocated * * *" All non-minimum States will also receive an increased formula grant allocation in Fiscal Year 1994.

Proposed State formula grant allocations for Fiscal Years 1993 and 1994 have been provided to all States and Territories. The precise procedure used by the budget staff of the Office of Justice Programs to calculate State formula grant allocations is available upon request.

Collocated Juvenile and Adult Facilities

Section 223(a)(14) of the JJDP Act requires that juveniles be removed from adult jails and lockups. OJJDP policy No. 91–1401, July 16, 1991, sought to clarify the existing OJJDP regulatory requirements for establishing the existence of a separate juvenile detention facility where such facility is located in the same building or on the same grounds as an adult jail or lockup.

OJJDP's initial policy on collocated juvenile and adult facilities was established by an OJJDP "Position Statement on Minimum Requirements of Section 223(a)(14) of the Juvenile Justice and Delinquency Prevention Act, as amended," which was published as a Notice in the **Federal Register** on January 17, 1984. Four criteria were established in that policy publication, each of which had to be met to ensure the requisite separateness of juvenile and adult facilities. The criteria were subsequently incorporated into the Formula Grants regulation the following year (See 50 FR 119, 25550–25561, June 20, 1985). The July 16, 1991 OJJDP policy reiterated each of the four criteria, and sought to clarify a number of specific implementation mechanisms that would be acceptable to OJJDP while remaining within the parameters of each criterion.

The clarifications in OJJDP Policy No. 91–1401 have been the subject of continued concern and controversy in the juvenile justice community. In addition, the 1992 Amendments substantially revise one of the four criteria (separate staff) for determining whether a separate juvenile detention facility exists. For these reasons, the Administrator deems it essential to provide interested parties with an opportunity to comment on each of the four collocated facility criteria.

In formulating the four criteria initially, and in providing additional policy clarification, OJJDP recognized a need to distinguish an optimal system, where a juvenile detention center would never be collocated with an adult jail or lockup, from a system where States can use collocated facilities that meet the regulatory requirements for a separate facility by creating and maintaining an atmosphere that is appropriate and conducive to the care of alleged juvenile criminal-type offenders who require a secure detention environment. Given the limited level of funds available to States under the Formula Grants program, and the need to expend these funds to address a variety of priorities and needs identified in the JJDP Act and State plans, OJJDP has sought to provide States with sufficient flexibility to achieve and maintain compliance with JJDP Act mandates while, at the same time, addressing needed delinquency prevention and other system improvement initiatives.

The proposed regulation clarifies the four criteria by providing that: (1) Total separation in spatial areas of juvenile and adult facilities can be achieved by providing for no common use areas or by time-phasing common use areas, provided that the arrangement precludes even haphazard or accidental contact between juvenile and adult residents and adult facility staff at all times and provided that time-phasing of common use areas cannot extend to sleeping or living areas. Under either approach to total separation, written operational plans, policies and procedures must be in place to insure that the objective of total separation is achieved; (2) total separation in juvenile and adult program activities requires the formulation of an independent and comprehensive operational plan for the juvenile facility which provides a full range of separate program activities for juveniles. While program space, equipment and resources may be shared

by both juvenile and adult facility populations subject to the requirements of total separation in spatial areas, the key feature of this policy is the express requirement that the juvenile population receive a full range of services in circumstances where collocation of facilities is approved; (3) separate juvenile and adult staff—management, security and direct care—is essential to the maintenance of an appropriate atmosphere for the care of juveniles in detention. The regulation distinguishes between staff who routinely have day-to-day direct care responsibility for juveniles and specialized service staff not normally in contact with detainees. For security and direct care staff (including management), the 1992 Amendments require that these functions be vested in totally separate staff. This requirement is designed to ensure that a facility's security and direct care staff are both well qualified to serve, and appropriately focused on, the needs of the juvenile population while providing juvenile facility services; (4) in States that have standards or licensing requirements for secure juvenile detention facilities, a collocated facility must meet the standards (on the same basis as separate facilities) and be licensed as appropriate. The proposed regulation establishes an express requirement that a responsible State authority must certify that State standards and licensing requirements have been met and that the architectural configuration and operational procedures and policies of the facility assure total separation between juvenile detention center and adult facility populations.

OJJDP intends these clarifications to strengthen the four requirements for a separate facility and to establish reliable parameters for States completing final steps to achieve and maintain full compliance with the jail and lockup removal requirement. The regulatory language committing OJJDP to the "rule of reason" represents a further attempt to place the collocated facility criteria in perspective. Finally, States are reminded of their oversight responsibility to insure that the separate character of any collocated juvenile detention facility is fully maintained following its classification as a separate juvenile detention facility. The 1992 Amendments require States to reassess the separate staff criterion in all collocated facilities, including those classified as such by the State and concurred with by OJJDP prior to the effective date of this proposed regulation.

OJJDP's original policy on collocated facilities was designed to accommodate a small number of existing juvenile detention facilities. However, several States have used the policy and regulation to create a network of collocated juvenile detention facilities in rural areas as county or regional detention facilities in lieu of establishing dedicated county or regional juvenile detention facilities. Consequently, and because OJJDP does not believe either that building or establishing collocated facilities in urban areas can be justified or that States should rely upon collocated facilities as a primary or long-term strategy for achieving and maintaining compliance with the jail and lockup removal mandate in rural areas, OJJDP proposes to limit future approval of collocated facilities to those that are outside a Standard Metropolitan Statistical Area (SMSA), are operational or planned such that a determination of compliance with the criteria can be made, and have been determined by the State (with subsequent OJJDP concurrence) to meet each of the four criteria, by December 31, 1994.

Criteria for Compliance With DSO, Adult Jail and Lockup Removal, Separation, and Minority Overrepresentation

The proposed regulation deletes the "substantial compliance criteria" from § 31.303(c)(3) and (e)(4) of the regulation. Pursuant to the 1992 Amendments, all eligible States and territories are required to be in full compliance with the DSO and Jail and Lockup Removal requirements in order to be eligible for FY 1994 Formula Grant funds. Also, States must demonstrate compliance with the enhanced Separation and Disproportionate Minority Confinement mandates in order to be eligible for 1994 funds. Therefore, the regulatory provision recognizing "progress" toward compliance with the Separation mandate is being deleted. Also, enhanced criteria and specific timelines would be established for the Disproportionate Minority Confinement Mandate. OJJDP would use these criteria and timelines to determine if States have demonstrated compliance with the Minority Overrepresentation Mandate.

Deinstitutionalization of Status Offenders

Revisions are proposed to the valid court order exception and monitoring report requirements related to the deinstituionalization of status offenders and nonoffenders requirement (DSO) [section 223(a)(12)(A)]. These changes are designed to bring the DSO requirement in line with the section 223(a)(14) Jail and Lockup Removal requirement. Currently, the regulatory DSO exceptions for valid court order violations [28 CFR 31.303(f)(3)] and the 24-hour monitoring report exception for detention of status and nonoffender juveniles [28 CFR 31.303(f)(5)] do not prohibit the use of adult jails and lockups for status offenders who violate a valid court order or for status or nonoffender juveniles held in secure custody pursuant to the 24-hour monitoring exception. This anomaly, which resulted from the separate years in which these requirements became law (1974 and 1980, respectively), is being addressed to reflect OJJDP's determination that there are no longer any circumstances in which the secure custody of noncriminal juveniles in adult jails and lockups can be justified or sanctioned. To the extent that inadvertent or isolated violations occur, or where violations result from emergency situations, the de minimis criteria for full compliance should continue to provide sufficient latitude to permit States to maintain full compliance with the DSO requirement. Monitoring information to reflect these changes must be included in the State Monitoring Report due by December 31, 1995, and subsequent monitoring reports.

Waiver of Termination—Criteria and Number

The criteria for a waiver of termination when a State has failed to achieve full compliance, or full compliance with de minimis exceptions with the jail and lockup removal requirement, were established by regulation in § 31.303(f)(6) in 1989. Section 223(c)(3) of the JJDP Act provided that a State's failure to achieve compliance with the jail and lockup removal requirement "* * * shall terminate any State's eligibility for funding unless the Administrator waives the termination of the State's eligibility on the condition that the State agrees to expend all of the funds to be received under this part by the State, [with specific exceptions] only to achieve compliance with subsection (a)(14)."

OJJDP established seven regulatory criteria to be satisfied by a State requesting a waiver. OJJDP's premise, based on Congressional guidance, was that

"A State which satisfies these standards qualifies for a waiver on the basis that: (1) It has made significant progress to date; and (2) additional funding is likely to produce further

progress toward compliance (54 FR 14769, April 12, 1989).

The seven criteria, set forth at 28 CFR 31.303(f)(6)(iii)(D)(*2*), provide that a State requesting a waiver must demonstrate that it:

(*i*) Agrees to expend all of its Formula Grant Award except planning and administration, advisory group set aside, and Indian tribe pass-through funds, to achieve compliance with section 223(a)(14); and

(*ii*) Removed all status and nonoffender juveniles from adult jails and lockups as set forth in paragraph (f)(6)(iii)(A)(2)(*i*) of this section; and

(*iii*) Made meaningful progress in removing other juveniles from adult jails and lockups as set forth in paragraph (f)(6)(iii)(A)(2)(*ii*) of this section; and

(*iv*) Diligently carried out the State's jail and lockup removal plan as set forth in paragraph (f)(6)(iii)(A)(2)(*iii*) of this section; and (*v*) Submitted an acceptable plan, based on an assessment of current jail and lockup removal barriers within the State, to eliminate noncompliant incidents; and

(*vi*) Achieved compliance with section 223(a)(15) of the JJDP Act; and

(*vii*) Demonstrated a commitment, through appropriate executive or legislative action, to achieving full compliance.

The reference in (*ii*) above, is to regulatory provisions implementing the former "substantial compliance" standard, which reads as follows:

(*i*) Removed all status and nonoffender juveniles from adult jails and lockups. Compliance with this standard requires that the last submitted monitoring report demonstrate that no status offender (including those accused of or adjudicated for violating a valid court order) or nonoffender juveniles were securely detained in adult jails or lockups for any length of time; or, that all status offenders and nonoffenders securely detained in adult jails and lockups for any length of time were held in violation of an enforceable state law and did not constitute a pattern or practice within the state.

Currently, several States have not been awarded their FY 1992 and/or FY 1993 funds because they cannot meet criterion (*ii*) for receiving a waiver. While the numbers of status and nonoffenders are typically small, these States either lack an enforceable State law which would prohibit any violations or the State has been unable to demonstrate that the violations do not constitute a pattern or practice within the State. OJJDP does not believe that the practice of detaining status or nonoffender juveniles in adult jails or lockups is acceptable or that States should in any way sanction or permit such a practice. However, OJJDP also has to weigh the detriment that will occur if States which are close to achieving full compliance are deprived of a significant means of obtaining that important goal through the application of criteria that are inflexible.

Consequently, OJJDP proposes to modify criterion (*ii*) to provide that States can meet the standard by demonstrating that the number of status offenders (including valid court order violators) and nonoffenders securely detained in adult jails and lockups is less than the numerical de minimis rate of 9 per 100,000 juvenile population in the State. This provision is balanced by the addition in criterion (*vii*) of a requirement that the State demonstrate an *unequivocal* commitment, *through appropriate executive or legislative action*, to achieving full compliance, and the proposed change in the monitoring exception for DSO to prohibit placing a status or nonoffender juvenile in an adult jail or lockup for any length of time. The proposed revisions should provide these few remaining States with a reasonable opportunity to achieve full compliance without a loss of Formula Grant Program funds while, at the same time, reiterating the Congressional mandate that adult jails and lockups are inappropriate places in which to securely detain children who have committed no criminal law violation.

Finally, OJJDP proposes to increase the maximum number of waivers of termination from three to four. There are several States that may need to receive a fourth waiver in order to be eligible for a Fiscal Year 1992 or 1993 Formula Grant Award.

Executive Order 12866

This notice is not a "significant regulatory action" for purposes of Executive Order 12886 because it does not result in: (1) an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and (4) does not raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles of Executive Order No. 12866.

Regulatory Flexibility Act

This proposed regulation, if promulgated, will not have a "significant" economic impact on a substantial number of small "entities," as defined by the Regulatory Flexibility Act (Pub.L. 96–354).

Paperwork Reduction Act

No collection of information requirements are contained in or effected by this regulation (See the Paperwork Reduction Act, 44 U.S.C. 3504(H)).

Intergovernmental Review of Federal Programs

In accordance with Executive Order 12372 and the Department of Justice's implementing regulation 28 CFR Part 30, States must submit Formula Grant Program applications to the State "Single Point of Contact," if one exists. The State may take up to 60 days from the application date to comment on the application.

Lists of Subjects in 28 CFR Part 31

Grant programs—law, juvenile delinquency, grant programs. For the reasons set forth in the preamble, it is proposed to amend the OJJDP Formula Grants Regulation, 28 CFR Part 31, as follows:

PART 31—[AMENDED]

1. The authority citation for Part 31 would continue to read as follows:

Authority: Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5601 et seq.).

2. Section 31.3 is revised to read as follows:

§ 31.3 General.

Formula Grant Applications for each fiscal year should be submitted to OJJDP by August 1 (60 days prior to the beginning of the fiscal year) or within 60 days after the States are officially notified of the fiscal year formula grant allocations. Beginning with Fiscal Year 1995 and each subsequent fiscal year, all Formula Grant Applications must be submitted no later than March 31 of the fiscal year for which the funds are allocated.

3. Section 31.101 is revised to read as follows:

§ 31.101 Designation of State agency.

The Chief Executive of each State which chooses to apply for a formula grant shall establish or designate a State agency as the sole agency for supervising the preparation and

administration of the plan. The plan must demonstrate compliance with administrative and supervisory board membership requirements established by the OJJDP Administrator pursuant to section 299(c) of the JJDP Act. States must have available for review a copy of the State law or executive order establishing the State agency and its authority.

4. Section 31.102(c) is amended by adding the following sentence at the end thereof:

§ 31.102 State agency structure.

(c) * * * At a minimum, one full-time Juvenile Justice Specialist must be assigned to the Formula Grants Program by the State agency. Where the State does not currently provide or maintain a full-time Juvenile Justice Specialist, the plan must clearly establish and document that the program and administrative support staff resources currently assigned to the program will temporarily meet the adequate staff requirement, and provide an assurance that at least one full-time Juvenile Justice Specialist will be assigned to the Formula Grants Program by the end of Fiscal Year 1995 (September 30, 1995).

5. Section 31.203 is revised to read as follows:

§ 31.203 Open meetings and public access to records.

The State must assure that the State agency, its supervisory board established pursuant to section 299(c) and the State advisory group established pursuant to section 223(a)(3) will follow applicable State open meeting and public access laws and regulations in the conduct of meetings and the maintenance of records relating to their functions.

6. Section 31.301 (a), (c), (d), and (e) is revised to read as follows:

§ 31.301 Funding.

(a) *Allocation to states.* Funds shall be allocated annually among the States on the basis of relative population of persons under age 18. If the amount allocated for title II (other than Parts D and E) of the JJDP Act is less than $75 million, the amount allocated to each State will not be less than $325,000, nor more than $400,000, provided that no State receives less than its allocation for Fiscal Year 1992. The Territories will receive not less than $75,000 or more than $100,000. If the amount appropriated for title II (other than Part D) is $75 million or more, the amount allocated for each State will be not less than $400,000, nor more than $600,000, provided that Parts D and E have been funded in the full amounts authorized. For the Territories, the amount remains at $100,000.

* * * * *

(c) *Match.* Formula Grants under the JJDP Act shall be 100% of approved costs, with the exception of planning and administration funds, which require a 100% cash match (dollar for dollar), and construction projects funded under section 299C (a)(2) of the JJDP Act which also require a 100% cash match.

(d) *Funds for administration.* Not more than 10% of the total annual Formula Grant award may be utilized to develop the annual juvenile justice plan and pay for administrative expenses, including project monitoring. These funds are to be matched on a dollar for dollar basis. The State shall make available needed funds for planning and administration to units of local government on an equitable basis. Each annual application must identify uses of such funds.

(e) *Nonparticipating States.* Pursuant to section 223(d), the OJJDP Administrator shall endeavor to make the fund allotment under section 222(a), of a State which chooses not to participate or loses its eligibility to participate in the formula grant program, directly available to local public and private nonprofit agencies within the nonparticipating State. The funds may be used only for the purpose(s) of achieving deinstitutionalization of status offenders and nonoffenders, separation of juveniles from incarcerated adults, removal of juveniles from adult jails and lockups, and/or reducing the disproportionate confinement of minority youth in secure facilities. Absent a request for extension which demonstrates compelling circumstances justifying the reallocation of formula grant funds back to the State to which the funds were initially allocated, or the pendency of administrative hearing proceedings under section 223(d), formula grant funds allocated to a State which has failed to submit an application, plan, or monitoring data establishing its eligibility for the funds will, beginning with Fiscal Year 1994, be reallocated to the nonparticipating State program on September 30 of the fiscal year for which the funds were appropriated. Reallocated funds will be awarded to eligible recipients pursuant to program announcements published in the **Federal Register**.

7. Section 31.302 (a) and (b)(2) is amended to read as follows:

§ 31.302 Applicant State agency.

(a) Pursuant to section 223(a)(1), section 223(a)(2) and section 299(c) of the JJDP Act, the State must assure that the State agency approved under section 299(c) has been designated as the sole agency for supervising the preparation and administration of the plan and has the authority to implement the plan.

(b) * * *

(2) Should consider in meeting the statutory membership requirements and responsibilities of section 223(a)(3) (A)–(E), appointing at least one member who represents each of the following: a locally elected official representing general purpose local government; a law enforcement officer; a juvenile or family court judge; a probation officer; a juvenile corrections official; a prosecutor; a representative from an organization, such as a parents group, concerned with teenage drug and alcohol abuse; a high school principal; a recreation director; a volunteer who works with delinquent or at risk youth; a person with a special focus on the family; a youth worker experienced with programs that offer alternatives to incarceration; persons with special competence in addressing programs of school violence and vandalism and alternatives to expulsion and suspension; and, persons with special knowledge concerning learning disabilities, child abuse, neglect and youth violence.

8. Section 31.303 (a) and (b) is revised to read as follows:

§ 31.303 Assurances.

(a) Assurances. The State must certify through the provision of assurances that it has complied and will comply (as appropriate) with section 223(a) (1), (2), (3), (4), (5), (6), (7), (8)(c), (9), (10), (11), (16), (17), (18), (19), (20), (21), (22), and (25), and sections 229 and 261(d), in formulating and implementing the State plan. The Formula Grant Application kit provides a form and guidance for the provision of assurances. OJJDP interprets the 223(a)(16) assurance as satisfied by an affirmation that State law and/or policy clearly require equitable treatment on the required bases; or by providing in the State plan that the State agency will require an assurance of equitable treatment by all Formula Grant subgrant and contract recipients, and establish as a program goal, in conjunction with the State Advisory Group, the adoption and implementation of a statewide juvenile justice policy that all youth in the juvenile justice system will be treated equitably without regard to gender, race, family income, and mentally, emotionally, or physically handicapping conditions. OJJDP interprets the 223(a)(25) assurance as satisfied by a provision in the State plan for the State agency and the State Advisory Group to

promulgate policies and budget priorities that require the funding of programs that are part of a comprehensive and coordinated community system of services as set forth in section 103(19) of the JJDP Act. This requirement is applicable when a State's formula grant for any fiscal year exceeds 105 percent of the State's formula grant for Fiscal Year 1992.

(b) Serious juvenile offender emphasis. Pursuant to sections 101(a)(10) and 223(a)(10) of the JJDP Act, the Office encourages States that have identified serious and violent juvenile offenders as a priority problem to allocate formula grant funds to programs designed for serious and violent juvenile offenders at a level consistent with the extent of the problem as identified through the State planning process. Particular attention should be given to improving prosecution, sentencing procedures, providing resources necessary for informed dispositions, providing for effective rehabilitation, and facilitating the coordination of services between the juvenile justice and criminal justice systems.

* * * * *

9. Section 31.301 is amended by revising paragraph (c)(3) to read as follows:

§ 31.301 Federal Wards.

(c) * * *

(3) Apply this requirement to alien juveniles under Federal jurisdiction who are held in State or local facilities.

* * * * *

10. Section 31.303 is amended by revising paragraph (c)(4) to read as follows:

§ 31.303 DSO Compliance.

(c) * * *

(4) Those States which, based upon the most recently submitted monitoring report, have been found to be in full compliance with section 223(a)(12)(A) may, in lieu of addressing paragraphs (c)(1) and (2) of this section, provide an assurance that adequate plans and resources are available to maintain full compliance.

* * * * *

11. Section 31.303 is amended by revising paragraphs (d)(1) (i) and (ii) to read as follows:

Section § 31.303 Separation

(d) * * *

(1) * * *

(i) Describe its plan and procedure, covering the three-year planning cycle, for assuring that the requirements of this section are met. The term "contact" is defined to include any sight and sound contact between juveniles in a secure custody status and incarcerated adults, including inmate trustees. Sound contact is further defined to mean that no conversation is possible. Separation must be accomplished in all secure areas of the facility which include, but are not limited to: sallyports within the secure perimeter of the facility, other entry areas, all passageways (hallways), admissions, sleeping, toilet and shower, dining, recreational, educational, vocational, health care, and other areas as appropriate.

(ii) In those instances where accused juvenile criminal-type offenders are authorized to be temporarily detained in facilities where adults are confined, the State must set forth the procedures for assuring no sight or sound contact between such juveniles and confined adults.

* * * * *

12. Paragraph (d)(2) of § 31.303 is amended by adding a period "." after the word "State" and removing the remainder of paragraph (d)(2).

13. Paragraph (e)(3) in § 31.303 is revised to read as follows:

§ 31.303 Collocated Facilities.

(e) * * *

(3)(i) Determine whether or not a facility in which juveniles are detained or confined is an adult jail or lockup. In circumstances where juveniles are detained or confined in a separate building within a justice center or building complex which includes both juvenile and adult facilities (same grounds) or in a separate juvenile area (floor, wing, or side) of a building which includes an adult jail or lockup (same building), the separate building or area in which juveniles are detained or confined may qualify as a juvenile detention facility. However, except when a collocated building or area within a building has previously been determined by the State (with OJJDP concurrence) to qualify as a separate juvenile detention facility under the four established requirements prior to the effective date of this proposed regulation, State determinations and OJJDP concurrence on collocated facilities will be limited to those which are located in geographic areas outside a Standard Metropolitan Statistical Area, *and* are operational or planned such that a determination of compliance with the criteria can be made, *and* are determined by the State (with subsequent OJJDP concurrence) to meet the criteria and procedure established in paragraph (e)(3)(i) (A) through (D) and (ii) of this section, no later than December 31, 1994. Each of the following four criteria must be met in order to ensure the requisite separateness of the two facilities. The requirements are:

(A) Total separation between juvenile and adult facility spatial areas such that there could be no contact between juveniles and adult residents in the respective facilities. Total separation in spatial areas of juvenile and adult facilities can be achieved by providing for no common use areas, or by time-phasing common use areas, provided that the arrangement precludes contact between juveniles and adult residents and adult facility staff at all times. Sleeping or other living areas may not be considered common use areas.

(B) Total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping, and general living activities. There must be an independent and comprehensive operational plan for the juvenile detention facility which provides for a full range of separate program activities. No program activities may be shared by juvenile and adult residents. However, program space, equipment, and other resources may be used by both facility populations subject to the criterion in paragraph (e)(3)(i)(A) of this section.

(C) Separate juvenile and adult staff, including management, security staff, and direct care staff such as recreation, education, and counseling. Specialized services staff, such as cooks, bookkeepers and medical professionals who are not normally in contact with detainees or whose infrequent contacts occur under conditions of separation of juveniles and adults, can serve both. The day to day management, security and direct care functions of the juvenile detention facility and its programs must be vested in totally separate staff. Collocated facilities classified by the State with subsequent OJJDP concurrence prior to the effective date of this proposed regulation must also meet this requirement.

(D) In States that have established State standards or licensing requirements for secure juvenile detention facilities, the juvenile facility meets the standards (on the same basis as free-standing juvenile detention facilities) and is licensed as appropriate. Responsible State authorities must certify that all State standards or licensing requirements for a secure juvenile detention facility have been met, and that the architectural and operational configuration of the juvenile facility assures total separation.

(ii) The State must initially determine that the four requirements are fully met. Upon such determination, the State

must submit to OJJDP a request to concur with the State finding that a separate juvenile facility exists. To enable OJJDP to assess the separateness of the two facilities, sufficient documentation must accompany the request to demonstrate that each requirement is met. In assessing the separateness of the two facilities pursuant to a State's request for OJJDP concurrence, OJJDP will be guided by the "rule of reason." If a facility is, in fact, a separate and distinct living environment for juveniles in secure custody, and not simply a juvenile wing, section, or area of an adult jail or lockup, a reasoned and reasonable application of the criteria will result in OJJDP's concurrence that a separate juvenile detention facility exists. It is incumbent upon each State to make the initial determination through an on-site facility (or full plan) review and, through the exercise of its oversight responsibility, to insure that the separate character of the facility is maintained by continuing to fully meet each of the four criteria in the operation of the juvenile detention facility.

* * * * *

14. Paragraph (e)(4) in § 31.303 is removed and paragraph (e)(5) is redesignated as paragraph (e)(4) and revised to read as follows:

§ 31.303 Jail Removal Compliance.

(e) * * *

(4) Those States which, based upon the most recently submitted monitoring report, have been found to be in full compliance with section 223(a)(14) may, in lieu of addressing paragraphs (e) (1) and (2) of this section, provide an assurance that adequate plans and resources are available to maintain full compliance.

15. In § 31.303, Paragraph (f)(1) introductory text is revised to read as follows:

§ 31.303 Compliance Monitoring.

(f) * * *

(1) Pursuant to section 223(a)(15) of the JJDP Act, the State shall:

* * * * *

16. Paragraph (f)(3)(i) in § 31.303 is amended by adding the following to the end of the paragraph:

§ 31.303 Valid Court Order.

(f) * * *

(3) * * *

(i) * * * Prior to issuance of the order, the juvenile must have received the full due process rights guaranteed by the Constitution of the United States.

* * * * *

17. Paragraph (f)(3)(iv) in § 31.303 is amended by revising the last sentence thereof to read as follows:

§ 31.303 Valid Court Order.

(f) * * *

(3) * * *

(iv) * * * A juvenile alleged or found in a violation hearing to have violated a valid court order may be held only in a secure juvenile detention or correctional facility, and not in an adult jail or lockup.

* * * * *

18. Paragraph (f)(3)(vi) in § 31.303 is amended by adding the following to the end of the paragraph:

§ 31.303 Valid Court Order.

(f) * * *

(3) * * *

(vi) * * * This determination must be informed by a written report, to the judge, that: reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by a public agency or organization other than a court or law enforcement agency. A multidisciplinary review team that operates independently of courts or law enforcement agencies would satisfy this requirement even if some individual members of the team represented court or law enforcement agencies.

* * * * *

19. Paragraph (f)(4)(vi) in § 31.303 is revised to read as follows:

§ 31.303 Rural Area.

(f) * * *

(4) * * *

(vi) Pursuant to section 223(a)(14) of the JJDP Act, the non-MSA (low population density) exception to the jail and lockup removal requirement as described in paragraphs (f)(4) (i) through (v) of this section shall remain in effect through 1997, and shall allow for secure custody beyond the 24 hour period described in paragraph (f)(4)(i) of this section when the facility is located where conditions of distance to be traveled or the lack of highway, road, or other ground transportation do not allow for court appearances within 24 hours, so that a brief (not to exceed an additional 48 hours) delay is excusable; or the facility is located where conditions of safety exist (such as severely adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonably safe travel. States may use these additional statutory allowances only where the precedent requirements set forth in paragraphs (f)(4) (i) through (v) of this section have been complied with. This may necessitate statutory or judicial (court rule or opinion) relief within the State from the 24 hour initial court appearance standard required by paragraph (f)(4)(i) of this section. States must document and describe in their annual monitoring report to OJJDP, the specific circumstances surrounding each individual use of the distance/ground transportation, and weather allowances.

* * * * *

20. Paragraph (f)(5) in § 31.303 is revised to read as follows:

§ 31.303 Monitoring Report.

(f) * * *

(5) *Reporting Requirement.* The State shall report annually to the Administrator of OJJDP on the results of monitoring for section 223(a) (12), (13), and (14) of the JJDP Act. The reporting period should provide 12 months of data, but shall not be less than six months. The report shall be submitted to the Administrator of OJJDP by December 31 of each year.

(i) To demonstrate compliance with section 223(a)(12)(A) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:

(A) Dates covered by the current reporting period.

(B) Total number of public and private secure detention and correctional facilities, the total number reporting, and the number inspected on-site.

(C) The total number of accused status offenders and nonoffenders, including out-of-state runaways and Federal wards, held in any secure detention or correctional facility for longer than 24 hours (not including weekends or holidays), excluding those held pursuant to the valid court order provision as set forth in paragraph (f)(3) of this section.

(D) The total number of accused status offenders and nonoffenders, including out-of-state runaways and Federal wards, held in any secure detention or correctional facility for less than 24 hours for purposes other than identification, investigation, release to parent(s), or transfer to a nonsecure facility.

(E) The total number of accused status offenders (including valid court order

violations) and nonoffenders securely detained in any adult jail, lockup, or nonapproved collocated facility for less than 24 hours.

(F) The total number of adjudicated status offenders and nonoffenders, including out-of-state runaways and Federal wards, held for any length of time in a secure detention or correctional facility, excluding those held pursuant to the valid court order provision.

(G) The total number of status offenders held in any secure detention or correctional facility pursuant to the valid court order provision set forth in paragraph (f)(3) of this section.

(ii) To demonstrate the extent to which the provisions of section 223(a)(12)(B) of the JJDP Act are being met, the report must include the total number of accused and adjudicated status offenders and nonoffenders placed in facilities that are:

(A) Not near their home community;

(B) Not the least restrictive appropriate alternative; and

(C) Not community-based.

(iii) To demonstrate the extent of compliance with section 223(a)(13) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:

(A) Dates covered by the current reporting period.

(B) The total number of facilities used to detain or confine both juvenile offenders and adult criminal offenders during the past 12 months AND the number inspected on-site.

(C) The total number of facilities used for secure detention and confinement of both juvenile offenders and adult criminal offenders which did not provide sight and sound separation.

(D) The total number of juvenile offenders and nonoffenders NOT separated in facilities used for the secure detention and confinement of both juveniles and adults.

(E) The total number of juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup that have been concurred with by OJJDP, including a list of such facilities.

(F) The total number of juveniles detained in collocated facilities concurred with by OJJDP, that were not separated from the security or direct care staff of the adult portion of the facility.

(G) The total number of juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup that have not been concurred with by OJJDP, including a list of such facilities.

(H) The total number of juveniles detained in collocated facilities not approved by the State and concurred with by OJJDP, that were not sight and sound separated from adult criminal offenders.

(iv) To demonstrate the extent of compliance with section 223(a)(14) of the JJDP Act, the report must include, at a minimum, include the following information for the current reporting period:

(A) Dates covered by the current reporting period.

(B) The total number of adult jails in the State AND the number inspected on-site.

(C) The total number of adult lockups in the State AND the number inspected on-site.

(D) The total number of adult jails holding juveniles during the past twelve months.

(E) The total number of adult lockups holding juveniles during the past twelve months.

(F) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups, and collocated facilities not concurred with by OJJDP, in excess of six hours.

(G) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups, and collocated facilities not concurred with by OJJDP, for less than six hours for purposes other than identification, investigation, processing, release to parent(s), or transfer to a juvenile facility.

(H) The total number of adjudicated juvenile criminal-type offenders held securely in adult jails, lockups and collocated facilities not concurred with by OJJDP, for any length of time.

(I) The total number of accused and adjudicated status offenders (including valid court order violators) and nonoffenders held securely in adult jails, lockups and collocated facilities not approved by the State and concurred with by OJJDP, for any length of time.

(J) The total number of adult jails, lockups and collocated facilities not concurred with by OJJDP, in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section, including a list of such facilities and the county or jurisdiction in which each is located.

(K) The total number of juveniles accused of a criminal-type offense who were held in excess of six hours but less than 24 hours in adult jails, lockups and collocated facilities not approved by the State and concurred with by OJJDP, in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section.

(L) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours in adult jails, lockups and collocated facilities not approved by the State and concurred with by OJJDP, in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section, due to conditions of distance or lack of ground transportation.

(M) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours in adult jails, lockups and collocated facilities not concurred with by OJJDP, in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section, due to adverse weather conditions.

* * * * *

21. Paragraph (f)(6) introductory text in § 31.303 is revised to read as follows:

§ 31.303 Funding Eligibility.

(f) * * *

(6) *Compliance.* The State must demonstrate the extent to which the requirements of section 223(a) (12)(A), (13), (14), and (23) of the Act are met. If the State fails to demonstrate full compliance with section 223(a) (12)(A) and (14), and compliance with (13) and (23) by the end of the fiscal year for any fiscal year beginning with 1994, the State's allotment under section 222 will be reduced by 25% for each such failure, provided that the State will lose its eligibility for *any* allotment unless: the State agrees to expend all remaining funds (except planning and administration, State advisory group set-aside funds and Indian tribe pass-through funds) for the purpose of achieving compliance with the mandate(s) for which the State is in noncompliance; or the Administrator makes a discretionary determination that the State has substantially complied with the mandate(s) for which there is noncompliance and that the State has made an unequivocal commitment to achieving full compliance within a reasonable time. Where a State's allocation is reduced, the amount available for planning and administration and the required pass-through allocation, other than State advisory group set-aside, will be reduced because they are based on the reduced allocation.

* * * * *

22. Paragraph (f)(6)(i) in § 31.303 is revised to read as follows:

§ 31.303 DSO Substantial Compliance.

(f) * * *

(6) * * *

(i) Substantial compliance with section 223(a)(12)(A) can be used to demonstrate eligibility for FY 1993 and prior year formula grant allocations if, within three years of initial plan submission, the State has achieved a 75% reduction in the aggregate number of status offenders and nonoffenders held in secure detention or correctional facilities, or removal of 100% of such juveniles from secure correctional facilities only. In addition, the State must make an unequivocal commitment, through appropriate executive or legislative action, to achieving full compliance by Fiscal Year 1994. Full compliance is achieved when a State has removed 100% of such juveniles from secure detention and correctional facilities or can demonstrate full compliance with de minimis exceptions pursuant to the policy criteria contained in the **Federal Register** of January 9, 1981 (46 FR 2566–2569).

* * * * *

23. Paragraph (f)(6)(iii)(A) in § 31.303 is removed and paragraphs (f)(6)(iii) (B), (C), (D), and (E), thereof are redesignated as paragraphs (f)(6)(iii) (A), (B), (C), and (D), respectively.

24. Newly designated paragraph (f)(6)(iii)(C) in § 31.303 is revised to read as follows:

§ 31.303 Jail Removal Waiver.

(f) * * *

(6) * * *

(iii) * * *

(C) *Waiver.* Failure to achieve full compliance as defined in this section shall terminate any State's eligibility for FY 1993 and prior year formula grant funds unless the Administrator of OJJDP waives termination of the State's eligibility. In order to be eligible for this waiver of termination, a State must request a waiver and demonstrate that it meets the standards set forth in paragraph (f)(6)(iii)(C) (*1*) through (*7*) of this section:

(*1*) Agrees to expend all of its Formula Grant award except planning and administration, advisory group set-aside, and Indian tribe pass-through funds, to achieve compliance with section 223(a)(14); and

(*2*) Removed all status and nonoffender juveniles from adult jails and lockups. Compliance with this standard requires that the last submitted monitoring report demonstrate that no status offender (including those accused of or adjudicated for violating a valid court order) or nonoffender juveniles were securely detained in adult jails or lockups for any length of time; or, that all status offenders and nonoffenders securely detained in adult jails and lockups for any length of time were held in violation of an enforceable State law and did not constitute a pattern or practice within the State; or, the number of status offenders and nonoffenders securely detained in adult jails and lockups is less than 9 per 100,000 juvenile population in the State; and

(*3*) Made meaningful progress in removing juvenile criminal-type offenders from adult jails and lockups. Compliance with this standard requires the State to document a significant reduction in the number of jurisdictions securely detaining juvenile criminal-type offenders in violation of section 223(a)(14) of the JJDP Act; or, a significant reduction in the number of facilities securely detaining such juveniles; or, a significant reduction in the average length of time each juvenile criminal-type offender is securely detained in an adult jail or lockup; or, that State legislation has recently been enacted and taken effect and which the State demonstrates will significantly impact the secure detention of juvenile criminal-type offenders in adult jails and lockups; and

(*4*) Diligently carried out the State's jail and lockup removal plan approved by OJJDP. Compliance with this standard requires that actions have been undertaken to achieve the State's jail and lockup removal goals and objectives within approved timelines, and that the State advisory group, required by section 223(a)(3) of the JJDP Act, has maintained an appropriate involvement in developing and/or implementing the State's plan; and

(*5*) Submitted an acceptable plan, based on an assessment of current jail and lockup removal barriers within the State, to eliminate noncompliant incidents; and

(*6*) Achieved compliance with section 223(a)(15) of the JJDP Act; and

(*7*) Demonstrates an unequivocal commitment, through appropriate executive or legislative action, to achieving full compliance.

* * * * *

25. Newly designated paragraph (f)(6)(iii)(D) in § 31.301 is revised to read as follows:

§ 31.303 Jail Removal Waiver.

(f) * * *

(6) * * *

(iii) * * *

(D) *Waiver Maximum.* A State may receive a waiver of termination of eligibility from the Administrator under paragraph (f)(6)(iii)(C) of this section for a combined maximum of four Formula Grant awards through Fiscal Year 1993. No additional waivers will be granted.

* * * * *

26. Paragraph (f)(7) in § 31.303 is revised to read as follows:

§ 31.303 Monitoring Report Exemption.

(f) * * *

(7) *Monitoring Report Exemptions.* States which have been determined by the OJJDP Administrator to have achieved full compliance with sections 223(a)(12)(A) and 223(a)(14), and compliance with section 223(a)(13) of the JJDP Act and wish to be exempted from the annual monitoring report requirements must submit a written request to the OJJDP Administrator which demonstrates that:

(i) The State provides for an adequate system of monitoring jails, law enforcement lockups, detention facilities, correctional facilities, and nonsecure facilities to enable an annual determination of State compliance with sections 223(a) (12)(A), (13), and (14) of the JJDP Act;

(ii) State legislation has been enacted which conforms to the requirements of sections 223(a) (12)(A), (13), and (14) of the JJDP Act; and

(iii) The enforcement of the legislation is statutorily or administratively prescribed, specifically providing that:

(A) Authority for enforcement of the statute is assigned;

(B) Time frames for monitoring compliance with the statute are specified; and

(C) Adequate procedures are set forth for enforcement of the statute and the imposition of sanctions for violations.

* * * * *

27. Paragraph (g) introductory text in § 31.303 is revised to read as follows:

§ 31.303 Crime Analysis.

(g) *Juvenile Crime Analysis.* Pursuant to section 223(a)(8), the State must conduct an analysis of juvenile crime problems, including juvenile gangs that commit crimes, and juvenile justice and delinquency prevention needs within the State, including those geographical areas in which an Indian tribe performs law enforcement functions. The analysis and needs assessment must include educational needs, gender specific services, delinquency prevention and treatment services in rural areas, and mental health services available to juveniles in the juvenile justice system. The analysis should discuss barriers to accessing services and provide a plan to provide such services where needed.

* * * * *

28. Paragraph (h) in § 31.303 is amended by adding the following sentence at the end thereof:

§ 31.303 Performance Report.

(h) * * * The annual performance report must be submitted to OJJDP no later than June 30 and address all formula grant activities carried out during the previous complete calendar year, federal fiscal year, or State fiscal year for which information is available, regardless of which year's formula grant funds were used to support the activities being reported on, e.g., during a reporting period, activities may have been funded from two or more formula grant awards.

* * * * *

29. Paragraph (j) in § 31.303 is revised to read as follows:

§ 31.303 Disproportionate Minority Confinement.

(j) *Minority Detention and Confinement.* Pursuant to section 223(a)(23) of the JJDP Act, States must demonstrate specific efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population, viz., in most States, youth between 10–17 are subject to secure custody. It is essential that States approach this statutory mandate in a comprehensive manner. Compliance with this provision is achieved when a State meets the requirements set forth in paragraphs (1) through (3) of this section:

(1) *Identification.* Provide quantifiable documentation (State, county and local level) in the State's FY 1994 Formula Grant Plan (and all subsequent Multi-Year Plans) Juvenile Crime Analysis and Needs Assessment to determine whether minority juveniles are disproportionately detained or confined in secure detention and correctional facilities, jails and lockups in relation to their proportion of the State juvenile population. Guidelines are provided in the OJJDP Disproportionate Minority Confinement Technical Assistance Manual (see Phase I Matrix). Where quantifiable documentation is not available to determine if disproportionate minority confinement exists in secure detention and correctional facilities, jails and lockups, the State must provide a time-limited plan of action, not to exceed six months, for developing and implementing a system for the ongoing collection, analysis and dissemination of information regarding minorities for those facilities where documentation does not exist.

(2) *Assessment.* Each State's FY 1994 Formula Grant Plan must provide a completed assessment of disproportionate minority confinement. Assessments must, at minimum, identify and explain differences in arrest, diversion and adjudication rates, court dispositions other than incarceration, the rates and periods of prehearing detention in and dispositional commitments to secure facilities of minority youth and non-minority youth in the juvenile justice system, and transfers to adult court (see Phase II Matrix). If a completed assessment is not available, the State must submit a time-limited plan (not to exceed 12 months from submission of the Formula Grant Application) for completing the assessment.

(3) *Intervention.* Each State's FY 1995 Formula Grant Plan must, where disproportionate confinement has been demonstrated, provide a time-limited plan of action for reducing the disproportionate confinement of minority juveniles in secure facilities. The intervention plan shall be based on the results of the assessment, and must include, but not be limited to the following:

(i) Diversion. Increasing the availability and improving the quality of diversion programs for minorities who come in contact with the juvenile justice system, such as police diversion programs;

(ii) Prevention. Providing developmental, operational, and assessment assistance (financial and/or technical) for prevention programs in communities with a high percentage of minority residents with emphasis upon support for community-based organizations (including non-traditional organizations) that serve minority youth;

(iii) Reintegration. Providing developmental, operational, and assessment assistance (financial and/or technical) for programs designed to reduce recidivism by facilitating the reintegration of minority youth in the community following release from dispositional commitments to reduce recidivism;

(iv) Policies and Procedures. Providing financial and/or technical assistance that addresses necessary changes in statewide and local, executive, judicial, and legal representation policies and procedures.

(v) Staffing and Training: Providing financial and/or technical assistance that addresses staffing and training needs that will positively impact the disproportionate confinement of minority youth in secure facilities.

(4) The time-limited plans of action set forth in paragraphs (j) (1), (2) and (3) of this section must include a clear indication of current and future barriers; which agencies, organizations, or individual(s) will be responsible for taking what specific actions; when; and what the anticipated outcomes are. The interim and final outcomes from implementation of the time-limited plan of action must be reported in each State's Multi-Year Plans and Annual Plan Updates. Final outcomes for individual project awards are to be included with each State's annual performance report [paragraph (h) of this section].

(5) Technical assistance is available through the OJJDP Technical Assistance Contract to help guide States with the data collection and analysis, and with programmatic elements of this requirement. Information from the OJJDP Special Emphasis Initiative on Disproportionate Minority Confinement pilot sites will be disseminated as it becomes available.

(6) For purposes of this statutory mandate, minority populations are defined as: African Americans, American Indians, Asians, Pacific Islanders, and Hispanics.

* * * * *

30. Section 31.403 is revised to read as follows:

§ 31.403 Other Requirements.

The State assures that it will comply, and that subgrantees and contractors will comply, with all applicable Federal non-discrimination requirements, including:

(a) Section 809(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and made applicable by section 299A of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended;

(b) Title VI of the Civil Rights Act of 1964, as amended;

(c) Section 504 of the Rehabilitation Act of 1973, as amended;

(d) Title IX of the Education Amendments of 1972;

(e) The Age Discrimination Act of 1975;

(f) The Department of Justice NonDiscrimination regulations, 28 CFR part 42, subparts C, D, E and G;

(g) The Department of Justice regulations on disability discrimination, 28 CFR part 35 and part 39; and

(h) Subtitle A, Title II of the Americans with Disabilities Act (ADA) of 1990.

John J. Wilson,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 94–17961 Filed 7–22–94; 8:45 am]

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federal register

Monday
July 25, 1994

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 1 and 23

Airworthiness Standards; Flight Proposals Based on European Joint Aviation Requirements Proposals; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1 and 23

[Docket No. 27807; Notice No. 94-22]

RIN 2120-AE61

Airworthiness Standards; Flight Proposals Based on European Joint Aviation Requirements Proposals

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposed changes to the flight airworthiness standards for normal, utility, acrobatic, and commuter category airplanes. These proposals arise from the joint effort of the Federal Aviation Administration (FAA) and the European Joint Aviation Authorities (JAA) to harmonize the Federal Aviation Regulations (FAR) and the Joint Aviation Requirements (JAR) for airplanes that will be certificated in these categories. The proposed changes would provide nearly uniform flight airworthiness standards for airplanes certificated in the United States under 14 CFR part 23 (part 23) and in the JAA countries under Joint Aviation Requirements 23 (JAR 23) simplifying airworthiness approvals for import and export purposes.

DATES: Comments must be submitted on or before November 22, 1994.

ADDRESSES: Comments on this notice should be mailed in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-200), Docket No. 27807, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27807. Comments may be inspected in Room 915G weekdays between 8:30 a.m. and 5:00 p.m., except on Federal holidays.

In addition, the FAA is maintaining a duplicate information docket of comments in the Office of the Assistant Chief Counsel, ACE-7, Federal Aviation Administration, Central Region, 601 East 12th Street, Kansas City, Missouri 64106. Comments in the duplicate information docket may be inspected in the Office of the Assistant Chief Counsel weekdays, except Federal holidays, between the hours of 7:30 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Lowell Foster, ACE-111, Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; telephone (816) 426-5688.

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. Comments relating to the environmental, energy, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice 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 the Administrator before taking action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received 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 docket. Commenters wishing the FAA 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. 27807." The postcard will be date stamped and returned to the commenter.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) 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) 267-3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request, from the above office, a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

At the June 1990 meeting of the JAA Council (consisting of JAA members from European countries) and the FAA, the FAA Administrator committed the FAA to support the harmonization of the FAR with the JAR being developed for use by the European authorities who are members of the JAA. In response to this commitment, the FAA Small Airplane Directorate established an FAA Harmonization Task Force to work with the JAR 23 Study Group to harmonize part 23 and the proposed JAR 23. The General Aviation Manufacturers Association (GAMA) also established a JAR 23/part 23 Committee to provide technical assistance in this effort.

Following a review of the first draft of proposed JAR 23, members of the FAA Harmonization Task Force and the GAMA Committee met in Brussels, Belgium for the October 1990 meeting of the JAR 23 Study Group. Representatives from the Association Europeenne des Constructeures de Material Aerospatial (AECMA), an organization of European airframe manufacturers, also attended. The main agenda item for this meeting was the establishment of procedures to accomplish harmonization of the airworthiness standards for normal, utility, and acrobatic category airplanes. The JAA had decided that its initial rulemaking effort should be limited to these three categories and that commuter category airworthiness standards should be addressed separately.

After that meeting, technical representatives from each of the four organizations (GAMA, AECMA, FAA and JAA) met to resolve differences between the proposed JAR and part 23. This portion of the harmonization effort involved a number of separate meetings of specialists in the flight, airframe, powerplant, and systems disciplines. These meetings showed that harmonization would require revisions to both part 23 and the proposed JAR 23.

Near the end of the effort to harmonize the normal, utility, and acrobatic category airplane airworthiness standards, the JAA requested and received recommendations from its member countries on proposed airworthiness standards for commuter category airplanes. The JAA and the FAA held specialist and study group meetings to discuss these recommendations, which resulted in proposals to revise portions of the part 23 commuter category airworthiness standards.

Unlike the European rules, where commuter category airworthiness standards are separate, for U.S. rulemaking, it is advantageous to adopt normal, utility, acrobatic, and commuter category airworthiness standards simultaneously, since commuter category airworthiness standards are already contained in part 23.

Accordingly, this NPRM proposes to revise the flight airworthiness standards for all part 23 airplanes.

During the part 23 harmonization effort, the FAA established an Aviation Rulemaking Advisory Committee (ARAC) (56 FR 2190, January 22, 1991), which held its first meeting on May 23, 1991. The ARAC on General Aviation and Business Airplane (GABA) Issues was established at that meeting to provide advice and recommendations to the Director, Aircraft Certification Service, FAA, regarding the airworthiness standards in part 23 as well as related provisions of parts 91 and 135 of the regulations.

The FAA announced, on June 2–5, 1992, at the JAA/FAA Harmonization Conference in Toronto, Ontario, Canada, that it would consolidate within the ARAC structure an ongoing objective to "harmonize" the JAR and the FAR. Coinciding with that announcement, the FAA assigned the ARAC on GABA Issues those rulemaking projects related to JAR 23/part 23 harmonization that were in final coordination between the JAA and the FAA. The harmonization process included the intention to present the results of JAA/FAA coordination to the public as NPRM's. Subsequently, the ARAC on GABA Issues established an ARAC–JAR 23 Study Group.

The JAR 23 Study Group made recommendations to the ARAC on GABA Issues concerning the FAA's disposition of the rulemaking issues coordinated between the JAA and the FAA. The draft NPRM's previously prepared by the FAA harmonization team were made available to the harmonization working group to assist them in their effort.

A notice of the formation of the JAR/FAR 23 Harmonization Working Group was published on November 30, 1992 (57 FR 56626). The group held its first meeting on February 2, 1993. These efforts resulted in the proposals for flight airworthiness standards contained in this notice. The ARAC on GABA Issues agreed with these proposals.

The FAA received unsolicited comments from the JAA dated January 20, 1994, concerning issues that were left unresolved with the JAR 23 Study Group. The JAR/FAR 23 Harmonization Working Group did not address some of the unresolved issues because the JAA had not yet reached positions on those issues. Unresolved issues will be dealt with at future FAR/JAR Harmonization meetings. With respect to other issues unresolved by the JAR 23 Study Group, the JAR/FAR 23 Harmonization Working Group recommendations did not reflect harmonization, but reflected the technical discussion of the merits of each issue that had been throroughly debated at the JAR/FAR 23 Harmonization meetings. (The Working Group Chairperson had been present at the Harmonization meetings.) The JAA comments have been placed in the docket for this proposal, and will be considered along with those received during the comment period.

Following completion of these harmonization efforts, the FAA determined that the proposed revisions to part 23 were too numerous for a single NPRM. The FAA decided to simplify the issues by issuing four NPRM's. These NPRM's address the airworthiness standards in the specific areas of systems and equipment, powerplant, flight, and airframe. These NPRM's propose changes in all seven subparts of part 23. Since there is some overlap, interested persons are advised to review all four NPRM's to identify all proposed changes to a particular section.

Discussion of Proposals

Section 1.1 General Definitions

This proposal would amend § 1.1 to add a definition of "maximum speed for stability characteristics, V_{FC}/M_{FC}." This proposed change would harmonize part 1 and JAR 1. The definition is currently contained in § 23.175(b)(2) and also in § 25.253(b). Moving the definition to part 1 would simplify the text of part 23 and ease the referencing of the term V_{FC}/M_{FC}. The definition would be deleted from § 23.175(b)(2).

Section 23.3 Airplane Categories

This proposal would make a change to the limited aerobatic operations authorized for utility category certification, change the authorized commuter category certification maneuvers and prohibit dual type certification of commuter category airplanes.

The limitation for utility category airplanes in § 23.3(b)(2) would be revised to add an outside limit of 90 degrees in angle of bank for lazy eights, chandelles, and steep turns.

Section 23.3(d) would be revised to delete chandelles and lazy eights as approved operations in commuter category airplanes because the FAA does not anticipate any operational need for such maneuvers.

Further, § 23.3(e) would be revised to prohibit type certification of commuter category airplanes in any other category. In the preamble discussion of Proposal 3 for Amendment No. 23–34 (52 FR 1806, January 15, 1987), the FAA discussed the issue of dual certification, with emphasis on the issuance of airworthiness certificates. Since then, the FAA has gained experience with airplanes certificated in both normal and commuter categories. The FAA has found confusion among pilots and operators about the appropriate performance limitations.

Although the proposed performance requirements, based on weight, altitude, and temperature (WAT) criteria (see proposal for § 23.45), would alleviate some of the problems with current airplanes, the FAA proposes that commuter category airplanes not have dual type certificates. One problem with dual type certification is pilot confusion. WAT limits would differ between normal and commuter categories, requiring pilots who get type rated in these airplanes to know two sets of limitations and to remember when each set of limitations is applicable. This proposed rule would not preclude the type certification of similar airplanes with different model numbers, such as the present Cessna models 500 and 501.

Section 23.25. Weight Limits

This proposal would make changes to § 23.25(a) and remove references to commuter category zero fuel weight in paragraph (a) and standby power rocket engines in paragraph (a)(1)(iii).

Revised § 23.25(a) would clarify that the maximum weight that must be selected is the least of the three choices given in § 23.25(a)(1). The airframe NPRM proposes moving the commuter category zero fuel weight requirement in § 23.25(a) to § 23.343. The FAA proposes removing the reference to both standby power rocket engines and to appendix E in § 23.25(a)(1)(iii) because this is a rare and obsolete design feature. If standby power rocket engines were proposed as a design feature, the FAA would issue special conditions to ensure adequate airworthiness.

Section 23.33 Propeller Speed and Pitch Limits

Proposed revisions to § 23.33(b)(1) would delete the reference to V_y and replace it with "the all engine(s) operating climb speed specified in § 23.65." This would be done for consistency with other changes in performance requirements. Section 23.33(b)(2) would be revised to use "V_{NE}" in place of "never exceed speed," since V_{NE} is defined in part 1, and to delete the world "placarded" which is unnecessary.

Section 23.45 General

In Notice of Proposed Rulemaking, Small Airplane Airworthiness Review

Program Notice No. 4, Notice No. 90–18 (55 FR 26534, June 28, 1990), the FAA requested comments on the need for weight, altitude, and temperature (WAT) criteria, as information or as a limitation on piston-powered, twin-engine part 23 airplanes. The FAA also requested comments about WAT criteria on turbine-powered twin-engine part 23 airplanes, specifically during takeoff and landing.

WAT criteria is used to determine the maximum weight an airplane can have in relation to altitude and temperature for safe takeoff. This criteria provides a pilot with the information needed to determine if a takeoff and climb can be successfully completed, including for multiengine airplanes, if one engine becomes inoperative. WAT criteria has been required under part 23 for commuter category airplanes, at all approved altitudes. A limited WAT criteria has been required for turbine engine powered airplanes at 5,000 feet and at standard temperatures plus 40°F, but not for higher altitudes or temperatures. For some multiengine powered airplanes WAT data has been provided by the manufacturer as information to pilots but is not required to be followed.

The FAA received three comments on mandating WAT criteria in part 23. One commenter (GAMA) "believes that WAT information is useful but certainly not the only way to present operating data for any airplane" and that making WAT criteria an airplane or operating limitation for part 23 airplanes is "an unnecessary and unjustified expansion or redirection of operating criteria."

Another commenter (the Airline Pilots Associaton—ALPA) wants WAT information furnished during the certification process. The commenter cites the variety of operational uses of these airplanes including in scheduled air carrier and regional airline service. The commenter also cities the need for "one level" of safety as justification for expanding the WAT requirements.

The other commenter (JAA) also supports WAT criteria. This commenter believes that the chance of a single-engine failure on any airplane is high. Also, this commenter warns that safety considerations include airplane occupants and personnel on the ground. According to the commenter, transport category airplanes follow WAT criteria by limiting the operation of the airplane. Beyond the point where takeoff can be rejected, one-engine-inoperative climbs must guarantee obstacle clearance. The commenter recognizes a need for generally similar requirements for commuter category airplanes.

The JAA believes that requiring a continued flight capability would preclude the operation of single-engine airplanes. Also, the commenter believes that airplane size and stall speed provide characteristics that permit safe landings in the event of an inoperative engine for single-engine airplanes and smaller multiengine airplanes.

The commenter points out that between the two extremes of the transport category airplane and the single-engine airplane lies the light twin-engine reciprocating airplanes and turbine engine airplanes, ranging from four seats to nine and from 4,000 to 12,500 pounds. The commenter notes that, for these types of airplanes, it would be burdensome to require compliance with full net flight path obstacle clearance. In the commenter's opinion, a safe forced landing becomes less satisfactory with increased takeoff weight, involving longer stopping distances even for the same landing speed. The commenter notes that the twin-engine airplanes have other significant adverse characteristics compared to single-engine airplanes. First, an engine failure is twice as probable; second, asymmetric power demands immediate pilot action.

The commenter also points out that the inability to continue flight with one engine inoperative creates the following situation: the chance of a second engine failure is increased; a suitable site for an emergency landing is reduced; and the pilot resists the inevitable forced landing and tries to maintain flight. Training under more favorable conditions may have taught the pilot to expect success in those situations. In unfavorable conditions, attempts to maintain flight may lead to loss of airspeed at high asymmetric power and, commonly, loss of directional control that results in a stall/spin accident.

The commenter advocates certification and operating criteria for multiengine airplanes that blend the performance requirements for a single-engine airplane and a transport category airplane. The commenter believes that the existing requirements accept a limited period of risk just before and just after liftoff, where engine failure may not be fully accounted for. The commenter believes that the application of WAT limits clearly accounts for actual conditions, although the climb gradient requirements are lower than the requirements of part 25/JAR 25.

The commenter proposes no distinction between reciprocating and turbine engines. In the commenter's opinion, the WAT criteria should be imposed, where applicable, as limitations through the Airplane Flight Manual (AFM).

The commenter does not believe that such proposals would involve costs disproportionate to the benefit. The commenter suggests that the comment from the Small Airplane Airworthiness Review Conference, held October 22–26, 1984, that such criteria would "eliminate the certification of an entire class of airplanes," is an exaggeration. The proposals are achievable, in the commenter's view, by typical modern light twin-engine airplanes with realistic payloads, particularly the more significant executive/air taxi airplanes. The adoption of the WAT concept, in the commenter's opinion, would instill a greater awareness of performance consideration in pilots from an early stage of their training.

The commenter also believes that the requirements on climb and handling qualities of the present §§ 23.65 and 23.67 are illogical and unreasonable. The commenter recommends using WAT criteria so that it applies equally to all airplane operations because it offers improved airplane capability.

The commenter points out that manufacturers of "WAT type" airplanes routinely determine performance under a wide range of conditions. The commenter also notes that flight manuals produced to the widely accepted General Aviation Manufacturers Association (GAMA) specification already contain performance data beyond the minimum requirements of part 23. In the commenter's opinion, additional testing or data scheduling create no additional costs.

To determine the necessity of applying WAT criteria to other than transport and commuter airplanes, the commenter notes that present draft JAR 23 applies WAT limits only to piston-engine airplanes above 6,000 pounds and turbine-engine airplanes. The JAR Operations Study Group proposes applying WAT limits to all JAR 23 airplanes in commercial operations.

In 1991, the FAA studied the accident record of reciprocating engine-powered, multiengine part 23 airplanes of over 6,000 pounds maximum takeoff weight with a substantial fleet size. The FAA completed the study using the National Transportation Safety Board (NTSB) accident briefs and evaluated those statistics over the study period of the individual airplanes. The statistics show the following:

(a) Over 100 accidents and 200 fatalities occurred due to engine failure during the study period.

(b) Forty-seven of the engine failure accidents occurred because the pilot

failed to maintain flying speed and/or directional control.

(c) Engine reliability is a significant factor in the accident study. (For example, airplanes of similar or the same aerodynamic configuration, but with different engines, have significantly different accident records.)

After reviewing the accident statistics, and recognizing the performance capabilities of the accident airplanes, the FAA concludes the following:

(a) Engine reliability would not be of major concern if the airplane had adequate performance on the remaining operative engine.

(b) The loss of flying speed and subsequent loss of airplane control would not be a significant problem if the airplane exhibited adequate climb performance capabilities to fly out of an engine loss situation at low speeds.

Based on these statistics and conclusions from the FAA 1991 study and on comments, the FAA has determined that WAT limits are necessary for safe operation of multiengine airplanes of the type that will be involved in transporting passengers for hire. Operating rules (part 135) are already in place that specify some performance limitations. The cutoff weight for reciprocating engine-powered airplanes of 6,000 pounds would encompass most airplanes of concern. All turbine engine-powered airplanes are included because of the adverse effect of increasing temperatures on turbine engine performance.

This proposal would change § 23.45 to require weight, altitude, and temperature (WAT) performance accountability for normal, utility, and acrobatic airplanes with a maximum takeoff weight over 6,000 pounds and all turbine-powered airplanes. Including WAT accountability necessitates reorganization and revisions to all paragraphs of this section. The inclusion of WAT accountability in part 23 also requires changes to several other sections in part 23.

Paragraph (a)(1) would be revised to require that performance requirements be met for still air and "standard atmosphere." Current (a)(1) uses the term "standard atmospheric conditions."

The applicability of paragraph (a) (1) and (2) would be revised to require that all airplanes meet the performance requirements in still air and standard atmosphere, and that ambient atmospheric conditions, which currently must be met by commuter category airplanes, would have to be met by (1) commuter category airplanes, (2) reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight, and (3) turbine engine-powered airplanes.

Proposed paragraph (b) would replace current requirements of paragraph (b), pertaining to power or thrust available, with the altitude and temperature requirements for performance data.

Proposed § 23.45(c) is modified § 23.51. It would require that performance data be determined with the cowl flaps in the position used in cooling tests required by § 23.1041 to § 23.1047 and permits the cowl flap position to be addressed uniformly.

Proposed paragraph (d) is the same as current paragraph (c) pertaining to the determination of available propulsion thrust. Proposed changes to § 23.45 (b), (c), (d), and (e) would delete references to "thrust" and retain just "power," for standardization with the JAR. This is considered appropriate since power covers engine output, despite how the absorbed power is transmitted to the atmosphere. The FAA proposes this change in subsequent sections where the term "power or thrust" is used.

Proposed paragraph (e) is the same as requirements of current paragraph (d) with a minor editorial revision.

Proposed new paragraph (f) is based on current paragraphs (e)(3) and (e)(5)(i), which apply only to commuter category airplanes. Proposed changes to § 23.45(f) would extend to all airplane categories the requirement for all takeoff and landing procedures to be consistently executable by pilots of average skill. This is considered appropriate since takeoffs and landings must be made routinely by operational pilots. It is also appropriate that takeoff and landing performance data published in the Airplane Flight Manual (AFM) can be consistently achieved by operational pilots.

Proposed new paragraph (g) would require determining takeoff distance, accelerate-stop distance, takeoff distance and takeoff run, and landing distance on a smooth, dry, hard-surfaced runway. The FAA considers these limitations necessary for WAT limited airplanes since the WAT takeoff performance is only valid on a particular defined surface. The FAA does not consider the testing necessary to extend the same limitations to non-WAT airplanes burdensome to applicants since that information is already available in GAMA Spec. No. 1 AFM's. Additionally, the proposal allows for the derivation of landing and takeoff data on non-hard surfaces, such as grass and gravel and, thus, may not require additional flight testing.

Proposed paragraph (h) is the same as current paragraph (e), which covers additional performance requirements for commuter category airplanes, except for some minor revisions. In the list of items to be determined in paragraph (h)(3), "landing distance" would not be included since it would already be covered in proposed § 23.45(g). A reference to § 23.67 in paragraph (h)(4) would be updated to be consistent with proposed revisions to that section in this notice; and the phrase "missed approaches" would be changed to "discontinued approaches" to be consistent with the proposed change to § 23.143. Proposed paragraph (h)(5)(i) requiring that the procedures must be able to be consistently executed by a crew of average skill would have added to it "in atmospheric conditions reasonably expected to be encountered in service." These clarifying words would also appear in paragraph (h).

Section 23.49 Stalling Speed

Section 23.49 would be reorganized and edited for clarification. Currently the requirements for V_{S0} and V_{S1} are separated with parallel configuration items under paragraphs (a) and (d). The proposed clarification would merge the V_{S0} and V_{S1} requirements under paragraph (a). Existing paragraph (b) would be moved to paragraph (c) and existing paragraph (c) would be moved to paragraph (d). Existing paragraph (e) would become paragraph (b) and the thrust conditions in paragraph (f) would be incorporated under paragraph (a) items (1) and (2).

Proposed changes to paragraph (a) are as follows:

(1) Proposed paragraph (a)(4) would be a requirement that the airplane be in the condition existing in the test, in which V_{S0} and V_{S1} are being used.

(2) Proposed paragraph (a)(5) would be a revised version of current paragraph (a)(6). The current requirement states that the center of gravity must be in the most unfavorable position within the allowable landing range. The proposed requirement would state that the center of gravity must be in the position that results in the highest value of V_{S0} and V_{S1}.

(3) As mentioned under § 23.45, the current paragraph (a)(5) would be moved to § 23.45(c).

All of the changes are clarifying and not an increase in requirements.

Section 23.51 Takeoff Speeds

This proposal would revise the paragraph heading from "Takeoff" to "Takeoff speeds" and incorporate the takeoff speed requirements currently contained in § 23.53. This revision to the heading and reorganization of

takeoff requirements is proposed for harmony with JAR 23.

Current § 23.51(a) would be moved to § 23.53(a). Current paragraph (a) requires that the distance required to take off and climb over a 50-foot obstacle must be determined with the engines operating within approved operating limitations and with cowl flaps in the normal takeoff position. These requirements as modified would be covered under proposed §§ 23.45 (c) and (d) and 23.1587.

Current § 23.51(b) in measuring seaplane and amphibian takeoff distances would be deleted because it is a statement of an acceptable method of compliance. Also, there is not a need for addressing a separate seaplane starting point.

Current § 23.51(c) concerning pilot skills and conditions would be deleted since it would be covered under the general requirements in proposed § 23.45(f).

Current § 23.51(d) would be deleted because the requirements are partly covered under § 23.45 in commuter category performance and other performance requirements. In addition, the information requirements would be covered under § 23.1587. Subpart G, under which § 23.1587 appears, is generally used to specify what information must be in the AFM.

For multiengine normal, utility, and acrobatic category airplanes, the determination of V_R is transferred from § 23.53(a) to proposed § 23.51(a) with minor changes in the specified rotation speed. For multiengine airplanes, in proposed paragraph (a)(1), the margin between rotation speed and V_{MC} increases to 1.05 V_{MC}, or a margin of 1.10 V_{S1} is established between V_R and stall.

Proposed paragraph (a) would define V_R as the speed at which the pilot makes a control input, with the intention of lifting the airplane out of contact with the runway or water surface. This definition would apply to tail wheel and tricycle gear airplanes, seaplanes, and single-engine airplanes.

In addition to the multiengine rotation speed discussed above, proposed paragraph (a) would include rotation speeds for single-engine airplanes and seaplanes and amphibians. This proposed rule would extend V_R applicability to all part 23 airplanes to establish a safe and standardized procedure that can be used by operational pilots to achieve AFM takeoff performance. This proposed use of rotation speed is consistent with part 25.

In proposed paragraph (b) the speed at 50 feet is based on current § 23.53(b) with no change in requirements.

For commuter category airplanes, the takeoff speed requirements move from § 23.53(c) to proposed § 23.51(c) with editorial changes. The option in proposed (c)(1)(i) for an applicant to determine a V_{MCG} and establish a V_1 based on V_{MCG} rather than a margin above V_{MCA} is added.

Section 23.53 Takeoff Performance

The heading of § 23.53 would be new and the content would come primarily from existing § 23.51. This section would now provide general takeoff performance requirements.

The proposal would move the takeoff speed requirements of the current § 23.53 to § 23.51. (See proposal for § 23.51.) Proposed § 23.53 provides general takeoff performance requirements for normal, utility, acrobatic, and commuter category airplanes. Proposed paragraph (a) is based on current § 23.51(a). Proposed paragraph (b) is a modification of current § 23.1587(a)(5). Proposed paragraph (c) is based on § 23.51(d).

Section 23.55 Accelerate-stop Distance

This proposal would revise § 23.55 to clarify the accelerate-stop segments and to make editorial changes.

This proposal would divide the accelerate-stop maneuver into three segments, rest to V_{EF} (proposed (a)(1)), V_{EF} to V_1 (proposed (a)(2)), and V_1 to rest (proposed (a)(3)). This is not a new requirement, but it divides the total distance into three segments to be considered. The phrase, "in the case of engine failure," in current § 23.55(a)(2) would be deleted because it would be included in proposed (a)(2). Also, the phrase, "assuming that * * * the pilot has decided to stop as indicated by application of the first retarding means at the speed V_1," is deleted because it is stated in proposed § 23.51(c)(1)(ii). The "exceptional skill" phrase of § 23.55(b)(3) would be deleted because it will remain in proposed § 23.45(h)(5)(i). The § 23.55(b) phrase "if that means is available with the critical engine inoperative" would be deleted because it is covered by the safe and reliable requirements.

Section 23.57 Takeoff Path

Section 23.57 would be revised to clarify and specify which takeoff path segments must be determined in flight. Proposed paragraph (a) would clarify that the transition to the enroute configuration should be completed on or before reaching 1500 feet above the takeoff surface. In current § 23.57(c)(1), the slope of the airborne part of the takeoff path must be "positive at each point"; this is changed in proposed (c)(1) to "not negative at any point," to allow acceleration in level flight, which is implied by current § 23.61(c). A proposed editorial change to § 23.57(c)(3) would specify that the climb gradient "must not be less than * * *," as opposed to "may not be less than. * * *" The option in current § 23.57(d) of determining the takeoff path, either by continuous demonstration or by synthesis from segments, no longer reflects current practice, nor is it entirely desirable. The only viable option in determining the takeoff path from rest to 35 feet above the takeoff surface is by a continuous demonstration. The most practical method of determining the takeoff path from 35 feet to 1500 feet above the takeoff surface is by synthesis from segments. Accordingly, proposed § 23.57(d) and (e) would incorporate these changes.

Section 23.59 Takeoff Distance and Takeoff Run

This proposal would clarify § 23.59 with no substantial change in requirements. The proposal would change the opening text to clarify that the determination of takeoff run is the applicant's option since the applicant may choose not to present clearway data. The reference in current § 23.59(a)(2) and (b)(2) to "along the takeoff path," in a takeoff with all engines operating, would be deleted since takeoff path is a one-engine-inoperative condition. Additionally, the reference to V_{LOF} is replaced with the words "liftoff point" to clarify that the requirements specify a point and related distance, not a speed.

Section 23.63 Climbs: General

Proposed new § 23.63 would assemble general climb requirements from §§ 23.65 and 23.67 into a single section and differentiate between WAT limited airplanes (reciprocating engine powered airplanes of above 6,000 pounds maximum takeoff weight and all turbine engine powered airplanes) and those airplanes that are not WAT limited (reciprocating engine powered airplanes of 6,000 pounds or less). (See the proposed change to § 23.45 for discussion of WAT limits.) Proposed new § 23.63(a)(1) would require that compliance be shown out of ground effect. This requirement is in current § 23.67(e), which applies to commuter category airplanes. Proposed new § 23.63(a)(3) requires that compliance must be shown, unless otherwise specified, with one engine inoperative,

at a bank angle not exceeding 5 degrees. This requirement is in current § 23.149 and has been applied generally for part 23 airplanes except commuter category airplanes in certain circumstances.

Section 23.65 Climb: All Engines Operating

This proposal would clarify § 23.65 and would change minimum climb speeds for multiengine airplanes.

Proposed revisions to § 23.65(a) would change the applicability from "each airplane" as adopted in Amendment No. 23–45 (58 FR 42136, August 6, 1993) to "each normal, utility, and acrobatic category reciprocating engine-powered airplane of 6,000 pounds or less maximum weight." It would change the phrase "angle of climb" to "climb gradient" and establish the climb gradient at 8.3 percent for landplanes and 6.7 percent for seaplanes and amphibians with certain specified performance conditions.

Proposed (a)(4) would establish a minimum climb speed for multiengine airplanes of not less than the greater of 1.1 V_{MC} and 1.2 V_{S1}, which would provide a margin above V_{MC}.

The cowl flap requirements currently in paragraph (a)(5) would be moved to § 23.45(c).

Current § 23.65(b) would be deleted. These requirements should have been deleted in Amendment No. 23–45 (58 FR 42136, August 6, 1993), but they were overlooked. Since the adoption of Amendment No. 23–45 there is no longer a rate of climb requirement in § 23.65(a). The alternative means of compliance allowed by paragraph (b), therefore, is obsolete and not consistent with the more stringent performance requirements proposed by this NPRM. Also, the alternative means of compliance in paragraph (b) was rarely used by applicants.

The proposed § 23.65(b) would add WAT limits for reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and turbine engine-powered airplanes. (See proposal for § 23.45 for discussion of WAT limits.)

Current § 23.65(c) would be moved to § 23.65(b) and the temperature and altitude requirements would be deleted since WAT limits are proposed for turbine engine-powered airplanes and the four percent gradient would apply at any approved takeoff ambient condition. Proposed § 23.65(b)(2) provides for landing gear down unless the gear can be retracted in not more than seven seconds. This is more stringent than the present requirement, but the same as the proposed one-engine-inoperative takeoff climb requirements, and is considered appropriate to this weight and class of airplane with WAT limits.

Current § 23.65(d) would be deleted since the requirements would be covered in the proposed § 23.45(h)(2) and current § 23.21.

Section 23.66 Takeoff Climb; One-engine Inoperative

Proposed new § 23.66 would require the determination of the one-engine-inoperative climb capacity of all WAT limited reciprocating engine-powered and turbine engine-powered airplanes immediately after takeoff. Since most reciprocating engine-powered airplanes do not have autofeather, the condition immediately after takeoff can be critical. There is not a minimum climb requirement in this configuration, only the determination of the climb or descent gradient. This information does not become a limitation; it is provided to the pilot in the AFM (see § 23.1587) to allow the pilot to make informed judgments before takeoff.

Section 23.67 Climb: One Engine Inoperative

This proposal would reorganize § 23.67 for harmonization with the JAR; and would require WAT limits for some airplanes; require wings level climb up to 400 feet for commuter category airplanes, and make minor changes in airplane configuration requirements.

Revised § 23.67(a) would specify the climb requirements for non-WAT airplanes with no change in requirements for those airplanes.

Proposed § 23.67(b) would specify climb requirements for WAT airplanes. WAT criteria would be applied for both reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and turbine engine-powered airplanes. (See the discussion of WAT limits in the proposed change to § 23.45.) Turbine engine-powered airplanes are currently subject to limited WAT limitations under § 23.67(c), which would be incorporated into proposed § 23.67(b).

The takeoff flap position for normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds or less is changed to "wing flaps retracted" from "most favorable position" (current § 23.67(4)). Wing flaps retracted is the position most used in certification and in service for this size of airplane. The proposed change is contained in § 23.67(a)(1)(iv), (a)(2)(iv), and (b)(2)(iv).

Current § 23.67(d) is deleted since all climb speeds (both all-engine and one engine inoperative) are scheduled and the determination of V_Y is no longer required. V_Y is also proposed to be deleted in all other sections of part 23 for the same reason.

Current § 23.67(e) for commuter category airplanes would be redesignated as § 23.67(c) with no change in requirements except that the takeoff climb with landing gear extended must be conducted with the landing gear doors open. This is a conservative approach offered by the JAA to specify a definite gear door configuration and to delete the requirement to determine performance during the transient condition of gear doors opening and closing. Proposed § 23.67(c)(1) specifies that the first segment climb must be conducted with the wings level and further specifies that the climb speed for the segment must be V_2 instead of the current requirement for a range of speeds from V_{LOF} and whatever the applicant selects at gear retraction. Proposed § 23.67(c)(2) requires conducting the second segment climb with wings level, which would be appropriate for operational scenarios.

The current § 23.67(e)(1) requirements are partially moved to § 23.67(c) and the remainder are contained in § 23.63(a)(1) and (d).

Proposed § 23.67(c)(3), enroute climb, adds a minimum climb speed to ensure an adequate margin above stall speed.

The proposed § 23.67(c)(4) makes no substantive changes in the current requirements of § 23.67(e)(3) but does change the paragraph heading from "Approach" to "Discontinued approach." In addition, proposed § 23.67(c)(4) clarifies that the climb gradients must be met at an altitude of 400 feet above the landing surface.

Section 23.69 Enroute Climb/Descent

Proposed new § 23.69 would require the determination of all engine and one-engine-inoperative climb/descent rates and gradients in the enroute configuration under all operational WAT conditions. This information is necessary for enroute flight planning and dispatch. Climb speeds are specified to provide a margin above V_{S1}.

Section 23.71 Glide: Single-engine Airplanes

Proposed new § 23.71 would require the determination of glide distance and speed for single-engine airplanes. The information is necessary for flight planning and for providing the pilot with information from which to make informed decisions.

Section 23.73 Reference Landing Approach Speed

Proposed new § 23.73 would define the reference landing approach speeds,

V_{REF}. Establishing a definition for these speeds simplifies the use of V_{REF} in other portions of the rule. The V_{REF} speeds for the various category airplanes are established as not less than 1.3 V_{SO}. Also, the established speeds consider the appropriate relationship to V_{MC} determined under § 23.149.

Section 23.75 Landing Distance

This proposal would revise the heading, reorganize § 23.75 for harmonization with the JAR, add the landing reference speed, V_{REF}, and move the portion on brake pressures to § 23.735, Brakes.

The introductory paragraph of this section would be revised to delete the reference to the AFM because part 23, subpart B, is generally used to specify what must be determined during flight test and part 23, subpart G, is generally used to specify what must be placed in the AFM. The introductory paragraph would also be revised to require landing distances to be determined at standard temperature for each weight and altitude. Service experience has shown that landing distances are not sensitive to temperatures. The use of standard temperature is consistent with WAT requirements and the increased level of safety introduced in this NPRM. The revised introductory paragraph deletes the reference to "approximately 3 knots" for seaplanes and amphibians because this information will be moved to advisory material on acceptable methods of compliance.

Revised § 23.75(a) adds V_{REF} and requires its use. (See proposal for § 23.73.)

The text of the current § 23.75(b) is deleted because proposed § 23.45 would specify these general requirements. Proposed new § 23.75(b) clarifies that a constant configuration must be maintained throughout the maneuver.

Revised § 23.75(d) would continue the current requirement for showing that a safe transition to the balked landing conditions can be made and specify the weight that must be considered for the transition to the balked landing conditions. This proposed new requirement reflects current industry practice.

Proposed new § 23.75(e) is a general requirement to ensure the reliability of the brakes and tires.

Proposed § 23.75(f) is revised by changing the first use of the word "means" to "retardation means," and by deleting paragraph (f)(3). Paragraph (f)(3) requires that no more than average skill shall be required to control the airplane. This topic is covered in proposed § 23.45(f).

Section § 23.75(h) is deleted because the introductory paragraph of proposed § 23.75 would contain commuter category requirements and proposed § 23.1587 would require landing distance correction factors.

Section 23.77 Balked Landing

This section would be revised to include additional WAT requirements and to make editorial changes.

Proposed revisions to § 23.77 (a) and (b) would differentiate between WAT and non-WAT; and, in paragraph (b), would include the more stringent WAT limited airplane requirements. (See proposal for § 23.45.) Section 23.77(a)(4) adds a new climb speed requirement to ensure that acceleration is not required during the transition from landing to balked landing. The climb gradient of § 23.77(b) was selected to be slightly less than the non-WAT airplane sea level requirement as a tradeoff for a balked landing climb capability at all altitudes and temperatures.

The commuter category climb gradient of 3.3 percent specified in § 23.77(c) changes to 3.2 percent for consistency with part 25. Additional editorial changes and deletions are proposed for § 23.77(c) because the general requirements would be covered in the proposed § 23.45.

Section 23.143 General

Proposed § 23.143(a) would be revised to add the phrase "during all flight phases" to the lead-in of the paragraph. "Go-around" would be added to the list of flight phases.

The JAA/FAA decided, during FAR/JAR Harmonization meetings, that the term "go-around" included the all engine balked landings of § 23.77, various all engine and one-engine-inoperative aborted landings specified in the AFM, and the commuter category discontinued approach of § 23.67(c)(4). In this NPRM, balked landing refers only to the all engine balked landing of § 23.77.

The table in paragraph (c) would be changed to show a change in two-hand roll force from 60 to 50 pounds, which is consistent with JAR 25. The table also would be changed to show a one-hand on the rim roll force of 25 pounds. This is a JAA/FAA harmonized value.

Section 23.145 Longitudinal Control

Proposed § 23.145 would be revised by changing the speed ranges applicable to the takeoff, enroute, and landing configurations. In proposing paragraph (b)(2) the requirement for "altering and maintaining, as a minimum, the speed used to show compliance with § 23.77" would be changed "to allow the airspeed to transition from 1.3 V_{SO} to 1.3 V_{S1}." In proposed paragraph (b)(5) for landing configuration, the speed reference would be changed from 1.4 V_{SO} to V_{REF}.

Editorial changes are also proposed for the lead-in to paragraphs (b) with no substantive change.

Current paragraphs (b)(2)(i) and (ii) would be redesignated as (b)(2) and (b)(3), respectively.

Proposed paragraph (b)(3) would add more specific requirements if gated flap positions are used.

Proposed paragraph (b)(4) is the same as current paragraph (b)(4). Proposed paragraph (b)(5) is the same as current paragraph (b)(5) except for changes in trim speed to V_{REF} and the allowance of a two-handed control. Use of two hands is considered appropriate because the pilot does not need to change power settings.

Proposed paragraph (b)(6) is current paragraph (b)(3).

Proposed paragraph (c) could change the speed range for maneuvering capability from "above V_{MO}/M_{MO} and up to V_D/M_D" to "above V_{MO}/M_{MO} and up to the maximum speed shown under § 23.251." This change is considered necessary because a range of speeds can be chosen as V_D/M_D. Reference to § 23.251 would ensure a flight demonstrated speed instead of a design speed.

Proposed paragraph (d) would change the speed that must be maintained for power-off glide from 1.3 V_{SO} to V_{REF}.

Section 23.147 Directional and Lateral Control

This proposal would make minor revisions to § 23.147(a) and add two new requirements in proposed paragraphs (b) and (c). The flaps retracted configuration for § 23.127(a)(4) would be consistent with the proposed § 23.67.

Proposed § 23.147(b) would add a test for the condition when, during enroute climb, an engine fails and a time delay of two seconds occurs before the pilot takes corrective action. The intent of this proposed change is to test for a likely operational scenario and to ensure a satisfactory result.

Proposed § 23.147(c) would test for the failure or disconnection of the primary lateral control. This paragraph requires that the airplane exhibit adequate dihedral effect throughout the airplane's operational envelope to ensure continued safe flight and landings if a lateral control disconnects. In addition, this requirement provides compatibility with the relaxed requirements of proposed § 23.177(b) (see proposal for § 23.177).

Section 23.149 Minimum Control Speed

This proposal would clarify § 23.149, add a V_{MC} in the landing configuration, and provide the procedure for determining a ground V_{MC}.

Current § 23.149(a) would be revised in the proposal by making clarifying and editorial changes with no change in requirements. Section 23.149(b) would be revised by making clarifying changes and deleting the reference to lesser weights in paragraph (b)(4) because the range of weights is covered in § 23.21.

Proposed § 23.149(c) specifies the requirement for a V_{MC} in the landing configuration for WAT and commuter airplanes. This proposed new requirement is necessary for airplanes in this category to provide a V_{REF} margin above the V_{MC} determined in the landing configuration. (See proposal for § 23.73.)

The new § 23.149(f) proposes the requirements for determining a V_{MCG} for commuter category airplanes, at the option of the applicant, to comply with § 23.51. (See proposal for § 23.51.)

Section 23.153 Control During Landings

This proposal would revise § 23.153 to reference landing speeds to V_{REF} and to reorganize the section.

Section 23.155 Elevator Control Forces in Maneuvers

Proposed § 23.155 would make changes to the power and gradient of the stick force curve.

Proposed § 23.155(b) specifies the maximum continuous power for the test instead of allowing a power selected by the applicant as an operating limitation. This revision would eliminate a power specification that is unnecessary and would simplify normal operations for the pilot.

Proposed § 23.155(c) addresses stick force gradient to ensure that stick force lightening is not excessive. The FAA will issue advisory material on acceptable methods of compliance.

Section 23.157 Rate of Roll

This proposal would revise § 23.157(d) power and trim requirements and would clarify the flap position. Proposed § 23.157(d)(1) would clarify that the flaps should be in the landing position. Proposed § 23.157(d)(3) would make the power consistent with the approach configuration, which is the configuration being tested. Proposed § 23.157(d)(4) would relate the trim speed to the proposed V_{REF}. (See proposal for § 23.73.)

Section 23.161 Trim

This proposal would revise § 23.161 power, configurations, and speeds.

Proposed § 23.161(a) would state the safety principles underlying the trim requirements and would provide a regulatory requirement for considering conditions that might be encountered outside the requirements addressed in paragraphs (b) through (d).

Proposed § 23.161(b)(1) would add a requirement to trim at M_{MO} in addition to V_{MO}. This proposed change only clarifies that the airplane must trim in the Mach limited speed range.

Proposed § 23.161(b)(2) would require lateral and directional trim over a range of 1.4 V_{S1} to V_H or V_{MO}/M_{MO} for commuter category airplanes instead of only the high speed requirement in the present rules. It is appropriate for commuter category airplanes to trim in the proposed range. It would not be burdensome because all present commuter category airplanes were designed to the proposed standard.

The proposed introductory paragraph of § 23.161(c) would delete the reference to V_{MO}/M_{MO}, since it is addressed in other appropriate places. Proposed § 23.161(c)(1) would require trim at takeoff power, as this is a likely operational scenario for most airplanes and the condition should be tested. In addition, the proposed change would relate the maximum continuous power climb speeds and configuration to § 23.69, the enroute climb requirement. Current § 23.161(c)(2) moves to § 23.161(c)(4), changes the reference V_{REF} for a landing speed, and adds a requirement for the airplane to trim at the steepest landing approach gradient the applicant chooses under § 23.75. It is appropriate for the airplane to trim at all landing conditions. Current § 23.161(c)(3) moves to § 23.161(c)(2) with editorial changes. Current § 23.161(c)(4) moves to § 23.161(c)(3) with an increase in the trim speed from 0.9 V_{NO} or V_{MO} to V_{NO} or V_{MO}/M_{MO}. The increase in trim speed is appropriate because descent is permitted and is common at V_{MO}.

Proposed § 23.161(d) would make editorial changes in the introductory paragraph. It would reference the appropriate § 23.67 requirements and delete commuter category speed ranges, which are moved to the new § 23.161(e). Section § 23.161(d)(4) is revised to specify flaps retracted instead of referencing the § 23.67 configurations. Flaps retracted is the likely sustained configuration where a pilot would need to trim. Also, the flaps retracted configuration for § 23.161(d)(4) would be consistent with the proposed § 23.67.

Proposed new § 23.161(e) would ensure that excessive forces are not encountered in commuter category airplanes during extended climbs at V_2 in the takeoff configuration, when climb above 400 feet is required.

Section 23.175 Demonstration of Static Longitudinal Stability

This proposal would make changes to § 23.175 power, configurations, and speeds.

Proposed § 23.175(a)(1) would change the flap position from the climb position to the flaps retracted position. This is a clarifying change since virtually all part 23 airplanes use flaps retracted for climb. Also, this proposed change would align the part 23 and part 25 climb static longitudinal stability requirements.

Proposed § 23.175(a)(3) would delete the option for the applicant to select some power other than maximum continuous power as an operating limitation. As noted in the proposed change to § 23.155, this would eliminate a power specification that is unnecessary and simplify normal operations for the pilot. Proposed § 23.175(a)(4) would make the trim speed consistent with the enroute all-engine climb speed.

The proposed change to § 23.175(b) would rearrange the section with no change in requirements. The definition of V_{FC}/M_{MC} contained in § 23.175(b)(2) is proposed to be moved to part 1, to harmonize with JAR 1. (See the proposed change to § 1.1.)

Current § 23.175(c), which requires the test for gear down cruise static longitudinal stability, would be deleted. This test is considered superfluous to the land configuration static longitudinal stability test and does not represent a likely operating scenario.

Proposed § 23.175(c) would be current § 23.175(d) with only a change to use V_{REF} as the trim speed.

Section 23.177 Static Directional and Lateral Stability

Proposed revisions to § 23.177 would delete the requirements for two-control airplanes, make minor clarifying changes, and specify an exclusion for acrobatic category airplanes.

Proposed § 23.177 would delete the introductory phrase concerning three-control airplanes, which is consistent with the deletion of the requirements for two-control airplanes in current paragraph (b). The two-control airplane regulations were introduced in 1945 but no two-control airplanes have been certificated for several decades and no need is foreseen for these regulations. If an applicant proposes a two-control

airplane, the FAA would issue special conditions. After deleting the introductory portion of § 23.177(a), paragraph (a)(1) would be redesignated as (a). In the first sentence, the proposed change replaces "skid" with "wings level sideslip" to clarify the intended maneuver. Also, the proposed change increases the power requirement for demonstration of directional stability in the landing configuration. The current requirement specifies power necessary to maintain a three degree angle of decent. Maximum continuous power is considered appropriate since directional stability should be maintained during a balked landing, particularly since directional instability is an undesirable characteristic at any point in the flight envelope. Also, V_A is replaced by V_O to be consistent with § 23.1507.

Proposed § 23.177(b), currently (a)(2), replaces "any" with "all" in the first sentence to clarify that all landing gear and flap positions must be addressed. Also, the proposed paragraph would specify a minimum speed at which static lateral stability may not be negative, as 1.3 V_S, for all configurations except takeoff. This is consistent with the other speeds specified in § 23.177(b) and relieves the requirement for other than takeoff speeds.

Proposed new § 23.177(c) would provide an exclusion for the dihedral effect for acrobatic category airplanes approved for inverted flight. The proposed change recognizes that, in fully acrobatic airplanes, the dihedral effect is not a desired characteristic.

The addition of proposed § 23.147(c), which ensures lateral control capability without the use of the primary lateral control system, compensates for the relieving nature of proposed § 23.177(b) and the exception from the requirements of § 23.177(b) for acrobatic category airplanes.

Present § 23.177(a)(3) is redesignated as § 23.177(d). The proposed § 23.177(d) deletes the next to the last sentence, concerning bank angle and heading, because the current requirement is not a necessary test condition and a constant heading during the sideslip may be impossible in some airplanes.

Present § 23.177(b) is deleted, as previously discussed, because it applies to two-control airplanes.

Section 23.201 Wings Level Stall

This proposal would delete both two-control airplanes and altitude loss requirements and would make clarifying changes in § 23.201.

The proposed change to § 23.201(a) deletes the applicability reference for an airplane with independently controlled roll and directional controls. The last word, "pitches" is replaced by "stalls" since stalls may be defined by other than nose-down pitching.

Present § 23.201(b) is deleted since it applies to two-control airplanes. (See proposed change for § 23.177 for discussion of two-control airplane requirements.)

Current § 23.201(c) is divided into proposed § 23.201 (b) and (c). Proposed § 23.201(b) covers stall recognition and proposed § 23.201(c) addresses stall recovery. Proposed § 23.201(b) clarifies that the test should start from a speed at least 10 knots above the stall speed. Proposed § 23.201(b) has no change in requirements. Section 23.201(c) is changed to specify how long the control must be held against the stop. This change would ensure that the procedure for determining stall speed is the same procedure used to test stall characteristics. The last sentence of current paragraph (c) on the increase of power is deleted because it would only apply to altitude loss.

Present § 23.201(d) would be deleted, as suggested by the JAA, since the determination of altitude loss, and its subsequent furnishing in the AFM, is not considered information useful to the pilot for safe operation of the airplane.

Proposed § 23.201(d) would be based on present § 23.210(e) and would be revised to clarify that the roll and yaw limits apply during both entry and recovery.

Proposed § 23.201(e) is present paragraph (f) with some revisions. During FAR/JAR harmonization meetings, the JAA pointed out to the FAA that in high power-to-weight ratio airplanes, extreme nose-up attitudes were the principal criteria for use of reduced power, not the presence of undesirable stall characteristics. The FAA concurs and proposes to delete the phrase concerning stall characteristics.

Section 23.203 Turning Flight and Accelerated Turning Stalls

Proposed § 23.203 would be revised by adding the word "turning" before "stalls" and after "accelerated" in the heading, the introductory text, and in proposed paragraphs (a)(2) and (b)(5). This proposed change clarifies that accelerated stalls are performed in turning flight. Also, it clarifies the definition to show that accelerated stalls are not intended to be performed in straight flight. This clarification reflects current practice.

Proposed § 23.203 (a) and (b) would reference the stall definition in § 23.201(b), which is more specific than the present general words "when the stall has fully developed or the elevator has reached its stop."

For clarification, current paragraph (b)(4) would be separated into proposed paragraphs (b)(4) and (b)(5) without substantive change, and current paragraph (b)(5) would be redesignated as paragraph (b)(6).

Proposed § 23.203(c)(1) would clarify the wing flap positions by changing "each intermediate position" to "each intermediate normal operating position."

The proposed change to § 23.203(c)(4) would clarify the use of reduced power. (See the proposed change to § 23.201(f).)

Proposed new paragraph (c)(6) has been added to be consistent with new § 23.207(c)(6) configurations (Amendment No. 23–45).

Section 23.205 Critical Engine-Inoperative Stalls

This proposal would delete § 23.205. The present requirement to demonstrate stalls with the critical engine inoperative is restricted to the enroute configuration and to a level of power asymmetry with which the airplane is controllable with wings level at the stalling speed. As a result, the power on the operating engines at the stall is normally fairly low, and neither the configuration nor the power setting represent the conditions most likely to accompany an inadvertent stall in service. Reduction of power of the operating engine(s) during the recovery is permitted, and it is questionable whether such action would be taken promptly in an inadvertent stall in service. Experience shows that stalls with significant power asymmetry can result in a spin, even on airplanes that are certificated to the present requirement. Apparently the requirement for demonstrating one-engine-inoperative stalls is not effective in ensuring that inadvertent stalls in service with one engine inoperative will have satisfactory characteristics and be recoverable. Sufficient protection against the hazard of stalling with one engine inoperative is provided by the one-engine-inoperative performance requirements and operating speed margins, coupled with the requirements for determination of V_{MC}, the addition of a directional and lateral control test under § 23.147(b), and demonstration of stalling characteristics with symmetric power.

Section 23.207 Stall Warning

This proposal would delete the upper limit on stall speed margin and provide for mutable stall warning on acrobatic category airplanes in § 23.207.

Proposed § 23.207(c) would reference the stall tests required by § 23.201(b) and § 23.203(a)(1) and specify that

during such tests for one knot per second deceleration stalls, both wings level and turning, the stall must begin at a speed exceeding the stalling speed by a margin of not less than 5 knots. The quantified upper limit in the current rule of 10 knots or 15 percent of the stalling speed would be deleted. The upper limit has created problems for manufacturers because of the complex design features required to show compliance. The upper limit requirement was in effect replaced by the nuisance stall warning requirement in § 23.207.(d).

Present § 23.207(d) would be divided and moved to proposed § 23.207 (d) and (e). Proposed § 23.207(d) on nuisance stall warnings would have no change in requirements. Proposed § 23.207(e) would delete the bottom limit of five knots for decelerations greater than one knot per second. Also, it would specify that the stall warning must begin sufficiently before the stall so that the pilot can take corrective action. This is considered appropriate because, at the higher deceleration rates of three to five knots per second, a specified five knots may not be enough stall warning.

Proposed new § 23.207(f) allows for a mutable stall warning system for acrobatic category airplanes, with automatic arming for takeoff and rearming for landing. This feature is useful for acrobatic pilots and provides safeguards for takeoff and landing.

Secion 23.221 Spinning

This proposal would revise the point to start the one-turn-spin recovery count, delete the "characteristically incapable of spinning" option, and make minor changes in acrobatic category spins in § 23.221.

Proposed § 23.221(a) would replace the exception for airplanes characteristically incapable of spinning with an exception for airplanes that demonstrate compliance with the optional spin resistant requirements of paragraph (a)(2) of this section. Criteria for an airplane incapable of spinning are unnecessary since criteria for spin resistant airplanes are provided. Proposed § 23.221(a) would change the point at which the count for the one-turn-spin recovery begins. The change would specify a more specific point to begin the count by replacing the current phrase "after the controls have been applied" with "after initiation of the first control action for recovery." Under the present rules, if an applicant proposes a multiple step recovery procedure that starts with the rudder, then the airplane may be effectively recovered before the start of the recovery count.

Proposed § 23.221(a)(1)(ii) would specify that no control force or characteristic can adversely affect prompt recovery. This would be an improvement over the present prohibition of excessive back pressure in current § 23.221(a)(1)(ii).

Present § 23.221(a)(1) is proposed to be recodified into § 23.221(a)(1)(i) through (a)(1)(iv) with no changes in the requirements. Present § 23.221(a)(2) on spin resistant airplanes would be restated with minor editorial changes but with no change in requirements.

Proposed § 23.221(b) would specify the emergency egress requirements of § 23.807(b)(5) for those utility category airplanes approved for spinning. This is considered an appropriate way to cross-reference the requirements of § 23.807 to the flight requirements.

The proposed § 23.221(c) introductory paragraph would require acrobatic category airplanes to meet the one-turn-spin requirements of § 23.221(a). This change is proposed because acrobatic category airplanes should have sufficient controllability to recover from the developing one-turn-spin under the same conditions as normal category airplanes. The proposed introductory paragraph would also cross-reference § 23.807 for emergency egress requirements.

Proposed § 23.221(c) pertaining to acrobatic category airplanes would add a requirement in proposed paragraph (c)(1) for spin recovery after six turns or any greater number of turns for which certification is requested. The proposed rule would require recovery within 1.5 turns after initiation of the first control action for recovery. This proposed requirement would ensure recovery within 1.5 turns if the spin mode changes beyond six turns. As an alternative, the applicant may stop at six turns and provide a limitation of six turns.

Proposed § 23.221(c)(2) would delete the option to retract flaps during recovery and would provide the applicant with a choice of flaps up or flaps deployed for spin approval. The paragraph would continue to prohibit exceeding applicable airspeed limits and limit maneuvering load factors.

A new § 23.221(c)(4) is proposed to ensure that the acrobatic spins do not cause pilot incapacitation.

The present § 23.221(d) is proposed to be deleted. The recognition of airplanes that are "characteristically incapable of spinning" has been in the regulation since at least 1937. In 1942, the present weight, center of gravity, and control mis-rig criteria were introduced into Civil Air Regulation (CAR) 03. Since then, the National Aeronautics and Space Administration (NASA) spin resistant requirements, which are based on research, have been developed and incorporated in the regulations by Amendment No. 23–42 (56 FR 344, January 3, 1991). If an applicant proposes a non-spinable airplane, it would be appropriate to apply the more technologically advanced requirements of proposed § 23.221(a)(2); therefore, § 23.221(d) would be deleted.

Section 23.233 Directional Stability and Control

This proposal would make minor word changes to § 23.233(a) to harmonize this section with the corresponding JAR section.

Section 23.235 Operation on Unpaved Surfaces

This proposal would revise the heading of § 23.235 and delete water operating requirements, which are moved to proposed new § 23.237.

Section 23.237 Operation on Water

Proposed new § 23.237, for operation on water, is essentially the same as the current § 23.235(b).

Section 23.253 High Speed Characteristics

This proposal would delete the current paragraph (b)(1), since the requirement for piloting strength and skill is covered in § 23.141.

Section 23.562 Emergency Landing Dynamic Conditions

This proposal would change the one engine inoperative climb reference in § 23.562(d) to § 23.67(a)(1).

Section 23.1325 Static Pressure System

This proposal would revise § 23.1325(e) to clarify that the calibration must be conducted in flight, which is standard practice. The text of § 23.1325(f) would be removed and the paragraph would be reserved. The text of paragraph (g) would be moved to paragraph (f) in a future rulemaking action. The results of the calibration would be required in the proposed § 23.1587.

Section 23.1511 Flap Extended Speed

This proposal would delete from § 23.1511(a) references to § 23.457 because § 23.457 is proposed to be deleted from the FAR in a related NPRM on airframes, Notice No. 94–20 (59 FR 35196, July 8, 1994).

Section 23.1521 Powerplant Limitations

This proposal would require, under § 23.1521, maximum temperature to be

established for takeoff operation and would require an ambient temperature limit for reciprocating engines in airplanes of more than 6,000 pounds.

Proposed § 23.1521(b)(5) would require the establishment of maximum cylinder head, liquid coolant, and oil temperature limits for takeoff operation without regard to the allowable time. Presently, temperature limits are required only if the takeoff power operation is permitted for more than two minutes. It is appropriate to require operating temperature limitations because most takeoff operations will exceed two minutes.

Proposed § 23.1521(e) would require an ambient temperature limit for turbine engine-powered airplanes and reciprocating engine-powered airplanes over 6,000 pounds. This change is proposed because these airplanes are subject to WAT limits and it will ensure that airplane engines will cool at the ambient temperature limit.

Section 23.1543 Instrument Markings: General

Proposed new § 23.1543(c) would require that all related instruments be calibrated in compatible units. This is considered essential for safe operation.

Section 23.1545 Airspeed Indicator

Proposed revisions to § 23.1545 would differentiate between WAT limited and non-WAT limited airplanes in § 23.1545.

Proposed § 23.1545(b)(5) would delete any one-engine-inoperative best rate of climb speed marking requirements for WAT limited airplanes. These airplanes would already have scheduled speeds in case of an engine failure. Proposed paragraph (b)(5) would apply only to non-WAT airplanes for which the one-engine-inoperative best rate of climb speed marking has been simplified to sea level at maximum weight. Since the blue arc rule was promulgated in Amendment No. 23–23 (43 FR 50593, October 30, 1978), certification experience has shown that the marking of an arc is unnecessarily complicated. For many airplanes, the arc was so narrow that the arc was a line. Therefore, proposed paragraph (b)(5) would require a blue radial line instead of an arc.

Proposed § 23.1545(b)(6) would retain the same V_{MC} requirement for non-WAT airplanes and delete any V_{MC} markings for WAT airplanes since WAT airplanes already have scheduled speeds in case of engine failure.

Section 23.1553 Fuel Quantity Indicator

This proposal would delete, from § 23.1553, the use of an arc to show a quantity of unusable fuel. The proposed rule references the unusable fuel determination and requires only a red radial line, which would provide a clearer indication of fuel quantity for pilots.

Section 23.1555 Control Markings

This proposal would add to § 23.1555(e)(2) the requirement that no other control be red. This would help prevent use of a wrong control in an emergency.

Section 23.1559 Operating Limitations Placard

This proposal would simplify the present § 23.1559 and delete duplicate material.

Proposed § 23.1559(a), (b), and a new paragraph (c), would provide essentially the same information as the current rule. All airplanes currently operate with an AFM and the new rule places emphasis on using the AFM to define required operating limitations.

Section 23.1563 Airspeed Placards

This proposal would add a new paragraph (c) to § 23.1563. The new paragraph would be applicable to WAT limited airplanes and would require providing the maximum V_{MC} in the takeoff configuration determined under § 23.149(b). This is desirable since the V_{MC} is not marked on the airspeed indicator for these airplanes.

Section 23.1567 Flight Maneuver Placard

Proposed new § 23.1567(d), which would be applicable to acrobatic and utility airplanes approved for intentional spinning, would require a placard listing control actions for recovery. Also, it would require a statement on the placard that the airplane be recovered when spiral characteristics occur, or after six turns, or at any greater number of turns for which certification tests have been conducted. This paragraph would replace the similar placard requirement in current § 23.1583(e)(3) for acrobatic category airplanes, and the placard requirement would be deleted from § 23.1583(e).

Section 23.1581 General

This proposal would make editorial changes in § 23.1581 and would recognize WAT limited and non-WAT limited airplanes.

Proposed new § 23.1581(a)(3) would require information necessary to comply with relevant operating rules. This is a FAR/JAR harmonization item and is considered necessary because some operational rules, such as § 135.391, require flight planning with one-engine-inoperative cruise speed and/or driftdown data. For airplanes operated under part 135 in the United States, it represents no change in requirements.

Proposed § 23.1581(b)(2) would require that only WAT limited airplane AFM's provide data necessary for determining WAT limits.

Proposed new § 23.1581(c) would require the AFM units to be the same as on the instruments. This requirement would enhance operational safety.

Proposed § 23.1581(d) would delete the current requirement for a table of contents. This is considered to be a format requirement and not appropriate for this section, which specifies AFM content. Current § 23.1581(d) is being replaced by a requirement to present all operational airspeeds as indicated airspeeds. Although not currently required, this is current practice.

Section 23.1583 Operating Limitations

Proposed revisions to § 23.1583 would make minor changes in the operating limitations information furnished in the AFM. These proposed changes include revising airspeed limitations for commuter category airplanes, requiring AFM limitations for WAT limited airplanes, furnishing ambient temperature limitations, furnishing smoking restriction information, and furnishing information specifying types of runway surfaces.

Proposed § 23.1583(a)(3) would make the V_{MO}/V_{MO} airspeed operating limitations applicable only to turbine powered commuter category airplanes. This is consistent with current practice since no reciprocating engine-powered commuter category airplanes have been proposed.

Proposed § 23.1583(c)(3) would add takeoff and landing weight limitations for WAT limited airplanes. (See the § 23.45 proposal for discussion of WAT limited airplanes.)

Proposed § 23.1583(c)(4) and (5) renumber the present § 23.1583(c)(3) and (4). These proposed paragraphs are revised editorially and cross-references are updated. Proposed paragraph (c)(4)(ii) would impose a new requirement that the AFM include the maximum takeoff weight for each airport altitude and ambient temperature within the range selected by the applicant at which the accelerate-stop distance determined under § 23.55 is equal to the available runway length plus the length of any stopway, if available. This is currently required for

transport category airplanes and is necessary for harmonization with the JAR.

Proposed new § 23.1583(c)(6) would establish the zero wing fuel weight of § 23.343 as a limitation. This would provide the pilot with information necessary to prevent exceeding airplane structural limits.

Proposed new § 23.1583(d) has editorial changes only.

Proposed new § 23.1583(e)(1) and (2) would delete references to "characteristically incapable of spinning." As discussed under § 23.221, requirements for "characteristically incapable of spinning" would be deleted.

Proposed new § 23.1583(e)(3) and (4) would replace present paragraph (e)(3). Proposed § 23.1583(e)(4) would add the requirement for specifying limitations associated with spirals, six turn spins, or more than six turn spins. The requirement for a placard has been deleted since the requirement would be covered in § 23.1567.

Proposed new § 23.1583(e)(5) would be based on current paragraph (e)(4) for commuter category airplanes. It would be revised to define the maneuvers as those proposed for commuter category airplanes in § 23.3.

Proposed new § 23.1583(f) would revise the heading of the paragraph and add the limit negative load factor for acrobatic category airplanes. The limit negative load factor is essential for safe operational use.

Proposed new § 23.1583(g) would make editorial changes with no change in requirements. The paragraph would reference the requirements of flight crews in § 23.1523.

Proposed § 23.1583 (i), (j) and (k) are the current § 23.1583(k), (l) and (m), as redesignated.

Proposed new § 23.1583(l) would require furnishing baggage and cargo loading limits.

Proposed new § 23.1583(m) would require furnishing any special limitations on systems and equipment. This would provide the pilot with information necessary for safe operation of the airplane systems and equipment.

Proposed new § 23.1583(n) would require a statement on ambient temperature limitations. Maximum cooling temperature limits have been required for turbine powered airplanes by § 23.1521(e); however, the requirement for the limitation has never been specified in § 23.1583. Proposed § 23.1583(n) would require furnishing both maximum and minimum temperature limits if appropriate. A minimum temperature limit would provide the pilot with information necessary to avoid airplane damage during low temperature operations.

Proposed new § 23.1583(o) would require furnishing any occupant smoking limitations on the airplane. This would enhance safe operation of the airplane.

Proposed new § 23.1583(p) would require the applicant to state what runway surfaces have been approved. This provides the pilot with a positive indication of which runway types may be used.

Section 23.1585 Operating Procedures

This proposal would rearrange the current material in § 23.1585 and add additional requirements as discussed below.

Proposed § 23.1585(a) would contain the requirements applicable to all airplanes. The requirements would be arranged in a different order from the current requirements in paragraph (a). The requirements for information that must be included cover—unusual flight or ground handling characteristics; maximum demonstrated values of crosswinds; recommended speed for flight in rough air; restarting an engine in flight; and making a normal approach and landing in accordance with § 23.73 and § 23.75. All of these requirements are in current § 23.1585(a) except for restarting a turbine engine in flight, which is in current paragraph (c)(5) pertaining only to multiengine airplanes. The FAA decided that a restart capability is not required for single reciprocating engine airplanes for the reasons given in the preamble discussion of proposal 3 in Amendment No. 23–43 (58 FR 18958, April 9, 1993). The requirement for providing restart information should apply to single turbine engines, since turbine engine designs incorporate a restart capability and inadvertent shutdowns may occur. Normal approach and landing information in accordance with the landing requirement in proposed § 23.73 and § 23.75 is new. This is necessary to enable pilots to achieve the published landing distances and, if necessary, to safely transition to a balked landing.

Proposed § 23.1585(b) would be a revision of § 23.1585(b) on gliding after an engine failure for single-engine airplanes. The proposed version would reference requirements in proposed § 23.71.

Proposed § 23.1585(c) for multiengine airplanes would require compliance with (a) plus the following information requirements from current paragraph (c): approach and landing with an engine inoperative; balked landing with an engine inoperative; and V_{SSE} as determined in § 23.149. Current paragraph (c) requirements for information on procedures for continuing a takeoff following an engine failure and continuing a climb following an engine failure would be moved to proposed (e) for normal, utility, and acrobatic multiengines.

Proposed § 23.1585(d) would apply to normal, utility and acrobatic airplanes. These airplanes would have to comply with paragraph (a) and either (b) or (c). These airplanes would also have to comply with the normal takeoff, climb, and the abandoning a takeoff procedures, which are currently contained in paragraph (a).

As discussed above, § 23.1585(c), for normal, utility and acrobatic multiengine airplanes, would require compliance with proposed (a), (c), and (d) plus requirements for continuing a takeoff or climb with one engine inoperative, which are now in current paragraph (c) (1) and (2).

Proposed § 23.1585(f) would require commuter category airplanes to comply with paragraphs (a) and (c) plus the normal takeoff requirements from current paragraph (a)(2) revised; accelerate-stop requirements, which are new, and continuing takeoff after engine failure, which are in current paragraph (c)(1).

Proposed § 23.1585(g) would be the same as current paragraph (d) on identifying operating conditions, which necessitate fuel system independence.

Proposed § 23.1585(h) would be the same as current paragraph (e) for disconnecting the battery from its charging source.

Proposed § 23.1585(i) is based on current paragraph (g) on the total quantity of usable fuel and adds information on the effect of pump failure on unusable fuel.

Proposed new § 23.1585(j) would require procedures for safe operation of the airplanes' systems and equipment. Although not currently required, this is current industry practice.

Present § 23.1585(h), commuter category airplane procedures for restarting turbine engines in flight, would no longer be necessary because the requirement would be covered under paragraph (a)(4).

Section 23.1587 Performance Information

Proposed § 23.1587 would rearrange existing material, delete ski plane performance exceptions, delete the option of calculating approximate performance, delete stall altitude loss data, and require overweight landing performance in § 23.1587. Stalling speed requirements of current paragraph (c) (2) and (3) would be combined and moved

to paragraph (a)(1) and would reference the stalling speed requirement of § 23.49. Information on the steady rate and gradient of climb with all engines operating would be required by proposed paragraph (a)(2). This is revised from current paragraph (a)(2). The reference would be changed to proposed § 23.69(a).

Proposed (a)(3) would require, as is now required, that landing distance be determined under § 23.75, and would add that this must be provided for each airport altitude, standard temperature, and type of surface for which it is valid. Proposed paragraph (a)(4) would require information on the effect on landing distance when landing on other than hard surface, as determined under § 23.45(g). Proposed paragraph (a)(5) would cover information on the effects on landing distance of runway slope and wind. This would provide the pilot with data with which to account for these factors in his or her takeoff calculations.

Current requirements in § 23.1587(b) on ski planes would be deleted. Proposed paragraph (b) would add a steady angle of climb/descent requirement as determined under § 23.77(a). This requirement would apply to all non-WAT airplanes.

Proposed paragraph (c) would apply to normal, utility, and acrobatic category airplanes, rather than all airplanes as in current paragraph (c). The proposed (c) would delete stall altitude loss requirements that are in current paragraph (c)(1). As mentioned, current stalling speed requirements would be moved to proposed paragraph (a)(1). Current paragraph (c)(4) on cooling climb speed data would also be deleted since all airplanes would cool at scheduled speeds.

Proposed paragraph (c)(1) would pertain to the takeoff distance determined under § 23.53 and the type of surface. Proposed paragraph (c)(2) and (c)(3) pertain to the effect on takeoff distance of the runway surface, slope, and headwind and tailwind component.

Proposed paragraph (c)(4) would impose a new requirement pertaining to the one-engine inoperative takeoff climb/descent performance for WAT-limited airplanes. This pertains only to reciprocating engine-powered airplanes. It would provide the pilot with the information determined under proposed § 23.66.

Proposed paragraph (c)(5) pertains to enroute rate and gradient of climb/descent determined under § 23.69(b), for multiengine airplanes.

Proposed § 23.1587(d) for commuter category airplanes would incorporate the present data plus the addition of accelerate-stop data, overweight landing performance, and the effect of operation on other than smooth hard surfaces. In addition, in order to consolidate all of the requirements for what must appear in the AFM in subpart G, proposed § 23.1587(d)(10) would contain the requirement, found in existing § 23.1323(d), to show the relationship between IAS and CAS in the AFM.

Section 23.1589 Loading Information

Proposed § 23.1589(b) would make editorial changes to simplify the text, with no change in requirements.

Appendix E

Appendix E would be deleted for the reasons given in the proposed change to § 23.25.

Preliminary Regulatory Evaluation, Initial Regulatory Flexibility Determination, and Trade Impact Assessment

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade. In conducting these analyses, the FAA has determined that this rule: (1) Would generate benefits that justify its costs and is not a "significant regulatory action" as defined in the Executive Order; (2) is not significant as defined in DOT's Policies and Procedures; (3) would not have a significant impact on a substantial number of small entities; and (4) would not constitute a barrier to international trade. These analyses, available in the docket, are summarized below.

Regulatory Evaluation Summary

Of the 57 sections that would be amended or added in this proposed rule, the FAA has identified 15 that could result in additional compliance costs in one or more airplane categories. Amendments to five sections could result in cost savings. The greatest costs would be incurred by manufacturers of WAT limited airplanes (e.g., multiengine airplanes with maximum weights of more than 6,000 pounds). When amortized over a production run, the quantified incremental costs would be relatively modest—less than $100 per airplane. The FAA solicits comments concerning the incremental certification/development costs attributable to the proposed rule.

The primary benefit of the proposed rule would be the cost efficiencies of harmonization with the JAR for those manufacturers that choose to market airplanes in JAA countries as well as to manufacturers in JAA countries that choose to market airplanes in the U.S. Other benefits of the proposed rule would be decreased reliance on special conditions, simplification of the certification process through clarification of existing requirements, and increased flexibility through optional designs.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Federal regulations. The RFA requires a Regulatory Flexibility Analysis if a proposed rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. Based on FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, the FAA has determined that the proposed amendments would not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The proposed rule would not constitute a barrier to international trade, including the export of American airplanes to foreign countries and the import of foreign airplanes into the United States. Instead, the proposed flight certification procedures would be harmonized with those of the JAA and would lessen restraints on trade.

Federalism Implications

The regulation 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.

Conclusion

The FAA proposes to revise the flight airworthiness standards for normal, utility, acrobatic, and commuter category airplanes to be compatible with the same standards that will be proposed for the same category

airplanes by the Joint Airworthiness Authority in Europe. If adopted, the proposed revision would reduce the regulatory burden on the United States and European airplane manufacturers by relieving them of the need to show compliance with different standards each time they seek certification approval of an airplane in a different country.

For the reasons discussed in the preamble, and based on the findings in the Regulatory Evaluation, the FAA has determined that this proposed regulation is not a significant regulatory action. In addition, the FAA certifies that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposal is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). An initial regulatory evaluation of the proposal has been placed in the docket. A copy may be obtained by contacting the person identified under FOR FURTHER INFORMATION CONTACT.

List of Subjects

14 CFR Part 1

Air transportation.

14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend parts 1 and 23 of the Federal Aviation Regulations (14 CFR parts 1 and 23) as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

Authority: 49 U.S.C. app. 1347, 1348, 1354(a), 1357(d)(2), 1372, 1421 through 1430, 1432, 1442, 1443, 1472, 1510, 1522, 1652(e), 1655(c), 1657(f); 49 U.S.C. 106(g).

2. A new definition is added in alphabetical order to § 1.1 to read as follows:

§ 1.1 General definitions.

* * * * *

Maximum speed for stability characteristics, V_{FC}/M_{FC} means a speed that may not be less than a speed midway between maximum operating limit speed (V_{MO}/M_{MO}) and demonstrated flight diving speed (V_{DF}/M_{DF}), except that, for altitudes where the Mach number is the limiting factor, M_{FC} need not exceed the Mach number at which effective speed warning occurs.

* * * * *

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES

3. The authority citation for part 23 is revised to read as follows:

Authority: 49 U.S.C. app. 1344, 1354(a), 1355, 1421, 1423, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g).

4. Section 23.3 is amended by revising paragraphs (b)(2), (d), and (e) to read as follows:

§ 23.3 Airplane categories.

* * * * *

(b) * * *

(2) Lazy eights, chandelles, and steep turns, or similar maneuvers, in which the angle of bank is more than 60 degrees but not more than 90 degrees.

* * * * *

(d) The commuter category is limited to propeller-driven, multiengine airplanes that have a seating configuration, excluding pilot seats, of 19 or less, and a maximum certificated takeoff weight of 19,000 pounds or less. The commuter category operation is limited to any maneuver incident to normal flying, stalls (except whip stalls), and steep turns, in which the angle of bank is not more than 60 degrees.

(e) Except for commuter category, airplanes may be type certified in more than one category if the requirements of each requested category are met.

5. Section 23.25 is amended by revising paragraphs (a) introductory text and (a)(1) introductory text, and paragraphs (a)(1)(i) and (a)(1)(iii) to read as follows:

§ 23.25 Weight limits.

(a) *Maximum weight.* The maximum weight is the highest weight at which compliance with each applicable requirement of this part (other than those complied with at the design landing weight) is shown. The maximum weight must be established so that it is—

(1) Not more than the least of—

(i) The highest weight selected by the applicant; or

* * * * *

(iii) The highest weight at which compliance with each applicable flight requirement is shown, and

* * * * *

6. Section 23.33 is amended by revising paragraphs (b) (1) and (2) to read as follows:

§ 23.33 Propeller speed and pitch limits.

(b) * * *

(1) During takeoff and initial climb at the all engine(s) operating climb speed specified in § 23.65, the propeller must limit the engine r.p.m., at full throttle or at maximum allowable takeoff manifold pressure, to a speed not greater than the maximum allowable takeoff r.p.m.; and

(2) During a closed throttle glide, at V_{NE}, the propeller may not cause an engine speed above 110 percent of maximum continuous speed.

* * * * *

7. Section 23.45 is revised to read as follows:

§ 23.45 General.

(a) Unless otherwise prescribed, the performance requirements of this part must be met for—

(1) Still air and standard atmosphere; and

(2) Ambient atmospheric conditions, for commuter category airplanes, for reciprocating engine-powered airplanes or more than 6,000 pounds maximum weight, and for turbine engine-powered airplanes.

(b) Performance data must be determined over not less than the following ranges of conditions—

(1) Airport altitudes from sea level to 10,000 feet; and

(2) For reciprocating engine-powered airplanes of 6,000 pounds, or less, maximum weight, temperature from standard to 30°C above standard; or

(3) For reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and turbine engine-powered airplanes, temperature from standard to 30°C above standard, or the maximum ambient atmospheric temperature at which compliance with the cooling provisions of § 23.1041 to § 23.1047 is shown, if lower.

(c) Performance data must be determined with the cowl flaps or other means for controlling the engine cooling air supply in the position used in the cooling tests required by § 23.1041 to § 23.1047.

(d) The available propulsive thrust must correspond to engine power, not exceeding the approved power, less—

(1) Installation losses; and

(2) The power absorbed by the accessories and services appropriate to the particular ambient atmospheric conditions and the particular flight condition.

(e) The performance, as affected by engine power or thrust, must be based on a relative humidity:

(1) Of 80 percent, at and below standard temperature; and

(2) From 80 percent at the standard temperature, varying linearly down to

34 percent at the standard temperature plus 50°F.

(f) Unless otherwise prescribed, in determining the takeoff and landing distances, changes in the airplane's configuration, speed, and power must be made in accordance with procedures established by the applicant for operation in service. These procedures must be able to be executed consistently by pilots of average skill in atmospheric conditions reasonably expected to be encountered in service.

(g) The following, as applicable, must be determined on a smooth, dry, hard-surfaced runway—

(1) Takeoff distance of § 23.53(b);

(2) Accelerate-stop distance of § 23.55;

(3) Takeoff distance and takeoff run of § 23.59; and

(4) Landing distance of § 23.75.

The effect on these distances of operation on other types of surfaces (for example, grass, gravel) when dry, may be determined or derived and these surfaces listed in the Airplane Flight Manual in accordance with § 23.1583(p).

(h) For commuter category airplanes, the following also apply:

(1) Unless otherwise prescribed, the applicant must select the takeoff, enroute, approach, and landing configurations for the airplane.

(2) The airplane configuration may vary with weight, altitude, and temperature, to the extent that they are compatible with the operating procedures required by paragraph (h)(3) of this section.

(3) Unless otherwise prescribed, in determining the critical-engine-inoperative takeoff performance, takeoff flight path, and accelerate-stop distance, changes in the airplane's configuration, speed, and power must be made in accordance with procedures established by the applicant for operation in service.

(4) Procedures for the execution of discontinued approaches and balked landings associated with the conditions prescribed in § 23.67(c)(4) and § 23.77(c) must be established.

(5) The procedures established under paragraphs (h)(3) and (h)(4) of this section must—

(i) Be able to be consistently executed by a crew of average skill in atmospheric conditions reasonably expected to be encountered in service;

(ii) Use methods or devices that are safe and reliable; and

(iii) Include allowances for any reasonably expected time delays in the execution of the procedures.

8. Section 23.49 is revised to read as follows:

§ 23.49 Stalling speed.

(a) V_{SO} and V_{S1} are the stalling speeds or the minimum steady flight speeds, in knots (CAS), at which the airplane is controllable with—

(1) For reciprocating engine-powered airplanes, the engine(s) idling, the throttle(s) closed or at not more than the power necessary for zero thrust at a speed not more than 110 percent of the stalling speed;

(2) For turbine engine-powered airplanes, the propulsive thrust not greater than zero at the stalling speed, or, if the resultant thrust has no appreciable effect on the stalling speed, with engine(s) idling and throttle(s) closed;

(3) The propeller(s) in the takeoff position;

(4) The airplane in the condition existing in the test, in which V_{SO} and V_{S1} are being used;

(5) The center of gravity in the position that results in the highest value of V_{SO} and V_{S1}; and

(6) The weight used when V_{SO} or V_{S1} are being used as a factor to determine compliance with a required performance standard.

(b) V_{SO} and V_{S1} must be determined by flight tests, using the procedure and meeting the flight characteristics specified in § 23.201.

(c) Except as provided in paragraph (d) of this section, V_{SO} at maximum weight must not exceed 61 knots for—

(1) Single-engine airplanes; and

(2) Multiengine airplanes of 6,000 pounds or less maximum weight that cannot meet the minimum rate of climb specified in § 23.67(a)(1) with the critical engine inoperative.

(d) All single-engine airplanes, and those multiengine airplanes of 6,000 pounds or less maximum weight with a V_{SO} of more than 61 knots that do not meet the requirements of § 23.67(a)(1), must comply with § 23.562(d).

9. Section 23.51 is revised to read as follows:

§ 23.51 Takeoff speeds.

(a) For normal, utility, and acrobatic category airplanes, rotation speed, V_R, is the speed at which the pilot makes a control input, with the intention of lifting the airplane out of contact with the runway or water surface.

(1) For multiengine landplanes, V_R must not be less than the greater of 1.05 V_{MC} or 1.10 V_{S1};

(2) For single-engine landplanes, V_R, must not be less than V_{S1}; and

(3) For seaplanes and amphibians taking off from water, V_R, may be any speed that is shown to be safe under all reasonably expected conditions, including turbulence and complete failure of the critical engine.

(b) For normal, utility, and acrobatic category airplanes, the speed at 50 feet above the takeoff surface level must not be less than:

(1) For multiengine airplanes, the highest of—

(i) A speed that is shown to be safe for continued flight (or emergency landing, if applicable) under all reasonably expected conditions, including turbulence and complete failure of the critical engine;

(ii) 1.10 V_{MC}; or

(iii) 1.20 V_{S1}.

(2) For single-engine airplanes, the higher of—

(i) A speed that is shown to be safe under all reasonably expected conditions, including turbulence and complete engine failure; or

(ii) 1.20 V_{S1}.

(c) For commuter category airplanes, the following apply:

(1) V_1 must be established in relation to V_{EF} as follows:

(i) V_{EF} is the calibrated airspeed at which the critical engine is assumed to fail. V_{EF} must be selected by the applicant but must not be less than 1.05 V_{MC} determined under § 23.149(b) or, at the option of the applicant, not less than V_{MCG} determined under § 23.149(f).

(ii) The takeoff decision speed, V_1, is the calibrated airspeed on the ground at which, as a result of engine failure or other reasons, the pilot is assumed to have made a decision to continue or discontinue the takeoff. The takeoff decision speed, V_1, must be selected by the applicant but must not be less than V_{EF} plus the speed gained with the critical engine inoperative during the time interval between the instant at which the critical engine is failed and the instant at which the pilot recognizes and reacts to the engine failure, as indicated by the pilot's application of the first retarding means during the accelerate-stop determination of § 23.55.

(2) The rotation speed, V_R, in terms of calibrated airspeed, must be selected by the applicant and must not be less than the greatest of the following:

(i) V_1;

(ii) 1.05 V_{MC} determined under § 23.149(b);

(iii) 1.10 V_{S1}; or

(iv) The speed that allows attaining the initial climb-out speed, V_2, before reaching a height of 35 feet above the takeoff surface in accordance with § 23.57(c)(2).

(3) For any given set of conditions, such as weight, altitude, temperature, and configuration, a single value of V_R must be used to show compliance with both the one-engine-inoperative takeoff and all-engines-operating takeoff requirements.

(4) The takeoff safety speed, V_2, in terms of calibrated airspeed, must be selected by the applicant so as to allow the gradient of climb required in § 23.67(c)(1) and (c)(2) but must not be less than 1.10 V_{MC} or less than 1.20 V_{S1}.

(5) The one-engine-inoperative takeoff distance, using a normal rotation rate at a speed 5 knots less than V_R, established in accordance with paragraph (c)(2) of this section, must be shown not to exceed the corresponding one-engine-inoperative takeoff distance, determined in accordance with § 23.57 and § 23.59(a)(1), using the established V_R. The takeoff, otherwise performed in accordance with § 23.57, must be continued safely from the point at which the airplane is 35 feet above the takeoff surface and at a speed not less than the established V_2 minus 5 knots.

(6) The applicant must show, with all engines operating, that marked increases in the scheduled takeoff distances, determined in accordance with § 23.59(a)(2), do not result from over-rotation of the airplane or out-of-trim conditions.

10. Section 23.53 is revised to read as follows:

§ 23.53 Takeoff performance.

(a) For normal, utility, and acrobatic category airplanes, the takeoff distance must be determined in accordance with paragraph (b) of this section, using speeds determined in accordance with § 23.51(a) and (b).

(b) For normal, utility, and acrobatic category airplanes, the distance required to takeoff and climb to a height of 50 feet above the takeoff surface must be determined for each weight, altitude, and temperature within the operational limits established for takeoff with—

(1) Takeoff power on each engine;

(2) Wing flaps in the takeoff position(s); and

(3) Landing gear extended.

(c) For commuter category airplanes, takeoff performance, as required by §§ 23.55 through 23.59, must be determined with the operating engine(s) within approved operating limitations.

11. Section 23.55 is amended by revising paragraph (a) and the introductory text of paragraph (b) to read as follows:

§ 23.55 Accelerate-stop distance.

* * * * *

(a) The accelerate-step distance is the sum of the distances necessary to—

(1) Accelerate the airplane from a standing start to V_{EF} with all engines operating;

(2) Accelerate the airplane from V_{EF}, to V_1, assuming the critical engine fails at V_{EF}; and

(3) Come to a full stop from the point of which V_1 is reached.

(b) Means other than wheel brakes may be used to determine the accelerate-stop distances if that means—

* * * * *

12. Section 23.57 is amended by revising paragraphs (a) introductory text, (b), (c)(1), (c)(3) introductory text, (c)(4), and (d); and by adding a new paragraph (e) to read as follows:

§ 23.57 Takeoff path.

* * * * *

(a) The takeoff path extends from a standing start to a point in the takeoff at which the airplane is 1500 feet above the takeoff surface at or below which height the transition from the takeoff to the enroute configuration must be completed; and

* * * * *

(b) During the acceleration to speed V_2, the nose gear may be raised off the ground at a speed not less than V_R. However, landing gear retraction must not be initiated until the airplane is airborne.

(c) * * *

(1) The slope of the airborne part of the takeoff path must not be negative at any point;

* * * * *

(3) At each point along the takeoff path, starting at the point at which the airplane reaches 400 feet above the takeoff surface, the available gradient of climb must not be less than—

* * * * *

(4) Except for gear retraction and automatic propeller feathering, the airplane configuration must not be changed, and no change in power that requires action by the pilot may be made, until the airplane is 400 feet above the takeoff surface.

(d) The takeoff path to 35 feet above the takeoff surface must be determined by a continuous demonstrated takeoff.

(e) The takeoff flight path from 35 feet above the takeoff surface must be determined by synthesis from segments; and

(1) The segments must be clearly defined and must be related to distinct changes in configuration, power, and speed;

(2) The weight of the airplane, the configuration, and the power must be assumed constant throughout each segment and must correspond to the most critical condition prevailing in the segment; and

(3) The takeoff flight path must be based on the airplane's performance without utilizing ground effect.

13. Section 23.59 is amended by revising the introductory text for this section, paragraph (a)(2), and paragraph (b) to read as follows:

§ 23.59 Takeoff distance and takeoff run.

For each commuter category airplane, the takeoff distance and, at the option of the applicant, the takeoff run, must be determined.

(a) * * *

(2) With all engines operating, 115 percent of the horizontal distance from the start of the takeoff to the point at which the airplane is 35 feet above the takeoff surface, determined by a procedure consistent with § 23.57.

(b) If the takeoff distance includes a clearway, the takeoff run is the greater of—

(1) The horizontal distance along the takeoff path from the start of the takeoff to a point equidistant between the liftoff point and the point at which the airplane is 35 feet above the takeoff surface as determined under § 23.57; or

(2) With all engines operating, 115 percent of the horizontal distance from the start of the takeoff to a point equidistant between the liftoff point and the point at which the airplane is 35 feet above the takeoff surface, determined by a procedure consistent with § 23.57.

14. A new § 23.63 is added to read as follows:

§ 23.63 Climb: general.

(a) Compliance with the requirements of §§ 23.65, 23.66, 23.67, 23.69, and 23.77 must be shown—

(1) Out of ground effect; and

(2) At speeds that are not less than those at which compliance with the powerplant cooling requirements of §§ 23.1041 to 23.1047 has been demonstrated; and

(3) Unless otherwise specified, with one engine inoperative, at a bank angle not exceeding 5 degrees.

(b) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, compliance must be shown with § 23.65(a), § 23.67(a), where appropriate, and § 23.77(a) at maximum takeoff or landing weight, as appropriate, in a standard atmosphere.

(c) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight, and turbine engine-powered airplanes in the normal, utility, and acrobatic category, compliance must be shown at weights as a function of airport altitude and ambient temperature, within the operational limits established for takeoff and landing, respectively, with—

(1) Sections 23.65(b) and 23.67(b) (1) and (2), where appropriate, for takeoff, and

(2) Section 23.67(b)(2), where appropriate, and § 23.77(b), for landing.

(d) For commuter category airplanes, compliance must be shown at weights as a function of airport altitude and ambient temperature within the operational limits established for takeoff and landing, respectively, with—

(1) Sections 23.67(c)(1), 23.67(c)(2), and 23.67(c)(3) for takeoff; and

(2) Sections 23.67(c)(3), 23.67(c)(4), and 23.77(c) for landing.

15. Section 23.65 is revised to read as follows:

§ 23.65 Climb: all engines operating.

(a) Each normal, utility, and acrobatic category reciprocating engine-powered airplane of 6,000 pounds or less maximum weight must have a steady climb gradient at sea level of at least 8.3 percent for landplanes or 6.7 percent for seaplanes and amphibians with—

(1) Not more than maximum continuous power on each engine;

(2) The landing gear retracted;

(3) The wing flaps in the takeoff position(s); and

(4) A climb speed not less than the greater of 1.1 V_{MC} and 1.2 V_{S1} for multiengine airplanes and not less than 1.2 V_{S1} for single-engine airplanes.

(b) Each normal, utility, and acrobatic category reciprocating engine-powered airplane of more than 6,000 pounds maximum weight and turbine engine-powered airplanes in the normal, utility, and acrobatic category must have a steady gradient of climb after takeoff of at least 4 percent with—

(1) Takeoff power on each engine;

(2) The landing gear extended, except that if the landing gear can be retracted in not more than seven seconds, the test may be conducted with the gear retracted;

(3) The wing flaps in the takeoff position(s); and

(4) A climb speed as specified in § 23.65(a)(4).

16. A new § 23.66 is added to read as follows:

§ 23.66 Takeoff climb: one-engine inoperative.

For normal, utility, and acrobatic category reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight, and turbine engine-powered airplanes in the normal, utility, and acrobatic category, the steady gradient of climb or descent must be determined at each weight, altitude, and ambient temperature within the operational limits established by the applicant with—

(a) The critical engine inoperative and its propeller in the position it rapidly and automatically assumes;

(b) The remaining engine(s) at takeoff power;

(c) The landing gear extended, except that if the landing gear can be retracted in not more than seven seconds, the test may be conducted with the gear retracted;

(d) The wing flaps in the takeoff position(s);

(e) The wings level; and

(f) A climb speed equal to that achieved at 50 feet in the demonstration of § 23.53.

17. Section 23.67 is revised to read as follows:

§ 23.67 Climb: one engine inoperative.

(a) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, the following apply:

(1) Except for those airplanes that meet the requirements prescribed in § 23.562(d), each airplane with a V_{SO} of more than 61 knots must be able to maintain a steady climb gradient of at least 1.5 percent at a pressure altitude of 5,000 feet with the—

(i) Critical engine inoperative and its propeller in the minimum drag position;

(ii) Remaining engine(s) at not more than maximum continuous power;

(iii) landing gear retracted;

(iv) Wing flaps retracted; and

(v) Climb speed not less than 1.2 V_{S1}.

(2) For each airplane that meets the requirements prescribed in § 23.562(d), or that has a V_{SO} of 61 knots or less, the steady gradient of climb or descent at a pressure altitude of 5,000 feet must be determined with the—

(i) Critical engine inoperative and its propeller in the minimum drag position;

(ii) Remaining engine(s) at not more than maximum continuous power;

(iii) Landing gear retracted;

(iv) Wing flaps retracted; and

(v) Climb speed not less than 1.2 V_{S1}.

(b) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight, and turbine engine-powered airplanes in the normal, utility, and acrobatic category—

(1) The steady gradient of climb at an altitude of 400 feet above the takeoff surface must be measurably positive with the—

(i) Critical engine inoperative and its propeller in the minimum drag position;

(ii) Remaining engine(s) at takeoff power;

(iii) Landing gear retracted;

(iv) Wing flaps in the takeoff position(s); and

(v) Climb speed equal to that achieved at 50 feet in the demonstration of § 23.53.

(2) The steady gradient of climb must not be less than 0.75 percent at an altitude of 1,500 feet above the takeoff surface, or landing surface, as appropriate, with the—

(i) Critical engine inoperative and its propeller in the minimum drag position;

(ii) Remaining engine(s) at not more than maximum continuous power;

(iii) Landing gear retracted;

(iv) Wing flaps retracted; and

(v) Climb speed not less than 1.2 V_{S1}.

(c) For commuter category airplanes, the following apply:

(1) *Takeoff; landing gear extended.* The steady gradient of climb at the altitude of the takeoff surface must be measurably positive for two-engine airplanes, not less than 0.3 percent for three-engine airplanes, or 0.5 percent for four-engine airplanes with—

(i) The critical engine inoperative and its propeller in the position it rapidly and automatically assumes;

(ii) The remaining engine(s) at takeoff power;

(iii) The landing gear extended, and all landing gear doors open;

(iv) The wing flaps in the takeoff position(s);

(v) The wings level; and

(vi) A climb speed equal to V_2.

(2) *Takeoff; landing gear retracted.* The steady gradient of climb at an altitude of 400 feet above the takeoff surface must be not less than 2.0 percent for two-engine airplanes, 2.3 percent for three-engine airplanes, and 2.6 percent for four-engine airplanes with—

(i) The critical engine inoperative and its propeller in the position it rapidly and automatically assumes;

(ii) The remaining engine(s) at takeoff power;

(iii) The landing gear retracted;

(iv) The wing flaps in the takeoff position(s);

(v) A climb speed equal to V_2.

(3) *Enroute.* The steady gradient of climb at an altitude of 1,500 feet above the takeoff or landing surface, as appropriate, must be not less than 1.2 percent for two-engine airplanes, 1.5 percent for three-engine airplanes, and 1.7 percent for four-engine airplanes with—

(i) The critical engine inoperative and its propeller in the minimum drag position;

(ii) The remaining engine(s) at not more than maximum continuous power;

(iii) The landing gear retracted;

(iv) The wing flaps retracted; and

(v) A climb speed not less than 1.2 V_{S1}.

(4) *Discontinued approach.* The steady gradient of climb at an altitude of 400 feet above the landing surface must be not less than 2.1 percent for two-engine airplanes, 2.4 percent for three-engine airplanes, and 2.7 percent for four-engine airplanes, with—

(i) The critical engine inoperative and its propeller in the minimum drag position;

(ii) The remaining engine(s) at takeoff power;

(iii) Landing gear retracted;

(iv) Wing flaps in the approach position(s) in which V_{S1} for these position(s) does not exceed 110 percent of the V_{S1} for the related all-engines-operating landing position(s); and

(v) A climb speed established in connection with normal landing procedures but not exceeding 1.5 V_{S1}.

18. A new § 23.69 is added to read as follows:

§ 23.69 Enroute climb/descent.

(a) *All engines operating.* The steady gradient and rate of climb must be determined at each weight, altitude, and ambient temperature within the operational limits established by the applicant with—

(1) Not more than maximum continuous power on each engine;

(2) The landing gear retracted;

(3) The wing flaps retracted; and

(4) A climb speed not less than 1.3 V_{S1}.

(b) *One engine inoperative.* The steady gradient and rate of climb/descent must be determined at each weight, altitude, and ambient temperature within the operational limits established by the applicant with—

(1) The critical engine inoperative and its propeller in the minimum drag position;

(2) The remaining engine(s) at not more than maximum continuous power;

(3) The landing gear retracted;

(4) The wing flaps retracted; and

(5) A climb speed not less than 1.2 V_{S1}.

19. A new § 23.71 is added to read as follows:

§ 23.71 Glide: Single-engine airplanes.

The maximum horizontal distance traveled in still air, in nautical miles, per 1,000 feet of altitude lost in a glide, and the speed necessary to achieve this must be determined with the engine inoperative, its propeller in the minimum drag position, and landing gear and wing flaps in the most favorable available position.

20. A new § 23.73 is added to read as follows:

§ 23.73 Reference landing approach speed.

(a) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, the reference landing approach speed, V_{REF}, must not be less than the greater of V_{MC}, determined in § 23.149(b) with the wing flaps in the most extended takeoff position, and 1.3 V_{SO}.

(b) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds maximum weight, and turbine engine-powered airplanes in the normal, utility, and acrobatic category, the reference landing approach speed, V_{REF}, must not be less than the greater of V_{MC}, determined in § 23.149(c), and 1.3 V_{SO}.

(c) For commuter category airplanes, the reference landing approach speed, V_{REF}, must not be less than the greater of 1.05 V_{MC}, determined in § 23.149(c), and 1.3 V_{SO}.

21. Section 23.75 is amended by revising the section heading, introductory text for the section; the introductory text of paragraph (a); and paragraphs (b), (d), (e), and (f), and by removing paragraph (h), to read as follows:

§ 23.75 Landing distance.

The horizontal distance necessary to land and come to a complete stop from a point 50 feet above the landing surface must be determined, for standard temperatures at each weight and altitude within the operational limits established for landing, as follows:

(a) A steady approach at not less than V_{REF}, determined in accordance with § 23.73 (a), (b), or (c), as appropriate, must be maintained down to the 50 foot height and—

* * * * *

(b) A constant configuration must be maintained throughout the maneuver.

* * * * *

(d) It must be shown that a safe transition to the balked landing conditions of § 23.77 can be made from the conditions that exist at the 50 foot height, at maximum landing weight, or at the maximum landing weight for altitude and temperature of § 23.63(c)(2) or (d)(2), as appropriate.

(e) The brakes must be used so as to not cause excessive wear of brakes or tires.

(f) Retardation means other than wheel brakes may be used if that means—

(1) Is safe and reliable; and

(2) Is used so that consistent results can be expected in service.

* * * * *

22. Section 23.77 is revised to read as follows:

§ 23.77 Balked landing.

(a) Each normal, utility, and acrobatic category reciprocating engine-powered airplane of 6,000 pounds or less maximum weight must be able to maintain a steady gradient of climb at sea level of at least 3.3 percent with—

(1) Takeoff power on each engine;

(2) The landing gear extended;

(3) The wing flaps in the landing position, except that if the flaps may safely be retracted in two seconds or less without loss of altitude and without sudden changes of angle of attack, they may be retracted; and

(4) A climb speed equal to V_{REF}, as defined in § 23.73(a).

(b) Each normal, utility, and acrobatic category reciprocating engine-powered airplane of more than 6,000 pounds maximum weight and each normal, utility, and acrobatic category turbine engine-powered airplane must be able to maintain a steady gradient of climb of at least 2.5 percent with—

(1) Not more than the power that is available on each engine eight seconds after initiation of movement of the power controls from minimum flight-idle position;

(2) The landing gear extended;

(3) The wing flaps in the landing position; and

(4) A climb speed equal to V_{REF}, as defined in § 23.73(b).

(c) Each commuter category airplane must be able to maintain a steady gradient of climb of at least 3.2 percent with—

(1) Not more than the power that is available on each engine eight seconds after initiation of movement of the power controls from the minimum flight idle position;

(2) Landing gear extended;

(3) Wing flaps in the landing position; and

(4) A climb speed equal to V_{REF}, as defined in § 23.73(c).

23. Section 23.143 is amended by revising paragraphs (a) and (c) to read as follows:

§ 23.143 General.

(a) The airplane must be safely controllable and maneuverable during all flight phases including—

(1) Takeoff;

(2) Climb;

(3) Level flight;

(4) Descent;

(5) Go-around; and

(6) Landing (power on and power off) with the wing flaps extended and retracted.

* * * * *

(c) If marginal conditions exist with regard to required pilot strength, the control forces required must be determined by quantitative tests. In no case may the control forces under the conditions specified in paragraphs (a)

and (b) of this section exceed those prescribed in the following table:

Values in pounds force applied to the relevant control	Pitch	Roll	Yaw
(a) For temporary application:			
Stick	60	30	
Wheel (Two hands on rim)	75	50	
Wheel (One hand on rim)	50	25	
Rudder Pedal	.....	.....	150
(b) For prolonged application	10	5	20

24. Section 23.145 is amended by revising paragraph (b) introductory text, paragraphs (b)(2) through (b)(5); adding a new paragraph (b)(6); and revising paragraphs (c) and (d) to read as follows:

§ 23.145 Longitudinal control.

* * * * *

(b) Unless otherwise required, it must be possible to carry out the following maneuvers without requiring the application of single-handed control forces exceeding those specified in § 23.143(c). The trimming controls must not be adjusted during the maneuvers:

* * * * *

(2) With landing gear and flaps extended, power off, and the airplane as nearly as possible in trim at 1.3 V_{SO}, quickly apply takeoff power and retract the flaps as rapidly as possible to the recommended go around setting and allow the airspeed to transition from 1.3 V_{SO} to 1.3 V_{S1}. Retract the gear when a positive rate of climb is established.

(3) With landing gear and flaps extended, in level flight, power necessary to attain level flight at 1.1 V_{SO}, and the airplane as nearly as possible in trim, it must be possible to maintain approximately level flight while retracting the flaps as rapidly as possible with simultaneous application of not more than maximum continuous power. If gated flap positions are provided, the flap retraction may be demonstrated in stages with power and trim reset for level flight at 1.1 V_{S1} in the initial configuration for each stage—

(i) From the fully extended position to the most extended gated position;

(ii) Between intermediate gated positions, if applicable; and

(iii) From the least extended gated position to the fully retracted position.

(4) With power off, flaps and landing gear retracted and the airplane as nearly as possible in trim at 1.4 V_{S1}, apply takeoff power rapidly while maintaining the same airspeed.

(5) With power off, landing gear and flaps extended, and the airplane as nearly as possible in trim at V_{REF}, obtain and maintain airspeeds between 1.1. V_{SO} and either 1.7 V_{SO} or V_{FE}, whichever is lower without requiring the application of two-handed control forces exceeding those specified in § 23.143(c).

(6) With maximum takeoff power, landing gear retracted, flaps in the takeoff position, and the airplane as nearly as possible in trim at V_{FE} appropriate to the takeoff flap position, retract the flaps as rapidly as possible while maintaining constant speed.

(c) At speeds above V_{MO}/M_{MO}, and up to the maximum speed shown under § 23.251, a maneuvering capability of 1.5 g must be demonstrated to provide a margin to recover from upset or inadvertent speed increase.

(d) It must be possible, with a pilot control force of not more than 10 pounds, to maintain a speed of not more than V_{REF} during a power-off glide with landing gear and wing flaps extended, for any weight of the airplane, up to and including the maximum weight.

* * * * *

25. Section 23.147 is revised to read as follows:

§ 23.147 Directional and lateral control.

(a) For each multiengine airplane, it must be possible, while holding the wings level within five degrees, to make sudden changes in heading safely in both directions. This ability must be shown at 1.4 V_{S1} with heading changes up to 15 degrees, except that the heading change at which the rudder force corresponds to the limits specified in § 23.143 need not be exceeded, with the—

(1) Critical engine inoperative and its propeller in the minimum drag position;

(2) Remaining engines at maximum continuous power;

(3) Landing gear—

(i) Retracted; and

(ii) Extended; and

(4) Flaps retracted.

(b) For each multiengine airplane, it must be possible to regain full control of the airplane without exceeding a bank angle of 45 degrees, reaching a dangerous attitude or encountering dangerous characteristics, in the event of a sudden and complete failure of the critical engine, making allowance for a delay of two seconds in the initiation of recovery action appropriate to the situation, with the airplane initially in trim, in the following conditions:

(1) Maximum continuous power on each engine;

(2) The wing flaps retracted;

(3) The landing gear retracted;

(4) A speed equal to that at which compliance with § 23.69(a) has been shown; and

(5) All propeller controls in the position at which compliance with § 23.69(a) has been shown.

(c) For all airplanes, it must be shown that the airplane is safely controllable without the use of the primary lateral control system in any all-engine configuration(s) and at any speed or altitude within the approved operating envelope. It must also be shown that the airplane's flight characteristics are not impaired below a level needed to permit continued safe flight and the ability to maintain attitudes suitable for a controlled landing without exceeding the operational and structural limitations of the airplane. If a single failure of any one connecting or transmitting link in the lateral control system would also cause the loss of additional control system(s), the above requirement is equally applicable with those additional systems also assumed to be inoperative.

26. Section 23.149 is revised to read as follows:

§ 23.149 Minimum control speed.

(a) V_{MC} is the calibrated airspeed at which, when the critical engine is suddenly made inoperative, it is possible to maintain control of the airplane with that engine still inoperative, and thereafter maintain straight flight at the same speed with an angle of bank of not more than 5 degrees. The method used to simulate critical engine failure must represent the most critical mode of powerplant failure with respect to controllability expected in service.

(b) V_{MC} for takeoff must not exceed 1.2 V_{S1}, where V_{S1} is determined at the maximum takeoff weight. V_{MC} must be determined with the most unfavorable weight and center of gravity position

and with the airplane airborne and the ground effect negligible, for the takeoff configuration(s) with—

(1) Maximum available takeoff power initially on each engine;

(2) The airplane trimmed for takeoff;

(3) Flaps in the takeoff position(s);

(4) Landing gear retracted; and

(5) All propeller controls in the recommended takeoff position throughout.

(c) For all airplanes except reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, the conditions of paragraph (a) must also be met for the landing configuration with—

(1) Maximum available takeoff power initially on each engine;

(2) The airplane trimmed for an approach, with all engines operating, at V_{REF}, at an approach gradient equal to the steepest used in the landing distance demonstration of § 23.75;

(3) Flaps in the landing position;

(4) Landing gear extended; and

(5) All propeller controls in the position recommended for approach with all engines operating.

(d) A minimum speed to intentionally render the critical engine inoperative must be established and designated as the safe, intentional, one-engine-inoperative speed, V_{SSE}.

(e) At V_{MC}, the rudder pedal force required to maintain control must not exceed 150 pounds and it must not be necessary to reduce power of the operative engine(s). During the maneuver, the airplane must not assume any dangerous attitude and it must be possible to prevent a heading change of more than 20 degrees.

(f) At the option of the applicant, to comply with the requirements of § 23.51(c)(1), V_{MCG} may be determined. V_{MCG} is the minimum control speed on the ground, and is the calibrated airspeed during the takeoff run at which, when the critical engine is suddenly made inoperative, it is possible to maintain control of the airplane using the rudder control alone (without the use of nosewheel steering), as limited by 150 pounds of force, and using the lateral control to the extent of keeping the wings level to enable the takeoff to be safely continued. In the determination of V_{MCG}, assuming that the path of the airplane accelerating with all engines operating is along the centerline of the runway, its path from the point at which the critical engine is made inoperative to the point at which recovery to a direction parallel to the centerline is completed may not deviate more than 30 feet laterally from the centerline at any point. V_{MCG} must be established with—

(1) The airplane in each takeoff configuration or, at the option of the applicant, in the most critical takeoff configuration;

(2) Maximum available takeoff power on the operating engines;

(3) The most unfavorable center of gravity;

(4) The airplane trimmed for takeoff; and

(5) The most unfavorable weight in the range of takeoff weights.

27. Section 23.153 is revised to read as follows:

§ 23.153 Control during landings.

It must be possible, while in the landing configuration, to safely complete a landing without exceeding the one-hand control force limits specified in § 23.143(c) following an approach to land—

(a) At a speed of V_{REF} minus 5 knots;

(b) With the airplane in trim, or as nearly as possible in trim and without the trimming control being moved throughout the maneuver;

(c) At an approach gradient equal to the steepest used in the landing distance demonstration of § 23.75; and

(d) With only those power changes, if any, that would be made when landing normally from an approach at V_{REF}.

28. Section 23.155 is amended by revising the introductory text of paragraph (b) and paragraph (b)(1), and by adding a new paragraph (c) to read as follows:

§ 23.155 Elevator control force in maneuvers.

* * * * *

(b) The requirement of paragraph (a) of this section must be met at 75 percent of maximum continuous power for reciprocating engines, or the maximum continuous power for turbine engines, and with the wing flaps and landing gear retracted—

(1) In a turn, with the trim setting used for wings level flight at V_O; and

* * * * *

(c) There must be no excessive decrease in the gradient of the curve of stick force versus maneuvering load factor with increasing load factor.

29. Section 23.157 is amended by revising paragraph (d) to read as follows:

§ 23.157 Rate of roll.

* * * * *

(d) The requirement of paragraph (c) of this section must be met when rolling the airplane in each direction in the following conditions—

(1) Flaps in the landing position(s);

(2) Land gear extended;

(3) All engines operating at the power for a 3 degree approach; and

(4) The airplane trimmed at V_{REF}.

30. Section 23.161 is amended by revising paragraphs (a), (b)(1), (b)(2), (c), the introductory text of paragraph (d), and (d)(4), and by adding a new paragraph (e) to read as follows:

§ 23.161 Trim.

(a) *General.* Each airplane must meet the trim requirements of this section after being trimmed and without further pressure upon, or movement of, the primary controls or their corresponding trim controls by the pilot or the automatic pilot. In addition, it must be possible, in other conditions of loading, configuration, speed and power to ensure that the pilot will not be unduly fatigued or distracted by the need to apply residual control forces exceeding those for prolonged application of § 23.143(c). This applies in normal operation of the airplane and, if applicable, to those conditions associated with the failure of one engine for which performance characteristics are established.

(b) * * *

(1) For normal, utility, and acrobatic category airplanes, at a speed of 0.9 V_H, V_C, or V_{MO}/M_{MO}, whichever is lowest; and

(2) For the commuter category airplanes, at all speeds from 1.4 V_{S1} to the lesser of V_H or V_{MO}/M_{MO}.

(c) *Longitudinal trim.* The airplane must maintain longitudinal trim under each of the following conditions:

(1) A climb with—

(i) Takeoff power, landing gear retracted, wing flaps in the takeoff position(s), at the speeds used in determining the climb performance required by § 23.65; and

(ii) Maximum continuous power at the speeds and in the configuration used in determining the climb performance required by § 23.69(a).

(2) Level flight at all speeds from the lesser of V_H and either V_{NO} or V_{MO}/M_{MO} (as appropriate), to 1.4 V_{S1}, with the landing gear and flaps retracted.

(3) A descent at V_{NO} or V_{MO}/M_{MO}, whichever is applicable, with power off and with the landing gear and flaps retracted.

(4) Approach with landing gear extended and with—

(i) A 3 degree angle of descent, with flaps retracted and at a speed of 1.4 V_{S1};

(ii) A 3 degree angle of descent, flaps in the landing position(s) at V_{REF}; and

(iii) An approach gradient equal to the steepest used in the landing distance demonstrations of § 23.75, flaps in the landing position(s) at V_{REF}.

(d) In addition, each multiengine airplane must maintain longitudinal and directional trim, and the lateral control

force must not exceed 5 pounds at the speed used in complying with § 23.67(a), (b)(2), or (c)(3), as appropriate, with—

* * * * *

(4) Wing flaps retracted; and

* * * * *

(e) In addition, each commuter category airplane for which, in the determine of the takeoff path in accordance with § 23.57, the climb in the takeoff configuration at V_2 extends beyond 400 feet above the takeoff surface, it must be possible to reduce the longitudinal and lateral control forces to 10 pounds and 5 pounds, respectively, and the directional control force must not exceed 50 pounds at V_2 with—

(1) The critical engine inoperative and its propeller in the minimum drag position;

(2) The remaining engine(s) at takeoff power;

(3) Landing gear retracted;

(4) Wing flaps in the takeoff position(s); and

(5) An angle of bank not exceeding 5 degrees.

31. Section 23.175 is revised to read as follows:

§ 23.175 Demonstration of static longitudinal stability.

Static longitudinal stability must be shown as follows:

(a) *Climb.* The stick force curve must have a stable slope at speeds between 85 and 115 percent of the trim speed, with—

(1) Flaps retracted;

(2) Landing gear retracted;

(3) Maximum continuous power; and

(4) The airplane trimmed at the speed used in determining the climb performance required by § 23.69(a).

(b) *Cruise.* With flaps and landing gear retracted and the airplane in trim with power for level flight at representative cruising speeds at high and low altitudes, including speeds up to V_{NO} or V_{MO}/M_{MO}, as appropriate, except that the speed need not exceed V_H—

(1) For normal, utility, and acrobatic category airplanes, the stick force curve must have a stable slope at all speeds within a range that is the greater of 15 percent of the trim speed plus the resulting free return speed range, or 40 knots plus the resulting free return speed range, above and below the trim speed, except that the slope need not be stable—

(i) At speeds less than 1.3 V_{S1}; or

(ii) For airplanes with V_{NE} established under § 23.1505(a), at speeds greater than V_{NE}; or

(iii) For airplanes with V_{MO}/M_{MO} established under § 23.1505(c), at speeds greater than V_{FC}/M_{FC}.

(2) For commuter category airplanes, the stick force curve must have a stable slope at all speeds within a range of 50 knots plus the resulting free return speed range, above and below the trim speed, except that the slope need not be stable—

(i) At speeds less than 1.4 V_{S1}; or

(ii) At speeds greater than V_{FC}/M_{FC}; or

(iii) At speeds that require a stick force greater than 50 pounds.

(c) *Landing.* The stick force curve must have a stable slope at speeds between 1.1 V_{S1} and 1.8 V_{S1} with—

(1) Flaps in the landing position;

(2) Landing gear extended; and

(3) The airplane trimmed at—

(i) V_{REF}, or the minimum trim speed if higher, with power off; and

(ii) V_{REF} with enough power to maintain a 3 degree angle of descent.

32. Section 23.177 is revised to read as follows:

§ 23.177 Static directional and lateral stability.

(a) The static directional stability, as shown by the tendency to recover from a wings level sideslip with the rudder free, must be positive for any landing gear and flap position appropriate to the takeoff, climb, cruise, approach, and landing configurations. This must be shown with symmetrical power up to maximum continuous power, and at speeds from 1.2 V_{S1} up to the maximum allowable speed for the condition being investigated.

The angle of sideslip for these tests must be appropriate to the type of airplane. At larger angles of sideslip, up to that at which full rudder is used or a control force limit in § 23.143 is reached, whichever occurs first, and at speeds from 1.2 V_{S1} to V_O, the rudder pedal force must not reverse.

(b) The static lateral stability, as shown by the tendency to raise the low wing in a sideslip, must be positive for all landing gear and flap positions. This must be shown with symmetrical power up to 75 percent of maximum continuous power at speeds above 1.2 V_{S1} in the takeoff configuration(s) and at speeds above 1.3 V_{S1} in other configurations, up to the maximum allowable speed for the configuration being investigated, in the takeoff, climb, cruise, and approach configurations. For the landing configuration, the power must be up to that necessary to maintain 3 degree angle of descent in coordinated flight. The static lateral stability must not be negative at 1.2 V_{S1} in the takeoff configuration, or at 1.3 V_{S1} in other configurations. The angle of sideslip for these tests must be appropriate to the type of airplane, but in no case may the constant heading sideslip angle be less than that obtainable with a 10 degree bank, or if less, the maximum bank angle obtainable with full rudder deflection or 150 pound rudder force.

(c) Paragraph (b) of this section does not apply to acrobatic category airplanes certificated for inverted flight.

(d) In straight, steady slips at 1.2 V_{S1} for any landing gear and flap positions, and for any symmetrical power conditions up to 50 percent of maximum continuous power, the aileron and rudder control movements and forces must increase steadily, but not necessarily in constant proportion, as the angle of sideslip is increased up to the maximum appropriate to the type of airplane. At larger slip angles, up to the angle at which full rudder or aileron control is used or a control force limit contained in § 23.143 is reached, the aileron and rudder control movements and forces must not reverse as the angle of sideslip is increased. Rapid entry into, and recovery from, a maximum sideslip considered appropriate for the airplane must not result in uncontrollable flight characteristics.

33. Section 23.201 is revised to read as follows:

§ 23.201 Wings level stall.

(a) It must be possible to produce and to correct roll by unreversed use of the rolling control and to produce and to correct yaw by unreversed use of the directional control, up to the time the airplane stalls.

(b) The wings level stall characteristics must be demonstrated in flight as follows. Starting from a speed at least 10 knots above the stall speed, the elevator control must be pulled back so that the rate of speed reduction will not exceed one knot per second until a stall is produced, as shown by either:

(1) An uncontrollable downward pitching motion of the airplane; or

(2) A downward pitching motion of the airplane that results from the activation of a stall avoidance device (for example, stick pusher); or

(3) The control reaching the stop.

(c) Normal use of elevator control for recovery is allowed after the downward pitching motion of (b)(1) or (b)(2) has unmistakably been produced, or after the control has been held against the stop for not less than the longer of two seconds or the time employed in the minimum steady flight speed determination of § 23.49.

(d) During the entry into and the recovery from the maneuver, it must be possible to prevent more than 15 degrees of roll or yaw by the normal use of controls.

(e) Compliance with the requirements of this section must be shown under the following conditions:

(1) *Wing flaps.* Retracted, fully extended, and each intermediate normal operating position.

(2) *Landing gear.* Retracted and extended.

(3) *Cowl flaps.* Appropriate to configuration.

(4) *Power:*

(i) Power off; and

(ii) 75 percent of maximum continuous power. However, if the power-to-weight ratio at 75 percent of maximum continuous power results in extreme nose-up attitudes, the test may be carried out with the power required for level flight in the landing configuration at maximum landing weight and a speed of 1.4 V_{SO}, except that the power may not be less than 50 percent of maximum continuous power.

(5) *Trim.* The airplane trimmed at a speed as near 1.5 V_{S1} as practicable.

(6) *Propeller.* Full increase r.p.m. position for the power off condition.

34. Section 23.203 is amended by revising the section heading and introductory text, paragraph (a), the introductory text of paragraph (b), paragraphs (b)(4) and (b)(5), the introductory text of paragraph (c), and paragraphs (c)(1) and (c)(4), and by adding new paragraphs (b)(6) and (c)(6) to read as follows:

§ 23.203 Turning flight and accelerated turning stalls.

Turning flight and accelerated turning stalls must be demonstrated in tests as follows:

(a) Establish and maintain a coordinated turn in a 30 degree bank. Reduce speed by steadily and progressively tightening the turn with the elevator until the airplane is stalled, as defined in § 23.201(b). The rate of speed reduction must be constant, and—

(1) For a turning flight stall, may not exceed one knot per second; and

(2) For an accelerated turning stall, be 3 to 5 knots per second with steadily increasing normal acceleration.

(b) After the airplane has stalled, as defined in § 23.201(b), it must be possible to regain wings level flight by normal use of the flight controls, but without increasing power and without—

* * * * *

(4) Exceeding a bank angle of 60 degrees in the original direction of the turn or 30 degrees in the opposite direction in the case of turning flight stalls;

(5) Exceeding a bank angle of 90 degrees in the original direction of the turn or 60 degrees in the opposite direction in the case of accelerated turning stalls; and

(6) Exceeding the maximum permissible speed or allowable limit load factor.

(c) Compliance with the requirements of this section must be shown under the following conditions:

(1) *Wing flaps:* Retracted, fully extended, and each intermediate normal operating position;

* * * * *

(4) *Power:*

(i) Power off; and

(ii) 75 percent of maximum continuous power. However, if the power-to-weight ratio at 75 percent of maximum continuous power results in extreme nose-up attitudes, the test may be carried out with the power required for level flight in the landing configuration at maximum landing weight and a speed of 1.4 V_{SO}, except that the power may not be less than 50 percent of maximum continuous power.

* * * * *

(6) *Propeller.* Full increase r.p.m. position for the power off condition.

§ 23.205 [Removed]

35. Section 23.205 is removed.

36. Section 23.207 is amended by revising paragraphs (c) and (d), and by adding new paragraphs (e) and (f) to read as follows:

§ 23.207 Stall warning.

* * * * *

(c) During the stall tests required by § 23.201(b) and § 23.203(a)(1), the stall warning must begin at a speed exceeding the stalling speed by a margin of not less than 5 knots and must continue until the stall occurs.

(d) When following the procedures furnished in accordance with § 23.1585, the stall warning must not occur during a takeoff with all engines operating, a takeoff continued with one engine inoperative, or during an approach to landing.

(e) During the stall tests required by § 23.203(a)(2), the stall warning must begin sufficiently in advance of the stall for the stall to be averted by pilot action taken after the stall warning first occurs.

(f) For acrobatic category airplanes, an artificial stall warning may be mutable, provided that it is armed automatically during takeoff and rearmed automatically in the approach configuration.

37. Section 23.221 is revised to read as follows:

§ 23.221 Spinning.

(a) *Normal category airplanes.* A single-engine, normal category airplane must be able to recover from a one-turn spin or a three-second spin, whichever takes longer, in not more than one additional turn after initiation of the first control action for recovery, or demonstrate compliance with the optional spin resistant requirements of this section.

(1) The following apply to one turn or three second spins:

(i) For both the flaps-retracted and flaps-extended conditions, the applicable airspeed limit and positive limit maneuvering load factor must not be exceeded;

(ii) No control forces or characteristic encountered during the spin or recovery may adversely affect prompt recovery;

(iii) It must be impossible to obtain unrecoverable spins with any use of the flight or engine power controls either at the entry into or during the spin; and

(iv) For the flaps-extended condition, the flaps may be retracted during the recovery but not before rotation has ceased.

(2) At the applicant's option, the airplane may be demonstrated to be spin resistant by the following:

(i) During the stall maneuver contained in § 23.201, the pitch control must be pulled back and held against the stop. Then, using ailerons and rudders in the proper direction, it must be possible to maintain wings-level flight within 15 degrees of bank and to roll the airplane from a 30 degree bank in one direction to a 30 degree bank in the other direction;

(ii) Reduce the airplane speed using pitch control at a rate of approximately one knot per second until the pitch control reaches the stop; then, with the pitch control pulled back and held against the stop, apply full rudder control in a manner to promote spin entry for a period of seven seconds or through a 360 degree heading change, whichever occurs first. If the 360 degree heading change is reached first, it must have taken no fewer than four seconds. This maneuver must be performed first with the ailerons in the neutral position, and then with the ailerons deflected opposite the direction of turn in the most adverse manner. Power and airplane configuration must be set in accordance with § 23.201(e) without change during the maneuver. At the end of seven seconds or a 360 degree heading change, the airplane must respond immediately and normally to primary flight controls applied to regain coordinated, unstalled flight without reversal of control effect and without exceeding the temporary control forces specified by § 23.143(c); and

(iii) Compliance with §§ 23.201 and 23.203 must be demonstrated with the airplane in uncoordinated flight,

corresponding to one ball width displacement on a slip-skid indicator, unless one ball width displacement cannot be obtained with full rudder, in which case the demonstration must be with full rudder applied.

(b) *Utility category airplanes.* A utility category airplane must meet the requirements of paragraph (a) of this section. In addition, the requirements of paragraph (c) of this section and § 23.807(b)(7) must be met if approval for spinning is requested.

(c) *Acrobatic category airplanes.* An acrobatic category airplane must meet the spin requirements of paragraph (a) of this section and § 23.807(b)(6). In addition, the following requirements must be met in each configuration for which approval for spinning is requested:

(1) The airplane must recover from any point in a spin up to and including six turns, or any greater number of turns for which certification is requested, in not more than one and one-half additional turns after initiation of the first control action for recovery. However, beyond three turns, the spin may be discontinued if spiral characteristics appear.

(2) The applicable airspeed limits and limit maneuvering load factors must not be exceeded. For flaps-extended configurations for which approval is requested, the flaps must not be retracted during the recovery.

(3) It must be impossible to obtain unrecoverable spins with any use of the flight or engine power controls either at the entry into or during the spin.

(4) There must be no characteristics during the spin (such as excessive rates of rotation or extreme oscillatory motion) that might prevent a successful recovery due to disorientation or incapacitation of the pilot.

38. Section 23.233 is amended by revising paragraph (a) to read as follows:

§ 23.233 Directional stability and control.

(a) A 90 degree cross-component of wind velocity, demonstrated to be safe for taxiing, takeoff, and landing must be established and must be not less than 0.2 V_{SO}.

* * * * *

39. Section 23.235 is revised to read as follows:

§ 23.235 Operation on unpaved surfaces.

The airplane must be demonstrated to have satisfactory characteristics and the shock-absorbing mechanism must not damage the structure of the airplane when the airplane is taxied on the roughest ground that may reasonably be expected in normal operation and when takeoffs and landings are performed on unpaved runways having the roughest surface that may reasonably be expected in normal operation.

40. A new § 23.237 is added to read as follows:

§ 23.237 Operation on water.

A wave height, demonstrated to be safe for operation, and any necessary water handling procedures for seaplanes and amphibians must be established.

§ 23.253 [Amended]

41. Section 23.253 is amended by removing paragraph (b)(1) and by redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(1) and (b)(2).

42. Section 23.562 is amended by revising paragraph (d) to read as follows:

§ 23.562 Emergency landing dynamic conditions.

* * * * *

(d) For all single-engine airplanes with a V_{SO} of more than 61 knots at maximum weight, and those multiengine airplanes of 6,000 pounds or less maximum weight with a V_{SO} of more than 61 knots at maximum weight that do not comply with § 23.67(a)(1);

* * * * *

43. Section 23.1325 is amended by revising paragraph (e) and removing and reserving paragraph (f) to read as follows:

§ 23.1325 Static pressure system.

* * * * *

(e) Each static pressure system must be calibrated in flight to determine the system error. The system error, in indicated pressure altitude, at sea-level, with a standard atmosphere, excluding instrument calibration error, may not exceed ±30 feet per 100 knot speed for the appropriate configuration in the speed range between 1.3 V_{SO} with flaps extended, and 1.8 V_{S1} with flaps retracted. However, the error need not be less than 30 feet.

* * * * *

44. Section 23.1511 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 23.1511 Flap extended speed.

(a) * * *

(1) Not less than the minimum value of V_F allowed in § 23.345(b); and

(2) Not more than V_F established under § 23.345 (a), (c), and (d).

* * * * *

45. Section 23.1521 is amended by revising paragraphs (b)(5) and (e) to read as follows:

§ 23.1521 Powerplant limitations.

* * * * *

(b) * * *

(5) The maximum allowable cylinder head (as applicable), liquid coolant and oil temperatures.

* * * * *

(e) *Ambient temperature.* For all airplanes except reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, ambient temperature limitations (including limitations for winterization installations if applicable) must be established as the maximum ambient atmospheric temperature at which compliance with the cooling provisions of §§ 23.1041 through 23.1047 is shown.

46. Section 23.1543 is amended by adding a new paragraph (c) to read as follows:

§ 23.1543 Instrument markings: general.

* * * * *

(c) All related instruments must be calibrated in compatible units.

47. Section 23.1545 is amended by revising paragraphs (b)(5) and (b)(6) to read as follows:

§ 23.1545 Airspeed indicator.

* * * * *

(b) * * *

(5) For reciprocating multiengine-powered airplanes of 6,000 pounds or less maximum weight, for the speed at which compliance has been shown with § 23.69(b) relating to rate of climb at maximum weight and at sea level, a blue radial line.

(6) For reciprocating mulitengine-powered airplanes of 6,000 pounds or less maximum weight, for the maximum value of minimum control speed, V_{MC}, (one-engine-inoperative) determined under § 23.149(b), a red radial line.

* * * * *

48. Section 23.1553 is revised to read as follows:

§ 23.1553 Fuel quantity indicator.

A red radial line must be marked on each indicator at the calibrated zero reading, as specified in § 23.1337(b)(1).

49. Section 23.1555 is amended by revising paragraph (e)(2) to read as follows:

§ 23.1555 Control markings.

* * * * *

(e) * * *

(2) Each emergency control must be red and must be marked as to method of operation. No control other than an emergency control shall be this color.

50. Section 23.1559 is revised to read as follows:

§ 23.1559 Operating limitations placard.

(a) There must be a placard in clear view of the pilot stating—

(1) That the airplane must be operated in accordance with the Airplane Flight Manual; and

(2) The certification category of the airplane to which the placards apply.

(b) For airplanes certificated in more than one category, there must be a placard in clear view of the pilot stating that other limitations are contained in the Airplane Flight Manual.

(c) There must be a placard in clear view of the pilot that specifies the kind of operations to which the operation of the airplane is limited or from which it is prohibited under § 23.1525.

51. Section 23.1563 is amended by adding a new paragraph (c) to read as follows:

§ 23.1563 Airspeed placards.

* * * * *

(c) For reciprocating multiengine-powered airplanes of more than 6,000 pounds maximum weight, and turbine engine-powered airplanes, the maximum value of the minimum control speed, V_{MC}, (one-engine-inoperative) determined under § 23.149(b).

52. Section 23.1567 is amended by adding a new paragraph (d) to read as follows:

§ 23.1567 Flight maneuver placard.

* * * * *

(d) For acrobatic category airplanes and utility category airplanes approved for spinning, there must be a placard in clear view of the pilot—

(1) Listing the control actions for recovery from spinning maneuvers; and

(2) Stating that recovery must be initiated when spiral characteristics appear, or after not more than six turns or not more than any greater number of turns for which the airplane has been certificated.

53. Section 23.1581 is amended by adding new paragraphs (a)(3) and (c), and by revising the introductory text of paragraph (b)(2) and paragraph (d) to read as follows:

§ 23.1581 General.

(a) * * *

(3) Further information necessary to comply with the relevant operating rules.

(b) * * *

(2) The requirements of paragraph (b)(1) of this section do not apply to reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, if the following is met:

* * * * *

(c) The units used in the Airplane Flight Manual must be the same as those marked on the appropriate instruments and placards.

(d) All Airplane Flight Manual operational airspeeds, unless otherwise specified, must be presented as indicated airspeeds.

* * * * *

54. Section 23.1583 is amended by revising the introductory text for the section, and paragraphs (a)(3) introductory text, (a)(3)(i), (c)(3), (c)(4), (d), (e), (f), and (g); by redesignating paragraphs (k), (l), and (m) as paragraphs (i), (j), and (k), respectively and revising them; and by adding new paragraphs (c)(5), (c)(6), (l), (m), (n), (o), and (p) to read as follows:

§ 23.1583 Operating limitations.

The Airplane Flight Manual must contain operating limitations determined under part 23, including the following—

(a) * * *

(3) In addition, for turbine powered commuter category airplanes—

(i) The maximum operating limit speed, V_{MO}/M_{MO} and a statement that this speed must not be deliberately exceeded in any regime of flight (climb, cruise or descent) unless a higher speed is authorized for flight test or pilot training;

* * * * *

(c) * * *

(3) For normal, utility, and acrobatic category reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and for turbine engine-powered airplanes in the normal, utility, and acrobatic category, performance operating limitations as follows—

(i) The maximum takeoff weight for each airport altitude and ambient temperature within the range selected by the applicant at which the airplane complies with the climb requirements of § 23.63(c)(1).

(ii) The maximum landing weight for each airport altitude and ambient temperature within the range selected by the applicant at which the airplane complies with the climb requirements of § 23.63(c)(2).

(4) For commuter category airplanes, the maximum takeoff weight for each airport altitude and ambient temperature within the range selected by the applicant at which—

(i) The airplane complies with the climb requirements of § 23.63(d)(1); and

(ii) The accelerate-stop distance determined under § 23.55 is equal to the available runway length plus the length of any stopway, if utilized; and either:

(iii) The takeoff distance determined under § 23.59(a) is equal to the available runway length; or

(iv) At the option of the applicant, the takeoff distance determined under § 23.59(a) is equal to the available runway length plus the length of any clearway and the takeoff run determined under § 23.59(b) is equal to the available runway length.

(5) For commuter category airplanes, the maximum landing weight for each airport altitude within the range selected by the applicant at which—

(i) The airplane complies with the climb requirements of § 23.63(d)(2) for ambient temperatures within the range selected by the applicant; and

(ii) The landing distance determined under § 23.75 for standard temperatures is equal to the available runway length.

(6) The maximum zero wing fuel weight, where relevant, as established in accordance with § 23.343.

(d) *Center of gravity.* The established center of gravity limits.

(e) *Maneuvers.* The following authorized maneuvers, appropriate airspeed limitations, and unauthorized maneuvers, as prescribed in this section.

(1) *Normal category airplanes.* No acrobatic maneuvers, including spins, are authorized.

(2) *Utility category airplanes.* A list of authorized maneuvers demonstrated in the type flight tests, together with recommended entry speeds and any other associated limitations. No other maneuver is authorized.

(3) *Acrobatic category airplanes.* A list of approved flight maneuvers demonstrated in the type flight tests, together with recommended entry speeds and any other associated limitations.

(4) *Acrobatic category airplanes and utility category airplanes approved for spinning.* Spin recovery procedure established to show compliance with § 23.221(c).

(5) *Commuter category airplanes.* Maneuvers are limited to any maneuver incident to normal flying, stalls (except whip stalls) and steep turns in which the angle of bank is not more than 60 degrees.

(f) *Maneuver load factor.* The positive limit load factors in g's, and, in addition, the negative limit load factor for acrobatic category airplanes.

(g) *Minimum flight crew.* The number and functions of the minimum flight crew determined under § 23.1523.

* * * * *

(i) *Maximum operating altitude.* The maximum altitude established under § 23.1527.

(j) *Maximum passenger seating configuration.* The maximum passenger seating configuration.

(k) *Allowable lateral fuel loading.* The maximum allowable lateral fuel loading differential, if less than the maximum possible.

(l) *Baggage and cargo loading.* The following information for each baggage and cargo compartment or zone—

(1) The maximum allowable load; and

(2) The maximum intensity of loading.

(m) *Systems.* Any limitations on the use of airplane systems and equipment.

(n) *Ambient temperatures.* Where appropriate, maximum and minimum ambient air temperatures for operation.

(o) *Smoking.* Any restrictions on smoking in the airplane.

(p) *Types of surface.* A statement of the types of surface on which operations may be conducted. (See § 23.45(g) and § 23.1587(a)(4), (c)(2), and (d)(4)).

55. Section 23.1585 is revised to read as follows:

§ 23.1585 Operating procedures.

(a) For all airplanes, information concerning normal, abnormal (if applicable), and emergency procedures and other pertinent information necessary for safe operation and the achievement of the scheduled performance must be furnished, including—

(1) An explanation of significant or unusual flight or ground handling characteristics;

(2) The maximum demonstrated values of crosswind for takeoff and landing, and procedures and information pertinent to operations in crosswinds;

(3) A recommended speed for flight in rough air. This speed must be chosen to protect against the occurrence, as a result of gusts, of structural damage to the airplane and loss of control (for example, stalling);

(4) Procedures for restarting any turbine engine in flight, including the effects of altitude; and

(5) Procedures, speeds, and configuration(s) for making a normal approach and landing, in accordance with §§ 23.73 and 23.75, and a transition to the balked landing condition.

(6) For seaplanes and amphibians, water handling procedures and the demonstrated wave height.

(b) In addition to paragraph (a) of this section, for all single-engine airplanes, the procedures, speeds, and configuration(s) for a glide following engine failure, in accordance with § 23.71 and the subsequent forced landing, must be furnished.

(c) In addition to paragraph (a) of this section, for all multiengine airplanes, the following information must be furnished:

(1) Procedures, speeds, and configuration(s) for making an approach and landing with one engine inoperative;

(2) Procedures, speeds, and configuration(s) for making a balked landing with one engine inoperative and the conditions under which a balked landing can be performed safely, or a warning against attempting a balked landing;

(3) The V_{SSE} determined in § 23.149; and

(4) Procedures for restarting any engine in flight including the effects of altitude.

(d) In addition to paragraphs (a) and either (b) or (c) of this section, as appropriate, for all normal, utility, and acrobatic category airplanes, the following information must be furnished:

(1) Procedures, speeds, and configuration(s) for making a normal takeoff, in accordance with § 23.51(a) and (b), and § 23.53(a) and (b), and the subsequent climb, in accordance with § 23.65 and § 23.69(a).

(2) Procedures for abandoning a takeoff due to engine failure or other cause.

(e) In addition to paragraphs (a), (c), and (d) of this section, for all normal, utility, and acrobatic category multiengine airplanes, the information must include the following:

(1) Procedures and speeds for continuing a takeoff following engine failure and the conditions under which takeoff can safely be continued, or a warning against attempting to continue the takeoff.

(2) Procedures, speeds, and configurations for continuing a climb following engine failure, after takeoff, in accordance with § 23.67, or enroute, in accordance with § 23.69(b).

(f) In addition to paragraphs (a) and (c) of this section, for commuter category airplanes, the information must include the following:

(1) Procedures, speeds, and configuration(s) for making a normal takeoff.

(2) Procedures and speeds for carrying out an accelerate-stop in accordance with § 23.55.

(3) Procedures and speeds for continuing a takeoff following engine failure in accordance with § 23.59(a)(1) and for following the flight path determined with § 23.57 and 23.61(a).

(g) For multiengine airplanes, information identifying each operating condition in which the fuel system independence prescribed in § 23.953 is necessary for safety must be furnished, together with instructions for placing the fuel system in a configuration used to show compliance with that section.

(h) For each airplane showing compliance with § 23.1353(g)(2) or (g)(3), the operating procedures for disconnecting the battery from its charging source must be furnished.

(i) Information on the total quantity of usable fuel for each fuel tank, and the effect on the usable fuel quantity, as a result of a failure of any pump, must be furnished.

(j) Procedures for the safe operation of the airplane's systems and equipment, both in normal use and in the event of malfunction, must be furnished.

56. Section 23.1587 is revised to read as follows:

§ 23.1587 Performance information

Unless otherwise prescribed, performance information must be provided over the altitude and temperature ranges required by § 23.45(b).

(a) For all airplanes, the following information must be furnished—

(1) The stalling speeds V_{SO} and V_{S1} with the landing gear and wing flaps retracted, determined at maximum weight under § 23.49, and the effect on these stalling speeds of angles of bank up to 60 degrees;

(2) The steady rate and gradient of climb with all engines operating, determined under § 23.69(a);

(3) The landing distance, determined under § 23.75 for each airport altitude and standard temperature, and the type of surface for which it is valid;

(4) The effect on landing distances of operation on other than smooth hard surfaces, when dry, determined under § 23.45(g); and

(5) The effect on landing distances of runway slope and 50 percent of the headwind component and 150 percent of the tailwind component.

(b) In addition to paragraph (a) of this section, for all normal, utility, and acrobatic category reciprocating engine-powered airplanes of 6,000 pounds or less maximum weight, the steady angle of climb/descent, determined under § 23.77(a), must be furnished.

(c) In addition to paragraphs (a) and (b) of this section, if appropriate, for normal, utility, and acrobatic category airplanes, the following information must be furnished—

(1) The takeoff distance, determined under § 23.53 and the type of surface for which it is valid.

(2) The effect on takeoff distance of operation on other than smooth hard surfaces, when dry, determined under § 23.45(g);

(3) The effect on takeoff distance of runway slope and 50 percent of the headwind component and 150 percent of the tailwind component;

(4) For multiengine reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and

multiengine turbine powered airplanes, the one-engine-inoperative takeoff climb/descent gradient, determined under § 23.66;

(5) For multiengine airplanes, the enroute rate and gradient of climb/descent with one engine inoperative, determined under § 23.69(b); and

(6) For single-engine airplanes, the glide performance determined under § 23.71.

(d) In addition to paragraph (a) of this section, for commuter category airplanes, the following information must be furnished—

(1) The accelerate-stop distance determined under § 23.55;

(2) The takeoff distance determined under § 23.59(a);

(3) At the option of the applicant, the takeoff run determined under § 23.59(b);

(4) The effect on accelerate-stop distance, takeoff distance and, if determined, takeoff run, of operation on other than smooth hard surfaces, when dry, determined under § 23.45(g);

(5) The effect on accelerate-stop distance, takeoff distance, and if determined, takeoff run, of runway slope and 50 percent of the headwind component and 150 percent of the tailwind component;

(6) The net takeoff flight path determined under § 23.61(b);

(7) The enroute gradient of climb/descent with one engine inoperative, determined under § 23.69(b);

(8) The effect, on the net takeoff flight path and on the enroute gradient of climb/descent with one engine inoperative, of 50 percent of the headwind component and 150 percent of the tailwind component;

(9) Overweight landing performance information (determined by extrapolation and computed for the range of weights between the maximum landing and maximum takeoff weights) as follows—

(i) The maximum weight for each airport altitude and ambient temperature at which the airplane complies with the climb requirements of § 23.63(d)(2); and

(ii) The landing distance determined under § 23.75 for each airport altitude and standard temperature.

(10) The relationship between IAS and CAS determined in accordance with § 23.1323(b) and (c).

(11) The altimeter system calibration required by § 23.1325(e).

57. Section 23.1589 is amended by revising paragraph (b) to read as follows:

§ 23.1589 Loading information.

* * * * *

(b) Appropriate loading instructions for each possible loading condition between the maximum and minimum weights established under § 23.25, to facilitate the center of gravity remaining within the limits established under § 23.23.

Appendix E to Part 23—[Removed]

58. Appendix E to Part 23 is removed.

Issued in Washington, DC, on July 19, 1994.

Elizabeth Yoest,

Acting Director, Aircraft Certification Service.

[FR Doc. 94–17994 Filed 7–22–94; 8:45 am]

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Part V

Office of Management and Budget

Management of Federal Information Resources; Notice

OFFICE OF MANAGEMENT AND BUDGET

Management of Federal Information Resources

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Revision of OMB Circular No. A–130, Transmittal 2, *Management of Federal Information Resources.*

SUMMARY: The Office of Management and Budget is revising Circular No. A–130, *Management of Federal Information Resources* (hereafter referred to as Circular A–130). The revision is being done in stages.

Transmittal 1 to Circular A–130, effective June 25, 1993, and published on July 2, 1993 (58 FR 36068) addressed the Information Management Policy section of the Circular (Section 8a), as well as Appendix I, "Federal Agency Responsibilities for Maintaining Records About Individuals." That issuance dealt primarily with how the Federal government manages its information holdings, particularly information exchange with the public.

The revisions contained herein address agencies' internal management practices for information systems and information technology (Section 8b). These revisions to the circular: (1) promote agency investments in information technology that improve service delivery to the public, reduce burden on the public, and lower the cost of Federal program administration; (2) encourage agencies to use information technology as a strategic resource to promote fundamental reevaluation of federal agency work processes, organizational structures, and ways of interacting with the public; and (3) recognize the changes in the technical, legal, and operational environment that agencies face when managing information technology.

Also, the revisions make minor changes to Section 5, "Background," Section 6, "Definitions," Section 7, "Basic Considerations and Assumptions," and Appendix IV, "Analysis of Key Sections" of the Circular.

DATE: The revisions to the Circular are effective July 15, 1994.

ELECTRONIC AVAILABILITY: This document is available in electronic form at no charge from FEDWORLD®, a service of the National Technical Information Service. To access the document using a computer and a modem, dial (703) 321–8020; from the Internet, telnet to *fedworld.gov* (192.239.92.201). From the FEDWORLD menu, enter "*fsw-house*", which will connect you to the White House Library of files. At the White House Library, enter "*fka130*", which will list all files in the system associated with OMB Circular A–130. The revised circular will be clearly marked with the word "REVISED." These files can also be accessed using the Internet File Transfer Protocol by connecting to *ftp.fedworld.gov* (192.239.92.205). Go to directory "*w-house*" and look for files beginning with "*A–130.*"

FOR FURTHER INFORMATION CONTACT: All questions or inquiries should be addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Telephone: (202) 395–3785. Interested parties may obtain copies of the original OMB Circular A–130 (50 FR 52730) and Transmittal 1 (58 FR 36070) from the Executive Office of the President, Publications Services, by calling (202) 395–7332, between 9 am and 4 pm EST.

SUPPLEMENTARY INFORMATION

Background

The Paperwork Reduction Act (44 U.S.C. Chapter 35) assigns the Director of the Office of Management and Budget (OMB) responsibility for maintaining a comprehensive set of information resources management policies, and for promoting the application of information technology to improve the use and dissemination of information in the operation of Federal programs. To fulfill these responsibilities, OMB originally issued Circular No. A–130, *Management of Federal Information Resources* (50 FR 52730; December 24, 1985), which provided a policy framework for Federal information resources management (IRM). Since the Circular was issued in 1985, Congress has enacted several laws bearing on the information technology management section of the Circular, especially amendments to the Paperwork Reduction Act (Pub. L. 99–500).

OMB published four notices relating to this revision of the Circular. On March 4, 1991, OMB published a notice setting forth plans for revising all of the Circular (56 FR 9026) and on April 29, 1992, OMB specifically requested comments on topics for the proposed revision to Section 8b, *Information Systems and Information Technology Management*, of the Circular (57 FR 18296). On July 2, 1993, OMB published a notice (58 FR 36068) amending most of the Circular; in that notice, OMB stated its plans for amending other parts of the Circular (58 FR 36069–70). On September 10, 1993, OMB published a notice (58 FR 47790) requesting comment on the proposed changes to the information technology portion of the Circular.

Structure of this Revision

This revision substantially reorganizes Section 8b, *Information Systems and Information Technology Management*, which was issued in 1985 (50 FR 52736–37, December 24, 1985). For the convenience of readers of the circular, this issuance fully incorporates and supersedes Transmittal 1 of Circular A–130, which revised Section 8a and other related sections dealing with information management (58 FR 36070, July 2, 1993). This revision primarily addresses portions of the Circular that were not revised in the July 1993 **Federal Register** notice (i.e., Section 8b and Appendix II). However, this issuance also affects Section 5, *Background*, Section 6, *Definitions*, Section 7, *Basic Considerations and Assumptions*, and Appendix IV, *Analysis of Key Sections*, which were previously revised in the July 1993 notice.

Outline of Circular A–130 [as Revised]:

1. *Purpose:* [Unchanged; see 58 FR 36070]
2. *Rescissions:* [Unchanged; see 58 FR 36070]
3. *Authorities:* [Unchanged; see 58 FR 36070]
4. *Applicability and Scope:* [Unchanged; see 58 FR 36070]
5. *Background:* [Changed]
6. *Definitions:* [Changed]
7. *Basic Considerations and Assumptions:* [Changed]
8. *Policies:*

a. *Information Management Policy:* [Unchanged; see 58 FR 36071–73]

b. *Information Systems and Information Technology Management:* [Changed]

9. *Assignment of Responsibilities:* [Unchanged; see 58 FR 36073–74]
10. *Oversight:* [Unchanged; see 58 FR 36074]
11. *Effectiveness:* [Unchanged; see 58 FR 36074]
12. *Inquiries:* [Unchanged; see 58 FR 36074]
13. *Sunset Review Date:* [Unchanged; see 58 FR 36075]

Appendix I: *Federal Agency Responsibilities for Maintaining Records about Individuals* [Unchanged; see 58 FR 36075–79]

Appendix II: *Cost Accounting, Cost Recovery, and Interagency Sharing of Information Technology Facilities* [Deleted]

Appendix III: *Security of Federal Automated Information Systems* [Unchanged; see 50 FR 52742–44]

Appendix IV: *Analysis of Key Sections* [Changed]

Summary of Revisions

Section 5. *Background*. This revision substitutes the term "information resources management" for the term "information management" in the first sentence.

Section 6. *Definitions*.

This revision to the Circular adds definitions for the terms "full costs," "information management," "information resources," "information processing service organization," "information systems life cycle," "major information systems," and "service recipient." In addition, the revision amends the definitions for the terms "information resources management" and "information system." The following summarizes the changes to Section 6.

The term "full costs" describes the costs agencies should account for when charging for services provided by an Information Processing Service Organization (IPSO). This definition is changed from the September 10, 1993, proposal (58 FR 47793). The new definition has been made more detailed in response to agency comments.

The term "information management" is defined to distinguish the management of information from the management of information technology where necessary.

The term "information resources," implied in Circular A–130's previous definition of "information resources management" (Sec. 6i, 58 FR 36070), is defined specifically in order to broaden the applicability of some policy statements beyond just information technology or just information.

The term "information resources management" is changed from the July 2, 1993, issuance (Sec. 6i, 58 FR 36070) to emphasize the process of managing information resources instead of listing management activities for information resources.

The term "information system" is changed from the July 2, 1993, issuance (Sec. 6j, 58 FR 36070) to stress that information systems are discrete sets of resources—not just processes.

"Information systems life cycle," a term formerly contained in Appendix IV (50 FR 52749), is moved into Section 6 consistent with the discussion of information systems management oversight in Section 8b(3).

The new term "information processing services organization" (IPSO) replaces the term "information technology facility" (Sec. 6l, 58 FR 36071), which is deleted. This final issuance defines the term differently than proposed (Sec. 6l, 58 FR 47793) in response to agency comments.

The definition of "major information system" is changed slightly from the proposal (Sec. 6m, 58 FR 47793) for clarity.

"Service recipient" is a new term used solely in the context of interagency sharing or cross-servicing of information resources for purposes of establishing charge-back mechanisms. This term is being adopted rather than the term "user" proposed in the September 10, 1993, notice (Sec. 6t, 58 FR 47793).

Section 7. *Basic Considerations and Assumptions*.

The September 10, 1993, notice proposed to amend two statements of basic considerations and assumptions (Sec. 7i and 7l), and to add one (Sec. 7n) (58 FR 47793). This notice amends Section 7i, as proposed; adds a new Section 7n, revised from the proposal; amends Section 7l, with most of the proposed revision being moved to new Sections 7o and 7p; and adds a new Section 7q. These changes address:

(1) The need for agencies to apply information resources to meet the mission needs of the agency as agreed upon through agency strategic planning processes,

(2) The need for skills, training, and knowledge to support the management of information resources as the government moves toward program delivery to the public that relies more heavily on automation, and

(3) The need for federal managers with program delivery responsibilities to assume responsibility for the effective stewardship of information resources to fulfill mission needs.

(4) One basic consideration and assumption proposed (Section 7l, 58 FR 47793) is split into two separate statements in this issuance to emphasize:

(a) The need for agencies to recognize the opportunity that the introduction of information technology presents for organizational streamlining, work process redesign, and making public interactions with the Federal government more "user-friendly";

(b) The availability of government information in electronic forms to improve the management and use of this information for the government and the public; and

(5) The role of information resources in supporting the achievement of mission goals.

Section 8b. *Information Systems and Information Technology Management Policy*.

(1) *Evaluation and Performance Measurement*.

This section expands on the guidance for evaluating investments in information technology previously found in Section 43 of OMB Circular No. A–11, *Preparation and Submission of Budget Estimates*, and OMB Circular No. A–94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs* (57 FR 53519, November 10, 1992). Additionally, OMB broadens the criteria for evaluating information systems to include benefits to the public. This policy requires agencies to prepare a benefit-cost analysis for each information system as a management oversight tool. The policy also requires agencies to devise an agency-wide investment strategy, using benefit-cost analyses for individual systems, that maximizes the return on investment on information technology across the agency.

This section has been changed from the proposal (Sec. 8b(1), 58 FR 47793–4) to emphasize the role of reengineering in ensuring the greatest return possible from investments in information technology. Other changes add operational risk as a criterion for evaluating individual information systems and require agencies to review benefits that have accrued from implementing an information system. Finally, this issuance requires agencies to consider the return on investments in information technology from an organization-wide perspective. These changes reflect comments from the General Accounting Office.

(2) *Strategic Information Resources Management (IRM) Planning*.

This section describes a planning framework that links the management of information resources to operational and strategic IRM planning and agency-wide strategic planning. In addition, it expands the scope of the current planning requirement beyond automatic data processing equipment to planning for all information resources.

This section reflects changes from the proposal (Sec. 8b(2), 58 FR 47794) to provide more detailed instructions on the content of agency planning requirements, in response to agency comments. In particular, some material previously required to be reported to OMB in Section 43 of OMB Circular A–11 are now included in this Circular as required elements of agency operational information technology plans.

(3) *Information Systems Management Oversight*.

Section 8b(3) addresses the need for agencies to create management oversight processes that ensure information systems meet mission requirements. This represents a slight change in language and emphasis from the

proposal (Sec. 8b(3), 58 FR 47794). The language in this final issuance stresses a higher level of agency management attention to the progress of major information systems projects, with less emphasis on the term "life cycle management."

A new policy at Section 8b(3)(g) links the oversight of financial management systems through Circular No. A–127, *Financial Management Systems* (58 FR 41014–19, July 23, 1993), to the management of information systems more generally.

(4) *Use of Information Resources.*

A new policy is added at 8b(4) that prompts agencies to address the need for organization-wide frameworks for using information resources. This clarifies the proposal concerning information and information technology architectures contained in the section on IRM planning (Sec. 8b(2)(c), FR 58 47794), in response to agency comments.

The policy statement on the use of Federal Information Processing Standards (FIPS) is dropped from Section 8b of the Circular (Sec. 8b(14), 50 FR 52737) because it is now covered in Section 8a(1)(h). This change recognizes that the Computer Security Act of 1987 amended the Brooks Act to give the Secretary of Commerce the responsibility for determining the applicability of FIPS (see 40 U.S.C. 759(d)).

This section incorporates guidance formerly found in Appendix II (50 FR 52741–42) into Section 8b(4). This reflects changes in the technical environment surrounding the sharing of federal information processing services that allow for sharing of more than just mainframe computing resources. Moving this guidance into the policy section of the Circular gives it more prominence and fosters better integration of these principles in agencies' information technology management programs.

Section 8b(4) also collapses and simplifies the guidance found in proposed Section 8b(5) (58 FR 47794–5). This change reflects agency comments that the proposal for Section 8b(5) was too burdensome and detailed to serve its intended purposes cost-effectively.

Sec. 8b(4)(f) adds a policy statement stating the high-level policy principles of the Computer Security Act of 1987 (U.S.C. 759 note), as requested in several comments.

(5) *Acquisition of Information Technology.*

This section applies the economic principle of maximizing return on investment when acquiring information technology. This supports the criterion used in 8b(1) to evaluate investments in information technology for improvements in service delivery to the public. It had been proposed as part of a different section (Sec. 8b(4), 58 FR 47794), but now stands as a separate section in this issuance.

4. Appendix II: *Cost Accounting, Cost Recovery, and Interagency Sharing of Information Technology Facilities.*

In the July 1993 **Federal Register** notice (58 FR 36069–70), OMB stated its intention to revise the guidance in Appendix II, issued in 1985 (50 FR 52741–42). In the September 10, 1993, notice OMB proposed to delete the guidance in Appendix II and place revised guidance in Section 8b (58 FR 47793). This notice contains the revised guidance in Section 8b. Accordingly, policy pertaining to cost accounting, cost recovery, and interagency sharing of information technology facilities has been deleted from Appendix II. Appendix II will be reserved for future policy topics.

5. Appendix IV: *Analysis of Key Sections.*

OMB has completely revised the portion of this appendix pertaining to Section 8b, *Information Systems and Information Technology Management* (see 50 FR 52748–50) to reflect the changes made in Section 8b. Accordingly, Appendix IV now consists of the discussion concerning sections 1–8 and 9a(11) of the Circular, contained herein, plus the discussion of Section 9, *Assignment of Responsibilities*, and 10, *Oversight*, in Appendix IV from the 1985 issuance (50 FR 52750–51), which remains in effect.

Development of Future Topics

Section 9, *Assignment of Responsibilities*, and Section 10, Oversight. As part of the final stage of revising the Circular, OMB will review the assignment of responsibilities and oversight provisions to ensure that they reflect changes in Section 8, Policies, of the Circular.

Appendix III: *Security of Federal Automated Information Systems.*

OMB did not amend Appendix III (50 FR 52742–44) in the July 1993 **Federal Register** notice, and is not amending Appendix III in this notice. OMB intends to issue a proposal that would revise Appendix III to incorporate requirements of the Computer Security Act of 1987 including requirements for security plans described in OMB Bulletin 90–08. Those revisions will incorporate changes based on the experience gained in recent computer security visits to agencies by teams of staff from OMB, the National Institute of Standards and Technology (NIST), and the National Security Agency. OMB will also work with NIST to implement recommendations of the Computer Security and Privacy Advisory Board (established by the Computer Security Act) regarding better coordination between this Circular and OMB Circular No. A–123.

Accordingly, Circular A–130 is revised as set forth below.

Sally Katzen,

Administrator, Office of Information and Regulatory Affairs

Circular No. A–130—Revised

Transmittal Memorandum No. 2

To the Heads of Executive Departments and Establishments

SUBJECT: Management of Federal Information Resources

Circular No. A–130 provides uniform government-wide information resources management policies as required by the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35. This Transmittal Memorandum contains updated guidance on those portions of the Circular dealing with the management of information technology. It also contains a revised Appendix IV, "Analysis of Key Sections" and reprints Transmittal No. 1 (58 FR 36070–36086) with a few changes.

Leon E. Panetta,

Director

Circular No. A–130—Revised

Transmittal Memorandum No. 2

To the Heads of Executive Departments and Establishments

SUBJECT: Management of Federal Information Resources

1. *Purpose:* This Circular establishes policy for the management of Federal information resources. Procedural and analytic guidelines for implementing specific aspects of these policies are included as appendices.

2. *Rescissions:* This Circular rescinds OMB Circulars No. A–3, A–71, A–90, A–108, A–114, and A–121, and all Transmittal Memoranda to those circulars.

3. *Authorities:* This Circular is issued pursuant to the Paperwork Reduction Act (PRA), as amended (44 U.S.C. Chapter 35); the Privacy Act, as amended (5 U.S.C. 552a); the Chief Financial Officers Act (31 U.S.C. 3512 et seq.); the Federal Property and Administrative Services Act, as amended (40 U.S.C. 759 and 487); the Computer Security Act (40 U.S.C. 759 note); the Budget and Accounting Act, as amended (31 U.S.C. Chapter 11); Executive Order No. 12046 of March 27,

1978; and Executive Order No. 12472 of April 3, 1984.

4. *Applicability and Scope:*

a. The policies in this Circular apply to the information activities of all agencies of the executive branch of the Federal government.

b. Information classified for national security purposes should also be handled in accordance with the appropriate national security directives. National security emergency preparedness activities should be conducted in accordance with Executive Order No. 12472.

5. *Background:* The Paperwork Reduction Act establishes a broad mandate for agencies to perform their information resources management activities in an efficient, effective, and economical manner. To assist agencies in an integrated approach to information resources management, the Act requires that the Director of OMB develop and implement uniform and consistent information resources management policies; oversee the development and promote the use of information management principles, standards, and guidelines; evaluate agency information resources management practices in order to determine their adequacy and efficiency; and determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director.

6. *Definitions:*

a. The term "agency" means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal government, or any independent regulatory agency. Within the Executive Office of the President, the term includes only OMB and the Office of Administration.

b. The term "audiovisual production" means a unified presentation, developed according to a plan or script, containing visual imagery, sound or both, and used to convey information.

c. The term "dissemination" means the government initiated distribution of information to the public. Not considered dissemination within the meaning of this Circular is distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or Privacy Act.

d. The term "full costs," when applied to the expenses incurred in the operation of an Information Processing Services Organization (IPSO), is comprised of all direct, indirect, general, and administrative costs incurred in the operation of an IPSO. These costs include, but are not limited to, personnel, equipment, software, supplies, contracted services from private sector providers, space occupancy, intra-agency services from within the agency, inter-agency services from other Federal agencies, other services that are provided by State and local governments, and Judicial and Legislative branch organizations.

e. The term "government information" means information created, collected, processed, disseminated, or disposed of by or for the Federal Government.

f. The term "government publication" means information which is published as an individual document at government expense, or as required by law. (44 U.S.C. 1901)

g. The term "information" means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.

h. The term "information dissemination product" means any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, disseminated by an agency to the public.

i. The term "information life cycle" means the stages through which information passes, typically characterized as creation or collection, processing, dissemination, use, storage, and disposition.

j. The term "information management" means the planning, budgeting, manipulating, and controlling of information throughout its life cycle.

k. The term "information resources" includes both government information and information technology.

l. The term "information processing services organization" (IPSO) means a discrete set of personnel, information technology, and support equipment with the primary function of providing services to more than one agency on a reimbursable basis.

m. The term "information resources management" means the process of managing information resources to accomplish agency missions. The term encompasses both information itself and the related resources, such as personnel, equipment, funds, and information technology.

n. The term "information system" means a discrete set of information resources organized for the collection, processing, maintenance, transmission, and dissemination of information, in accordance with defined procedures, whether automated or manual.

o. The term "information system life cycle" means the phases through which an information system passes, typically characterized as initiation, development, operation, and termination.

p. The term "information technology" means the hardware and software operated by a Federal agency or by a contractor of a Federal agency or other organization that processes information on behalf of the Federal government to accomplish a Federal function, regardless of the technology involved, whether computers, telecommunications, or others. It includes automatic data processing equipment as that term is defined in Section 111(a)(2) of the Federal Property and Administrative Services Act of 1949. For the purposes of this Circular, automatic data processing and telecommunications activities related to certain critical national security missions, as defined in 44 U.S.C. 3502(2) and 10 U.S.C. 2315, are excluded.

q. The term "major information system" means an information system that requires special management attention because of its importance to an agency mission; its high development, operating, or maintenance costs; or its significant role in the administration of agency programs, finances, property, or other resources.

r. The term "records" means all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the informational value of the data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included. (44 U.S.C. 3301)

s. The term "records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to

records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations. (44 U.S.C. 2901(2))

t. The term "service recipient" means an agency organizational unit, programmatic entity, or chargeable account that receives information processing services from an Information Processing Services Organization (IPSO). A service recipient may be either internal or external to the organization responsible for providing information resources services, but normally does not report either to the manager or director of the IPSO or to the same immediate supervisor.

7. *Basic Considerations and Assumptions:*

a. The Federal Government is the largest single producer, collector, consumer, and disseminator of information in the United States. Because of the extent of the government's information activities, and the dependence of those activities upon public cooperation, the management of Federal information resources is an issue of continuing importance to all Federal agencies, State and local governments, and the public.

b. Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy—past, present, and future. It is a means to ensure the accountability of government, to manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace.

c. The free flow of information between the government and the public is essential to a democratic society. It is also essential that the government minimize the Federal paperwork burden on the public, minimize the cost of its information activities, and maximize the usefulness of government information.

d. In order to minimize the cost and maximize the usefulness of government information, the expected public and private benefits derived from government information should exceed the public and private costs of the information, recognizing that the benefits to be derived from government information may not always be quantifiable.

e. The nation can benefit from government information disseminated both by Federal agencies and by diverse nonfederal parties, including State and local government agencies, educational and other not-for-profit institutions, and for-profit organizations.

f. Because the public disclosure of government information is essential to the operation of a democracy, the management of Federal information resources should protect the public's right of access to government information.

g. The individual's right to privacy must be protected in Federal Government information activities involving personal information.

h. Systematic attention to the management of government records is an essential component of sound public resources management which ensures public accountability. Together with records preservation, it protects the government's historical record and guards the legal and financial rights of the government and the public.

i. Agency strategic planning can improve the operation of government programs. The application of information resources should support an agency's strategic plan to fulfill its mission. The integration of IRM planning with agency strategic planning promotes the appropriate application of Federal information resources.

j. Because State and local governments are important producers of government information for many areas such as health, social welfare, labor, transportation, and education, the Federal Government must cooperate with these governments in the management of information resources.

k. The open and efficient exchange of scientific and technical government information, subject to applicable national security controls and the proprietary rights of others, fosters excellence in scientific research and effective use of Federal research and development funds.

l. Information technology is not an end in itself. It is one set of resources that can improve the effectiveness and efficiency of Federal program delivery.

m. Federal Government information resources management policies and activities can affect, and be affected by, the information policies and activities of other nations.

n. Users of Federal information resources must have skills, knowledge, and training to manage information resources, enabling the Federal government to effectively serve the public through automated means.

o. The application of up-to-date information technology presents opportunities to promote fundamental changes in agency structures, work processes, and ways of interacting with the public that improve the effectiveness and efficiency of Federal agencies.

p. The availability of government information in diverse media, including electronic formats, permits agencies and the public greater flexibility in using the information.

q. Federal managers with program delivery responsibilities should recognize the importance of information resources management to mission performance.

8. *Policy:*

a. Information Management Policy

(1) *Information Management Planning.* Agencies shall plan in an integrated manner for managing information throughout its life cycle. Agencies shall:

(a) Consider, at each stage of the information life cycle, the effects of decisions and actions on other stages of the life cycle, particularly those concerning information dissemination;

(b) Consider the effects of their actions on members of the public and ensure consultation with the public as appropriate;

(c) Consider the effects of their actions on State and local governments and ensure consultation with those governments as appropriate;

(d) Seek to satisfy new information needs through interagency or intergovernmental sharing of information, or through commercial sources, where appropriate, before creating or collecting new information;

(e) Integrate planning for information systems with plans for resource allocation and use, including budgeting, acquisition, and use of information technology;

(f) Train personnel in skills appropriate to management of information;

(g) Protect government information commensurate with the risk and magnitude of harm that could result from the loss, misuse, or unauthorized access to or modification of such information;

(h) Use voluntary standards and Federal Information Processing Standards where appropriate or required;

(i) Consider the effects of their actions on the privacy rights of individuals, and ensure that appropriate legal and technical safeguards are implemented;

(j) Record, preserve, and make accessible sufficient information to ensure the management and accountability of agency programs, and to protect the legal and financial rights of the Federal Government;

(k) Incorporate records management and archival functions into the design, development, and implementation of information systems;

(l) Provide for public access to records where required or appropriate.

(2) *Information Collection.* Agencies shall collect or create only that information necessary for the proper performance of agency functions and which has practical utility.

(3) *Electronic Information Collection.* Agencies shall use electronic collection techniques where such techniques reduce burden on the public, increase efficiency of government programs, reduce costs to the government and the public, and/or provide better service to the public. Conditions favorable to electronic collection include:

(a) The information collection seeks a large volume of data and/or reaches a large proportion of the public;

(b) The information collection recurs frequently;

(c) The structure, format, and/or definition of the information sought by the information collection does not change significantly over several years;

(d) The agency routinely converts the information collected to electronic format;

(e) A substantial number of the affected public are known to have ready access to the necessary information technology and to maintain the information in electronic form;

(f) Conversion to electronic reporting, if mandatory, will not impose substantial costs or other adverse effects on the public, especially State and local governments and small business entities.

(4) *Records Management.* Agencies shall:

(a) Ensure that records management programs provide adequate and proper documentation of agency activities;

(b) Ensure the ability to access records regardless of form or medium;

(c) In a timely fashion, establish, and obtain the approval of the Archivist of the United States for, retention schedules for Federal records; and

(d) Provide training and guidance as appropriate to all agency officials and employees and contractors regarding their Federal records management responsibilities.

(5) *Providing Information to the Public.* Agencies have a responsibility to provide information to the public consistent with their missions. Agencies shall discharge this responsibility by:

(a) Providing information, as required by law, describing agency organization, activities, programs, meetings, systems of records, and other information holdings, and how the public may gain access to agency information resources;

(b) Providing access to agency records under provisions of the Freedom of Information Act and the Privacy Act, subject to the protections and limitations provided for in these Acts;

(c) Providing such other information as is necessary or appropriate for the proper performance of agency functions; and

(d) In determining whether and how to disseminate information to the public, agencies shall:

(i) Disseminate information in a manner that achieves the best balance between the goals of maximizing the usefulness of the information and minimizing the cost to the government and the public;

(ii) Disseminate information dissemination products on equitable and timely terms;

(iii) Take advantage of all dissemination channels, Federal and nonfederal, including State and local governments, libraries and private sector entities, in discharging agency information dissemination responsibilities;

(iv) Help the public locate government information maintained by or for the agency.

(6) *Information Dissemination Management System.* Agencies shall maintain and implement a management system for all information dissemination products which shall, at a minimum:

(a) Assure that information dissemination products are necessary for proper performance of agency functions (44 U.S.C. 1108);

(b) Consider whether an information dissemination product available from other Federal or nonfederal sources is equivalent to an agency information dissemination product and reasonably fulfills the dissemination responsibilities of the agency;

(c) Establish and maintain inventories of all agency information dissemination products;

(d) Develop such other aids to locating agency information dissemination products including catalogs and directories, as may reasonably achieve agency information dissemination objectives;

(e) Identify in information dissemination products the source of the information, if from another agency;

(f) Ensure that members of the public with disabilities whom the agency has a responsibility to inform have a reasonable ability to access the information dissemination products;

(g) Ensure that government publications are made available to depository libraries through the facilities of the Government Printing Office, as required by law (44 U.S.C. Part 19);

(h) Provide electronic information dissemination products to the Government Printing Office for distribution to depository libraries;

(i) Establish and maintain communications with members of the public and with State and local governments so that the agency creates information dissemination products that meet their respective needs;

(j) Provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products; and

(k) Ensure that, to the extent existing information dissemination policies or practices are inconsistent with the requirements of this Circular, a prompt and orderly transition to compliance with the requirements of this Circular is made.

(7) *Avoiding Improperly Restrictive Practices.* Agencies shall:

(a) Avoid establishing, or permitting others to establish on their behalf, exclusive, restricted, or other distribution arrangements that interfere with the availability of information dissemination products on a timely and equitable basis;

(b) Avoid establishing restrictions or regulations, including the charging of fees or royalties, on the reuse, resale, or redissemination of Federal information dissemination products by the public; and,

(c) Set user charges for information dissemination products at a level sufficient to recover the cost of dissemination but no higher. They shall exclude from calculation of the charges costs associated with original collection and processing of the information. Exceptions to this policy are:

(i) Where statutory requirements are at variance with the policy;

(ii) Where the agency collects, processes, and disseminates the information for the benefit of a specific identifiable group beyond the benefit to the general public;

(iii) Where the agency plans to establish user charges at less than cost of dissemination because of a determination that higher charges would constitute a significant barrier to properly performing the agency's functions, including reaching members of the public whom the agency has a responsibility to inform; or

(iv) Where the Director of OMB determines an exception is warranted.

(8) *Electronic Information Dissemination.* Agencies shall use electronic media and formats, including public networks, as appropriate and within budgetary constraints, in order to make government information more easily accessible and useful to the public. The use of electronic media and formats for information dissemination is

appropriate under the following conditions:

(a) The agency develops and maintains the information electronically;

(b) Electronic media or formats are practical and cost effective ways to provide public access to a large, highly detailed volume of information;

(c) The agency disseminates the product frequently;

(d) The agency knows a substantial portion of users have ready access to the necessary information technology and training to use electronic information dissemination products;

(e) A change to electronic dissemination, as the sole means of disseminating the product, will not impose substantial acquisition or training costs on users, especially State and local governments and small business entities.

(9) *Safeguards.* Agencies shall:

(a) Ensure that information is protected commensurate with the risk and magnitude of the harm that would result from the loss, misuse, or unauthorized access to or modification of such information;

(b) Limit the collection of information which identifies individuals to that which is legally authorized and necessary for the proper performance of agency functions;

(c) Limit the sharing of information that identifies individuals or contains proprietary information to that which is legally authorized, and impose appropriate conditions on use where a continuing obligation to ensure the confidentiality of the information exists;

(d) Provide individuals, upon request, access to records about them maintained in Privacy Act systems of records, and permit them to amend such records as are in error consistent with the provisions of the Privacy Act.

b. *Information Systems and Information Technology Management.*

(1) *Evaluation and Performance Measurement.* Agencies shall promote the appropriate application of Federal information resources as follows:

(a) Seek opportunities to improve the effectiveness and efficiency of government programs through work process redesign and the judicious application of information technology;

(b) Prepare, and update as necessary throughout the information system life cycle, a benefit-cost analysis for each information system:

(i) at a level of detail appropriate to the size of the investment;

(ii) consistent with the methodology described in OMB Circular No. A–94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs;" and

(iii) that relies on systematic measures of mission performance, including the:

(a) effectiveness of program delivery;

(b) efficiency of program administration; and

(c) reduction in burden, including information collection burden, imposed on the public;

(c) Conduct benefit-cost analyses to support ongoing management oversight processes that maximize return on investment and minimize financial and operational risk for investments in major information systems on an agency-wide basis; and

(d) Conduct post-implementation reviews of information systems to validate estimated benefits and document effective management practices for broader use.

(2) *Strategic Information Resources Management (IRM) Planning.* Agencies shall establish and maintain strategic information resources management planning processes which include the following components:

(a) Strategic IRM planning that addresses how the management of information resources promotes the fulfillment of an agency's mission. This planning process should support the development and maintenance of a strategic IRM plan that reflects and anticipates changes in the agency's mission, policy direction, technological capabilities, or resource levels;

(b) Information planning that promotes the use of information throughout its life cycle to maximize the usefulness of information, minimize the burden on the public, and preserve the appropriate integrity, availability, and confidentiality of information. It shall specifically address the planning and budgeting for the information collection burden imposed on the public as defined by 5 C.F.R. 1320;

(c) Operational information technology planning that links information technology to anticipated program and mission needs, reflects budget constraints, and forms the basis for budget requests. This planning should result in the preparation and maintenance of an up-to-date five-year plan, as required by 44 U.S.C. 3506, which includes:

(i) a listing of existing and planned major information systems;

(ii) a listing of planned information technology acquisitions;

(iii) an explanation of how the listed major information systems and planned information technology acquisitions relate to each other and support the achievement of the agency's mission; and

iv) a summary of computer security planning, as required by Section 6 of the Computer Security Act of 1987 (40 U.S.C. 759 note); and

(d) Coordination with other agency planning processes including strategic, human resources, and financial resources.

(3) *Information Systems Management Oversight.* Agencies shall establish information system management oversight mechanisms that:

(a) Ensure that each information system meets agency mission requirements;

(b) Provide for periodic review of information systems to determine:

(i) how mission requirements might have changed;

(ii) whether the information system continues to fulfill ongoing and anticipated mission requirements; and

(iii) what level of maintenance is needed to ensure the information system meets mission requirements cost effectively;

(c) Ensure that the official who administers a program supported by an information system is responsible and accountable for the management of that information system throughout its life cycle;

(d) Provide for the appropriate training for users of Federal information resources;

(e) Prescribe Federal information system requirements that do not unduly restrict the prerogatives of State, local, and tribal governments;

(f) Ensure that major information systems proceed in a timely fashion towards agreed-upon milestones in an information system life cycle, meet user requirements, and deliver intended benefits to the agency and affected publics through coordinated decision making about the information, human, financial, and other supporting resources; and

(g) Ensure that financial management systems conform to the requirements of OMB Circular No. A–127, "Financial Management Systems."

(4) *Use of Information Resources.* Agencies shall create and maintain management and technical frameworks for using information resources that document linkages between mission needs, information content, and information technology capabilities. These frameworks should guide both strategic and operational IRM planning. They should also address steps necessary to create an open systems environment. Agencies shall implement the following principles:

(a) Develop information systems in a manner that facilitates necessary interoperability, application portability, and scalability of computerized applications across networks of

heterogeneous hardware, software, and communications platforms;

(b) Ensure that improvements to existing information systems and the development of planned information systems do not unnecessarily duplicate information systems available within the same agency, from other agencies, or from the private sector;

(c) Share available information systems with other agencies to the extent practicable and legally permissible;

(d) Meet information technology needs through intra-agency and inter-agency sharing, when it is cost effective, before acquiring new information technology resources;

(e) For Information Processing Service Organizations (IPSOs) that have costs in excess of $5 million per year, agencies shall:

(i) account for the full costs of operating all IPSOs;

(ii) recover the costs incurred for providing IPSO services to all service recipients on an equitable basis commensurate with the costs required to provide those services; and

(iii) document sharing agreements between service recipients and IPSOs; and

(f) Establish a level of security for all information systems that is commensurate with the risk and magnitude of the harm resulting from the loss, misuse, or unauthorized access to or modification of the information contained in these information systems.

(5) *Acquisition of Information Technology.* Agencies shall:

(a) Acquire information technology in a manner that makes use of full and open competition and that maximizes return on investment;

(b) Acquire off-the-shelf software from commercial sources, unless the cost effectiveness of developing custom software to meet mission needs is clear and has been documented;

(c) Acquire information technology in accordance with OMB Circular No. A–109, "Acquisition of Major Systems," where appropriate; and

(d) Acquire information technology in a manner that considers the need for accommodations of accessibility for individuals with disabilities to the extent that needs for such access exist.

9. *Assignment of Responsibilities:*

a. *All Federal Agencies.* The head of each agency shall:

(1) Have primary responsibility for managing agency information resources;

(2) Ensure that the information policies, principles, standards, guidelines, rules, and regulations prescribed by OMB are implemented appropriately within the agency;

(3) Develop internal agency information policies and procedures and oversee, evaluate, and otherwise periodically review agency information resources management activities for conformity with the policies set forth in this Circular;

(4) Develop agency policies and procedures that provide for timely acquisition of required information technology;

(5) Maintain an inventory of the agencies' major information systems and information dissemination programs;

(6) Create, maintain, and dispose of a record of agency activities in accordance with the Federal Records Act of 1950, as amended;

(7) Identify to the Director, OMB, statutory, regulatory, and other impediments to efficient management of Federal information resources and recommend to the Director legislation, policies, procedures, and other guidance to improve such management;

(8) Assist OMB in the performance of its functions under the PRA including making services, personnel, and facilities available to OMB for this purpose to the extent practicable;

(9) Appoint a senior official, as required by 44 U.S.C. 3506(b), who shall report directly to the agency head to carry out the responsibilities of the agency under the PRA. The head of the agency shall keep the Director, OMB, advised as to the name, title, authority, responsibilities, and organizational resources of the senior official. For purposes of this paragraph, military departments and the Office of the Secretary of Defense may each appoint one official.

(10) Designate an office with responsibility for management oversight of agency audiovisual productions and establish an appropriate program for the management of audiovisual productions, facilities, and activities in conformance with the requirements contained at 36 CFR 1232.4.

(11) Direct the senior official appointed pursuant to 44 U.S.C. 3506(b) to monitor agency compliance with the policies, procedures, and guidance in this Circular. Acting as an ombudsman, the senior official shall consider alleged instances of agency failure to comply with this Circular and recommend or take corrective action as appropriate. The senior official shall report annually, not later than February 1st of each year, to the Director those instances of alleged failure to comply with this Circular and their resolution.

b. *Department of State.* The Secretary of State shall:

(1) Advise the Director, OMB, on the development of United States positions and policies on international information policy issues affecting Federal Government information activities and ensure that such positions and policies are consistent with Federal information resources management policy;

(2) Ensure, in consultation with the Secretary of Commerce, that the United States is represented in the development of international information technology standards, and advise the Director, OMB, of such activities.

c. *Department of Commerce.* The Secretary of Commerce shall:

(1) Develop and issue Federal Information Processing Standards and guidelines necessary to ensure the efficient and effective acquisition, management, security, and use of information technology;

(2) Advise the Director, OMB, on the development of policies relating to the procurement and management of Federal telecommunications resources;

(3) Provide OMB and the agencies with scientific and technical advisory services relating to the development and use of information technology;

(4) Conduct studies and evaluations concerning telecommunications technology, and concerning the improvement, expansion, testing, operation, and use of Federal tele communications systems and advise the Director, OMB, and appropriate agencies of the recommendations that result from such studies;

(5) Develop, in consultation with the Secretary of State and the Director of OMB, plans, policies, and programs relating to international telecommunications issues affecting government information activities;

(6) Identify needs for standardization of telecommunications and information processing technology, and develop standards, in consultation with the Secretary of Defense and the Administrator of General Services, to ensure efficient application of such technology;

(7) Ensure that the Federal Government is represented in the development of national and, in consultation with the Secretary of State, international information technology standards, and advise the Director, OMB, of such activities.

d. *Department of Defense.* The Secretary of Defense shall develop, in consultation with the Administrator of General Services, uniform Federal telecommunications standards and guidelines to ensure national security, emergency preparedness, and continuity of government.

e. *General Services Administration.* The Administrator of General Services shall:

(1) Advise the Director, OMB, and agency heads on matters affecting the procurement of information technology;

(2) Coordinate and, when required, provide for the purchase, lease, and maintenance of information technology required by Federal agencies;

(3) Develop criteria for timely procurement of information technology and delegate procurement authority to agencies that comply with the criteria;

(4) Provide guidelines and regulations for Federal agencies, as authorized by law, on the acquisition, maintenance, and disposition of information technology;

(5) Develop policies and guidelines that facilitate the sharing of information technology among agencies as required by this Circular;

(6) Review agencies' information resources management activities to meet the objectives of the triennial reviews required by the PRA and report the results to the Director, OMB;

(7) Manage the Automatic Data Processing Fund and the Federal Telecommunications Fund in accordance with the Federal Property and Administrative Services Act as amended;

(8) Establish procedures for approval, implementation, and dissemination of Federal telecommunications standards and guidelines and for implementation of Federal Information Processing Standards.

f. *Office of Personnel Management.* The Director, Office of Personnel Management, shall:

(1) Develop and conduct training programs for Federal personnel on information resources management including end-user computing;

(2) Evaluate periodically future personnel management and staffing requirements for Federal information resources management;

(3) Establish personnel security policies and develop training programs for Federal personnel associated with the design, operation, or maintenance of information systems.

g. *National Archives and Records Administration.* The Archivist of the United States shall:

(1) Administer the Federal records management program in accordance with the National Archives and Records Act;

(2) Assist the Director, OMB, in developing standards and guidelines relating to the records management program.

h. *Office of Management and Budget.* The Director of the Office of Management and Budget shall:

(1) Provide overall leadership and coordination of Federal information resources management within the executive branch;

(2) Serve as the President's principal adviser on procurement and management of Federal telecommunications systems, and develop and establish policies for procurement and management of such systems;

(3) Issue policies, procedures, and guidelines to assist agencies in achieving integrated, effective, and efficient information resources management;

(4) Initiate and review proposals for changes in legislation, regulations, and agency procedures to improve Federal information resources management;

(5) Review and approve or disapprove agency proposals for collection of information from the public, as defined by 5 CFR 1320.7;

(6) Develop and publish annually in consultation with the Administrator of General Services, a five-year plan for meeting the information technology needs of the Federal Government;

(7) Evaluate agencies' information resources management and identify cross-cutting information policy issues through the review of agency information programs, information collection budgets, information technology acquisition plans, fiscal budgets, and by other means;

(8) Provide policy oversight for the Federal records management function conducted by the National Archives and Records Administration and coordinate records management policies and programs with other information activities;

(9) Review, with the advice and assistance of the Administrator of General Services, selected agencies' information resources management activities to meet the objectives of the triennial reviews required by the PRA;

(10) Review agencies' policies, practices, and programs pertaining to the security, protection, sharing, and disclosure of information, in order to ensure compliance with the Privacy Act and related statutes;

(11) Resolve information technology procurement disputes between agencies and the General Services Administration pursuant to Section 111 of the Federal Property and Administrative Services Act;

(12) Review proposed U.S. Government Position and Policy statements on international issues affecting Federal Government information activities and advise the Secretary of State as to their consistency with Federal information resources management policy.

10. *Oversight:*

a. The Director, OMB, will use information technology planning reviews, fiscal budget reviews, information collection budget reviews, management reviews, GSA reviews of agency information resources management measures and such other measures as the Director deems necessary to evaluate the adequacy and efficiency of each agency's information resources management and compliance with this Circular.

b. The Director, OMB, may, upon written request of an agency, grant a waiver from particular requirements of this Circular. Requests for waivers must detail the reasons why a particular waiver is sought, identify the duration of the waiver sought, and include a plan for the prompt and orderly transition to full compliance with the requirements of this Circular. Notice of each waiver request shall be published promptly by the agency in the **Federal Register**, with a copy of the waiver request made available to the public on request.

11. *Effectiveness:* This Circular is effective upon issuance. Nothing in this Circular shall be construed to confer a private right of action on any person.

12. *Inquiries:* All questions or inquiries should be addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Telephone: (202) 395–3785.

13. *Sunset Review Date:* OMB will review this Circular three years from the date of issuance to ascertain its effectiveness.

Appendix I to OMB Circular No. A–130—Federal Agency Responsibilities for Maintaining Records About Individuals

1. *Purpose and Scope.*

This Appendix describes agency responsibilities for implementing the reporting and publication requirements of the Privacy Act of 1974, 5 U.S.C. 552a, as amended (hereinafter "the Act"). It applies to all agencies subject to the Act. Note that this Appendix does not rescind other guidance OMB has issued to help agencies interpret the Privacy Act's provisions, e.g., Privacy Act Guidelines (40 FR 28949–28978, July 9, 1975), or Final Guidance for Conducting Matching Programs (54 FR at 25819, June 19, 1989).

2. *Definitions.*

a. The terms "agency," "individual," "maintain," "record," "system of records," and "routine use," as used in this Appendix, are defined in the Act (5 U.S.C. 552a(a)).

b. *Matching Agency.* Generally, the Recipient Federal agency (or the Federal source agency in a match conducted by a nonfederal agency) is the matching agency and is responsible for meeting the reporting and publication requirements associated with the matching program. However, in large, multi-agency matching programs, where the recipient agency is merely performing the matches and the benefit accrues to the source agencies, the partners should assign responsibility for compliance with the administrative requirements in a fair and reasonable way. This may mean having the matching agency carry out these requirements for all parties, having one participant designated to do so, or having each source agency do so for its own matching program(s).

c. *Nonfederal Agency.* Nonfederal agencies are State or local governmental agencies receiving records from a Federal agency's automated system of records to be used in a matching program.

d. *Recipient Agency.* Recipient agencies are Federal agencies or their contractors receiving automated records from the Privacy Act systems of records of other Federal agencies, or from State or local governments, to be used in a matching program as defined in the Act.

e. *Source Agency.* A source agency is a Federal agency that discloses automated records from a system of records to another Federal agency or to a State or local agency to be used in a matching program. It is also a State or local agency that discloses records to a Federal agency for use in a matching program.

3. *Assignment of Responsibilities.*

a. *All Federal Agencies.* In addition to meeting the agency requirements contained in the Act and the specific reporting and publication requirements detailed in this Appendix, the head of each agency shall ensure that the following reviews are conducted as often as specified below, and be prepared to report to the Director, OMB, the results of such reviews and the corrective action taken to resolve problems uncovered. The head of each agency shall:

(1) *Section (m) Contracts.* Review every two years a random sample of agency contracts that provide for the maintenance of a system of records on behalf of the agency to accomplish an agency function, in order to ensure that the wording of each contract makes the provisions of the Act binding on the contractor and his or her employees. (See 5 U.S.C. 552a(m)(1))

(2) *Recordkeeping Practices.* Review annually agency recordkeeping and disposal policies and practices in order to assure compliance with the Act, paying particular attention to the maintenance of automated records.

(3) *Routine Use Disclosures.* Review every four years the routine use disclosures associated with each system of records in order to ensure that the recipient's use of such records continues to be compatible with the purpose for which the disclosing agency collected the information.

(4) *Exemption of Systems of Records.* Review every four years each system of records for which the agency has promulgated exemption rules pursuant to Section (j) or (k) of the Act in order to determine whether such exemption is still needed.

(5) *Matching Programs.* Review annually each ongoing matching program in which the agency has participated during the year, either as a source or as a matching agency, in order to ensure that the requirements of the Act, the OMB guidance, and any agency regulations, operating instructions, or guidelines have been met.

(6) *Privacy Act Training.* Review annually agency training practices in order to ensure that all agency personnel are familiar with the requirements of the Act, with the agency's implementing regulation, and with any special requirements of their specific jobs.

(7) *Violations.* Review annually the actions of agency personnel that have resulted either in the agency being found civilly liable under Section (g) of the Act, or an employee being found criminally liable under the provisions of Section (i) of the Act, in order to determine the extent of the problem and to find the most effective way to prevent recurrence of the problem.

(8) *Systems of Records Notices.* Review annually each system of records notice to ensure that it accurately describes the system of records. Where minor changes are needed, e.g., the name of the system manager, ensure that an amended notice is published in the **Federal Register.** Agencies may choose to make one annual comprehensive publication consolidating such minor changes. This requirement is distinguished from and in addition to the requirement to report to OMB and Congress significant changes to systems of records and to publish those changes in the **Federal Register** (See paragraph 4c of this Appendix).

b. *Department of Commerce.* The Secretary of Commerce shall, consistent with guidelines issued by the Director, OMB, develop and issue standards and guidelines for ensuring the security of information protected by the Act in automated information systems.

c. *The Department of Defense, General Services Administration, and National Aeronautics and Space Administration.* These agencies shall, consistent with guidelines issued by the Director, OMB, ensure that instructions are issued on what agencies must do in order to comply with the requirements of Section (m) of the Act when contracting for the operation of a system of records to accomplish an agency purpose.

d. *Office of Personnel Management.* The Director of the Office of Personnel Management shall, consistent with guidelines issued by the Director, OMB:

(1) Develop and maintain government-wide standards and procedures for civilian personnel information processing and recordkeeping directives to assure conformance with the Act.

(2) Develop and conduct Privacy Act training programs for agency personnel, including both the conduct of courses in various substantive areas (e.g., administrative, information technology) and the development of materials that agencies can use in their own courses. The assignment of this responsibility to OPM does not affect the responsibility of individual agency heads for developing and conducting training programs tailored to the specific needs of their own personnel.

e. National Archives and Records Administration. The Archivist of the United States through the Office of the Federal Register, shall, consistent with guidelines issued by the Director, OMB:

(1) Issue instructions on the format of the agency notices and rules required to be published under the Act.

(2) Compile and publish every two years, the rules promulgated under 5 U.S.C. 552a(f) and agency notices published under 5 U.S.C. 552a(e)(4) in a form available to the public at low cost.

(3) Issue procedures governing the transfer of records to Federal Records Centers for storage, processing, and servicing pursuant to 44 U.S.C. 3103. For purposes of the Act, such records are considered to be maintained by the agency that deposited them. The Archivist may disclose deposited records only according to the access rules established by the agency that deposited them.

f. *Office of Management and Budget.* The Director of the Office of Management and Budget will:

(1) Issue guidelines and directives to the agencies to implement the Act.

(2) Assist the agencies, at their request, in implementing their Privacy Act programs.

(3) Review new and altered system of records and matching program reports submitted pursuant to Section (o) of the Act.

(4) Compile the biennial report of the President to Congress in accordance with Section (s) of the Act.

(5) Compile and issue a biennial report on the agencies' implementation of the computer matching provisions of the Privacy Act, pursuant to Section (u)(6) of the Act.

4. *Reporting Requirements.* The Privacy Act requires agencies to make the following kinds of reports:

Report	When Due	Recipient **
Biennial Privacy Act Report	June 30, 1994, 1996, 1998, 2000	Administrator, OIRA
Biennial Matching Activity Report	June 30, 1994, 1996, 1998, 2000	Administrator, OIRA
New System of Records Report	When establishing a system of records—at least 40 days before operating system *	Administrator, OIRA, Congress
Altered System of Records Report	When adding a new routine use, exemption, or otherwise significantly altering an existing system of records—at least 40 days before change to system takes place *	Administrator, OIRA, Congress
New Matching Program Report	When establishing new matching program—at least 40 days before operating program *	Administrator, OIRA, Congress
Renewal of Existing Matching Program	At least 40 days prior to expiration of one year extension of original program—treat as new program	Administrator, OIRA, Congress
Altered Matching Program	When making a significant change to an existing matching program—at least 40 days before operating altered program *	Administrator, OIRA, Congress
Matching Agreements	At least 40 days prior to start of matching program *	Congress

*–*Review Period:* Note that the statutory reporting requirement is 30 days prior; the additional 10 days will ensure that OMB and Congress have sufficient time to review the proposal. Agencies should therefore ensure that reports are mailed expeditiously after being signed.
**–*Recipient Addresses:* At bottom of envelope print "PRIVACY ACT REPORT"

House of Representatives:
The Chair of the House Committee on Government Operations, 2157 RHOB, Washington, D.C. 20515–6143.

Senate:
The Chair of the Senate Committee on Governmental Affairs, 340 SDOB, Washington, D.C. 20510–6250.

Office of Management and Budget:
The Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, ATTN: Docket Library, NEOB Room 3201, Washington, D.C. 20503.

a. *Biennial Privacy Act Report.* To provide the necessary information for the biennial report of the President, agencies shall submit a biennial report to OMB, covering their Privacy Act activities for the calendar years covered by the reporting period. The exact format of the report will be established by OMB. At a minimum, however, agencies should collect and be prepared to report the following data on a calendar year basis:

(1) A listing of publication activity during the year showing the following:

*–*Total Number of Systems of Records (Exempt/NonExempt)*

*–*Number of New Systems of Records Added (Exempt/NonExempt)*

*–*Number Routine Uses Added*

*–*Number Exemptions Added to Existing Systems*

*–*Number Exemptions Deleted from Existing Systems*

*–*Total Number of Automated Systems of Records (Exempt/NonExempt)*

The agency should provide a brief narrative describing those activities in detail, e.g., "the Department added a (k)(1) exemption to an existing system of records entitled "Investigative Records of the Office of Investigations;" or "the agency added a new routine use to a system of records entitled "Employee Health Records" that would permit disclosure of health data to researchers under contract to the agency to perform workplace risk analysis."

(2) A brief description of any public comments received on agency publication and implementation activities, and agency response.

(3) Number of access and amendment requests from record subjects citing the Privacy Act that were received during the calendar year of the report. Also the disposition of requests from any year that were completed during the calendar year of the report:

*–*Total Number of Access Requests*
Number Granted in Whole
Number Granted in Part
Number Wholly Denied
Number For Which No Record Found

*–*Total Amendment Requests*
Number Granted in Whole
Number Granted in Part
Number Wholly Denied

*–*Number of Appeals of Denials of Access*
Number Granted in Whole
Number Granted in Part
Number Wholly Denied
Number For Which No Record Found

*–*Number of Appeals of Denials of Amendment*
Number Granted in Whole
Number Granted in Part
Number Wholly Denied

(4) Number of instances in which individuals brought suit under section (g) of the Privacy Act against the agency and the results of any such litigation that resulted in a change to agency practices or affected guidance issued by OMB.

(5) Results of any reviews undertaken in response to paragraph 3a of this Appendix.

(6) Description of agency Privacy Act training activities conducted in accordance with paragraph 3a(6) of this Appendix.

b. *Biennial Matching Activity Report* (See 5 U.S.C. 552a(u)(3)(D)). At the end of each calendar year, the Data Integrity Board of each agency that has participated in matches covered by the computer matching provisions of the Privacy Act will collect data summarizing that year's matching activity. The Act requires that such activity be reported every two years. OMB will establish the exact format of the report, but agencies' Data Integrity Boards should be prepared to report the data identified below both to the agency head and to OMB.

(1) A listing of the names and positions of the members of the Data Integrity Board and showing separately the name of the Board Secretary, his or her agency mailing address, and telephone number. Also show and explain any changes in membership or structure occurring during the reporting year.

(2) A listing of each matching program, by title and purpose, in which the agency participated during the reporting year. This listing should show names of participant agencies, give a brief description of the program, and give a citation including the date to the **Federal Register** notice describing the program.

(3) For each matching program, an indication of whether the cost/benefit analysis performed resulted in a favorable ratio. The Data Integrity Board should explain why the agency proceeded with any matching program for which an unfavorable ratio was reached.

(4) For each program for which the Board waived a cost/benefit analysis, reasons for the waiver and the results of match, if tabulated.

(5) A description of each matching agreement the Board rejected and an explanation of why it was rejected.

(6) A listing of any violations of matching agreements that have been alleged or identified, and a discussion of any action taken.

(7) A discussion of any litigation involving the agency's participation in any matching program.

(8) For any litigation based on allegations of inaccurate records, an explanation of the steps the agency used to ensure the integrity of its data as well as the verification process it used in the matching program, including an assessment of the adequacy of each.

c. *New and Altered System of Records Report.* The Act requires agencies to publish notices in the **Federal Register** describing new or altered systems of records, and to submit reports to OMB, and to the Chair of the Committee on Government Operations of the House of Representatives, and the Chair of the Committee on Governmental Affairs of the Senate. The reports must be transmitted at least 40 days prior to the operation of the new system of records or the date on which the alteration to an existing system takes place.

(1) *When to Report Altered Systems of Records.* Minor changes to systems of records need not be reported. For example, a change in the designation of the system manager due to a reorganization would not require a report, so long as an individual's ability to gain access to his or her records is not affected. Other examples include changing applicable safeguards as a result of a risk analysis or deleting a routine use when there is no longer a need for the disclosure. The following changes are those for which a report is required:

(a) A significant increase in the number of individuals about whom records are maintained. For example, a decision to expand a system that originally covered only residents of public housing in major cities to cover such residents nationwide would require a report. Increases attributable to normal growth should not be reported.

(b) A change that expands the types or categories of information maintained. For example, a file covering physicians that has been expanded to include other types of health care providers, e.g., nurses, technicians, etc., would require a report.

(c) A change that alters the purpose for which the information is used.

(d) A change to equipment configuration (either hardware or software) that creates substantially greater access to the records in the system of records. For example, locating interactive terminals at regional offices for accessing a system formerly accessible only at the headquarters would require a report.

(e) The addition of an exemption pursuant to Section (j) or (k) of the Act. Note that, in examining a rulemaking for a Privacy Act exemption as part of a report of a new or altered system of records, OMB will also review the rule under applicable regulatory review procedures and agencies need not make a separate submission for that purpose.

(f) The addition of a routine use pursuant to 5 U.S.C. 552a(b)(3).

(2) *Reporting Changes to Multiple Systems of Records.* When an agency makes a change to an information technology installation or a telecommunication network, or makes any other general changes in information collection, processing, dissemination, or storage that affect multiple systems of records, it may submit a single, consolidated report, with changes to existing notices and supporting documentation included in the submission.

(3) *Contents of the New or Altered System Report.* The report for a new or altered system has three elements: a transmittal letter, a narrative statement, and supporting documentation that includes a copy of the proposed **Federal Register** notice. There is no prescribed format for either the letter or the narrative statement. The notice must appear in the format prescribed by the Office of the Federal Register's *Document Drafting Handbook.*

(a) *Transmittal Letter.* The transmittal letter should be signed by the senior agency official responsible for implementation of the Act within the agency and should contain the name and telephone number of the individual who can best answer questions about the system of records. The letter should contain the agency's assurance that the proposed system does not duplicate any existing agency or government-wide systems of records. The letter sent to OMB may also include requests for waiver of the time period for the review. The agency should indicate why it cannot meet the established review period and what will be the consequences of not obtaining the waiver, (see paragraph 4e below).

(b) *Narrative Statement.* The narrative statement should be brief. It should make reference, as appropriate, to information in the supporting documentation rather than restating such information. The statement should:

1. Describe the purpose for which the agency is establishing the system of records.

2. Identify the authority under which the system of records is maintained. The agency should avoid citing housekeeping statutes, but rather cite the underlying programmatic authority for collecting, maintaining, and using the information. When the system is being operated to support an agency housekeeping program, e.g., a carpool locator, the agency may, however, cite a general housekeeping statute that authorizes the agency head to keep such records as necessary.

3. Provide the agency's evaluation of the probable or potential effect of the proposal on the privacy of individuals.

4. Provide a brief description of the steps taken by the agency to minimize the risk of unauthorized access to the system of records. A more detailed assessment of the risks and specific administrative, technical, procedural, and physical safeguards established shall be made available to OMB upon request.

5. Explain how each proposed routine use satisfies the compatibility requirement of subsection (a)(7) of the Act. For altered systems, this requirement pertains only to any newly proposed routine use.

6. Provide OMB Control Numbers, expiration dates, and titles of any OMB approved information collection requests (e.g., forms, surveys, etc.) contained in the system of records. If the request for OMB clearance of an information collection is pending, the agency may simply state the title of the collection and the date it was submitted for OMB clearance.

(c) *Supporting Documentation.* Attach the following to all new or altered system of records reports:

1. A copy of the new or altered system of records notice in **Federal Register** format, consistent with the provisions of 5 U.S.C. 552a(e)(4). For proposed altered systems the agency should supply a

copy of the original system of records notice to ensure that reviewers can understand the changes proposed.

2. A copy in **Federal Register** format of any new exemption rules or changes to published rules (consistent with the provisions of 5 U.S.C. 552a(f),(j), or (k)) that the agency proposes to issue for the new or altered system.

(4) *OMB Concurrence.* Agencies may assume that OMB concurs in the Privacy Act aspects of their proposal if OMB has not commented within 40 days from the date the transmittal letter was signed. Agencies should ensure that letters are transmitted expeditiously after they are signed. Agencies may publish system of records and routine use notices as well as proposed exemption rules in the **Federal Register** at the same time that they send the new or altered system report to OMB and Congress. The period for OMB and congressional review and the notice and comment period for routine uses and exemptions will then run concurrently. Note that exemptions must be published as final rules before they are effective.

d. *New or Altered Matching Program Report.* The Act requires agencies to publish notices in the **Federal Register** describing new or altered matching programs, and to submit reports to OMB, and to Congress. The report must be received at least 40 days prior to the initiation of any matching activity carried out under a new or substantially altered matching program. For renewals of continuing programs, the report must be dated at least 40 days prior to the expiration of any existing matching agreement.

(1) *When to Report Altered Matching Programs.* Agencies need not report minor changes to matching programs. The term "minor change to a matching program" means a change that does not significantly alter the terms of the agreement under which the program is being carried out. Examples of significant changes include:

(a) Changing the purpose for which the program was established.

(b) Changing the matching population, either by including new categories of record subjects or by greatly increasing the numbers of records matched.

(c) Changing the legal authority covering the matching program.

(d) Changing the source or recipient agencies involved in the matching program.

(2) *Contents of New or Altered Matching Program Report.* The report for a new or altered matching program has three elements: a transmittal letter, a narrative statement, and supporting documentation that includes a copy of the proposed **Federal Register** notice. There is no prescribed format for either the letter or the narrative statement. The notice must appear in the format prescribed by the Office of the Federal Register's *Document Drafting Handbook.*

(a) *Transmittal Letter.* The transmittal letter should be signed by the senior agency official responsible for implementation of the Privacy Act within the agency and should contain the name and telephone number of the individual who can best answer questions about the matching program. The letter should state that a copy of the matching agreement has been distributed to Congress as the Act requires. The letter to OMB may also include a request for waiver of the review time period.

(b) *Narrative Statement.* The narrative statement should be brief. It should make reference, as appropriate, to information in the supporting documentation rather than restating such information. The statement should provide:

1. A description of the purpose of the matching program and the authority under which it is being carried out.

2. A description of the security safeguards used to protect against any unauthorized access or disclosure of records used in the match.

3. If the cost/benefit analysis required by Section (u)(4)(A) indicated an unfavorable ratio or was waived pursuant to OMB guidance, an explanation of the basis on which the agency justifies conducting the match.

(c) *Supporting Documentation.* Attach the following:

1. A copy of the **Federal Register** notice describing the matching program.

2. For the Congressional report only, a copy of the matching agreement.

(3) *OMB Concurrence.* Agencies may assume that OMB concurs in the Privacy Act aspects of their proposal if OMB has not commented within 40 days from the date the transmittal letter was signed. Agencies should ensure that letters are transmitted expeditiously after they are signed. Agencies may publish matching program notices in the **Federal Register** at the same time that they send the matching program report to OMB and Congress. The period for OMB and congressional review and the notice and comment period will then run concurrently.

e. *Expediting the Review Process.* The Director, OMB, may grant a waiver of the 40-day review period for either systems of records or matching program reviews. The agency must ask for the waiver in the transmittal letter and demonstrate compelling reasons. When a waiver is granted, the agency is not thereby relieved of any other requirement of the Act. If no waiver is granted, agencies may presume concurrence at the expiration of the 40 day review period. Note that OMB cannot waive time periods specifically established by the Act such as the 30 days notice and comment period required for the adoption of a routine use proposal pursuant to Section (b)(3) of the Act.

5. *Publication Requirements.* The Privacy Act requires agencies to publish notices or rules in the **Federal Register** in the following circumstances: when adopting a new or altered system of records, when adopting a routine use or exemption for a system of records, or when proposing to carry out a new or altered matching program. (See paragraph 4c(1) and 4d(1) above on what constitutes a reportable alteration.)

a. *Publishing New or Altered Systems of Records Notices and Exemption Rules.*

(1) *Who Publishes.* The agency responsible for operating the system of records makes the necessary publication. Publication should be carried out at the departmental or agency level. Where a system of records is to be operated exclusively by a component, the department rather than the component should publish the notice. Thus, for example, the Department of the Treasury would publish a system of records notice covering a system operated exclusively by the Internal Revenue Service. Note that if the agency is proposing to exempt the system under Section (j) or (k) of the Act, it must publish a rule in addition to the system of records notice.

(a) *Government-wide Systems of Records.* Certain agencies publish systems of records containing records for which they have government-wide responsibilities. The records may be located in other agencies, but they are being used under the authority of and in conformance with the rules mandated by the publishing agency. The Office of Personnel Management, for example, has published a number of government-wide systems of records relating to the operation of the government's personnel program. Agencies should not publish systems of records that wholly or partly duplicate existing government-wide systems of records.

(b) *Section (m) Contract Provisions.* When an agency provides by contract for the operation of a system of records, it should ensure that a system of records notice describing the system has been published. It should also review the notice to ensure that it contains a routine use under Section (e)(4)(D) of

the Act permitting disclosure to the contractor and his or her personnel.

(2) *When to Publish.*

(a) *System Notice.* It must appear in the **Federal Register** before the agency begins to operate the system, e.g., collect and use the information.

(b) *Routine Use.* Must be published in the **Federal Register** 30 days before agency discloses records pursuant to its terms. If the sole change to an existing system of records is to add a routine use, the agency should either republish the entire system of records notice, a condensed description of the system of records, or a citation to the last full text **Federal Register** publication. (Note that the addition of a routine use to an existing system of records requires a report to OMB and Congress, and that the review period for this report is *40* days.)

(c) *Exemption Rule.* Must be established through informal rulemaking pursuant to the Administrative Procedure Act. This process generally requires publication of a proposed rule, a period during which the public may comment, publication of a final rule, and the adoption of the final rule. Agencies may not withhold records under an exemption until these requirements have been met.

(3) *Format.* Agencies should follow the publication format contained in the Office of the Federal Register's *Document Drafting Handbook* obtainable from the Government Printing Office.

b. *Publishing Matching Notices.*

(1) *Who Publishes.* Generally, the Recipient Federal agency (or the Federal source agency in a match conducted by a nonfederal agency) is responsible for publishing in the **Federal Register** a notice describing the new or altered matching program. However, in large, multi-agency matching programs, where the recipient agency is merely performing the matches, and the benefit accrues to the source agencies, the partners should assign responsibility for compliance with the administrative requirements in a fair and reasonable way. This may mean having the matching agency carry out these requirements for all parties, having one participant designated to do so, or having each source so for its own matching program(s).

(2) *Timing.* Publication must occur at least 30 days prior to the initiation of any matching activity carried out under a new or substantially altered matching program. For renewals of programs agencies wish to continue past the 30 month period of initial eligibility (i.e., the initial 18 months plus a 1 year extension), publication must occur at least 30 days prior to the expiration of the existing matching agreement. (But note that a report to OMB and the Congress is also required with a 40 day review period).

(3) *Format.* The matching notice shall be in the format prescribed by the Office of the Federal Register's *Document Drafting Handbook* and contain the following information:

(a) The name of the Recipient Agency.

(b) The Name(s) of the Source Agencies.

(c) The beginning and ending dates of the match.

(d) A brief description of the matching program, including its purpose; the legal authorities authorizing its operation; categories of individuals involved; and identification of records used, including name(s) of Privacy Act Systems of records.

(e) The identification, address, and telephone number of a Recipient Agency official who will answer public inquiries about the program.

Appendix II to OMB Circular No. A–130

Cost Accounting, Cost Recovery, and Interagency Sharing of Information Technology Facilities

[As proposed in the September 10, 1993 notice (58 FR 47793), the guidance formerly found in Appendix II has been revised and placed in Section 8b. Appendix II is therefore deleted and is reserved for future topics.]

Appendix III to OMB Circular No. A–130

Security of Federal Automated Information Systems

[Appendix III is unchanged by this revision. See 50 FR 52742–44 (December 24, 1985).]

Appendix IV to OMB Circular No. A–130

Analysis of Key Sections

1. *Purpose*

The purpose of this Appendix is to provide a general context and explanation for the contents of the key Sections of the Circular.

2. *Background*

The Paperwork Reduction Act (PRA) of 1980, Public Law 96–511, 94 Stat. 2812, codified at Chapter 35 of Title 44 of the United States Code, establishes a broad mandate for agencies to perform their information activities in an efficient, effective, and economical manner. Section 3504 of the Act provides authority to the Director, OMB, to develop and implement uniform and consistent information resources management policies; oversee the development and promote the use of information management principles, standards, and guidelines; evaluate agency information management practices in order to determine their adequacy and efficiency, and determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director.

The Circular implements OMB authority under the Act with respect to Section 3504(b), general information policy, Section 3504(e), records management, Section 3504(f), privacy, and Section 3504(g), Federal automatic data processing and telecommunications; the Privacy Act of 1974 (5 U.S.C. 552a); the Chief Financial Officers Act (31 U.S.C. 3512 et seq.); Sections 111 and 206 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 759 and 487, respectively); the Computer Security Act (40 U.S.C. 759 note); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.); and Executive Order No. 12046 of March 27, 1978, and Executive Order No. 12472 of April 3, 1984, Assignment of National Security and Emergency Telecommunications Functions. The Circular complements 5 CFR Part 1320, Controlling Paperwork Burden on the Public, which implements other Sections of the PRA dealing with controlling the reporting and recordkeeping burden placed on the public.

In addition, the Circular revises and consolidates policy and procedures in seven previous OMB directives and rescinds those directives, as follows:

A–3—Government Publications

A–71—Responsibilities for the Administration and Management of Automatic Data Processing Activities Transmittal Memorandum No. 1 to Circular No. A–71—Security of Federal Automated Information Systems

A–90—Cooperating with State and Local Governments to Coordinate and Improve Information Systems

A–108—Responsibilities for the Maintenance of Records about Individuals by Federal Agencies

A–114—Management of Federal Audiovisual Activities

A–121—Cost Accounting, Cost Recovery, and Interagency Sharing of Data Processing Facilities

3. *Analysis*

Section 6, *Definitions. Access and Dissemination.* The original Circular No. A–130 distinguished between the terms "access to information" and "dissemination of information" in order to separate statutory requirements from policy considerations. The first term means giving members of the public, at their request, information to which they

are entitled by a law such as the FOIA. The latter means actively distributing information to the public at the initiative of the agency. The distinction appeared useful at the time Circular No. A–130 was written, because it allowed OMB to focus discussion on Federal agencies' responsibilities for actively distributing information. However, popular usage and evolving technology have blurred differences between the terms "access" and "dissemination" and readers of the Circular were confused by the distinction. For example, if an agency "disseminates" information via an on-line computer system, one speaks of permitting users to "access" the information, and on-line "access" becomes a form of "dissemination."

Thus, the revision defines only the term "dissemination." Special considerations based on access statutes such as the Privacy Act and the FOIA are explained in context.

Government Information. The definition of "government information" includes information created, collected, processed, disseminated, or disposed of both by and for the Federal Government. This recognizes the increasingly distributed nature of information in electronic environments. Many agencies, in addition to collecting information for government use and for dissemination to the public, require members of the public to maintain information or to disclose it to the public. Sound information resources management dictates that agencies consider the costs and benefits of a full range of alternatives to meet government objectives. In some cases, there is no need for the government actually to collect the information itself, only to assure that it is made publicly available. For example, banks insured by the FDIC must provide statements of financial condition to bank customers on request. Particularly when information is available in electronic form, networks make the physical location of information increasingly irrelevant.

The inclusion of information created, collected, processed, disseminated, or disposed of for the Federal Government in the definition of "government information" does not imply that responsibility for implementing the provisions of the Circular itself extends beyond the executive agencies to other entities. Such an interpretation would be inconsistent with Section 4, Applicability, and with existing law. For example, the courts have held that requests to Federal agencies for release of information under the FOIA do not always extend to those performing information activities under grant or contract to a Federal agency. Similarly, grantees may copyright information where the government may not. Thus the information responsibilities of grantees and contractors are not identical to those of Federal agencies except to the extent that the agencies make them so in the underlying grants or contracts. Similarly, agency information resources management responsibilities do not extend to other entities.

Information Dissemination Product. This notice defines the term "information dissemination product" to include all information that is disseminated by Federal agencies. While the provision of access to on-line databases and search software included on compact disk, read-only memory (CD–ROM) are often called information services rather than products, there is no clear distinction and, moreover, no real difference for policy purposes between the two. Thus, the term "information dissemination product" applies to both products and services, and makes no distinction based on how the information is delivered.

Section 8a(1). *Information Management Planning.* Parallel to new Section 7, Basic Considerations and Assumptions, Section 8a begins with information resources management planning. Planning is the process of establishing a course of action to achieve desired results with available resources. Planners translate organizational missions into specific goals and, in turn, into measurable objectives.

The PRA introduced the concept of information resources management and the principle of information as an institutional resource which has both value and associated costs. Information resources management is a tool that managers use to achieve agency objectives. Information resources management is successful if it enables managers to achieve agency objectives efficiently and effectively.

Information resources management planning is an integral part of overall mission planning. Agencies need to plan from the outset for the steps in the information life cycle. When creating or collecting information, agencies must plan how they will process and transmit the information, how they will use it, how they will protect its integrity, what provisions they will make for access to it, whether and how they will disseminate it, how they will store and retrieve it, and finally, how the information will ultimately be disposed of. They must also plan for the effects their actions and programs will have on the public and State and local governments.

The Role of State and Local Governments. OMB made additions at Sections 7a, 7e, and 7j, Basic Considerations and Assumptions, concerning State and local governments, and also in policy statements at Sections 8a(1)(c), (3)(f), (5)(d)(iii), and (8)(e).

State and local governments, and tribal governments, cooperate as major partners with the Federal Government in the collection, processing, and dissemination of information. For example, State governments are the principal collectors and/or producers of information in the areas of health, welfare, education, labor markets, transportation, the environment, and criminal justice. The States supply the Federal Government with data on aid to families with dependent children; medicare; school enrollments, staffing, and financing; statistics on births, deaths, and infectious diseases; population related data that form the basis for national estimates; employment and labor market data; and data used for census geography. National information resources are greatly enhanced through these major cooperating efforts.

Federal agencies need to be sensitive to the role of State and local governments, and tribal governments, in managing information and in managing information technology. When planning, designing, and carrying out information collections, agencies should systematically consider what effect their activities will have on cities, counties, and States, and take steps to involve these governments as appropriate. Agencies should ensure that their information collections impose the minimum burden and do not duplicate or conflict with local efforts or other Federal agency requirements or mandates. The goal is that Federal agencies routinely integrate State and local government concerns into Federal information resources management practices. This goal is consistent with standards for State and local government review of Federal policies and programs.

Training. Training is particularly important in view of the changing nature of information resources management. Decentralization of information technology has placed the management of automated information and information technology directly in the hands of nearly all agency personnel rather than in the hands of a few employees at centralized facilities. Agencies must plan for incorporating policies and procedures regarding computer security, records management,

protection of privacy, and other safeguards into the training of every employee and contractor.

Section 8a(2). *Information Collection.* The PRA requires that the creation or collection of information be carried out in an efficient, effective, and economical manner. When Federal agencies create or collect information—just as when they perform any other program functions—they consume scarce resources. Such activities must be continually evaluated for their relevance to agency missions.

Agencies must justify the creation or collection of information based on their statutory functions. Policy statement 8a(2) uses the justification standard—"necessary for the proper performance of the functions of the agency"—established by the PRA (44 U.S.C. 3504(c)(2)). Furthermore, the policy statement includes the requirement that the information have practical utility, as defined in the PRA (44 U.S.C. 3502(16)) and elaborated in 5 CFR Part 1320. Practical utility includes such qualities of information as accuracy, adequacy, and reliability. In the case of general purpose statistics or recordkeeping, practical utility means that actual uses can be demonstrated (5 CFR 1320.7(o)). It should be noted that OMB's intent in placing emphasis on reducing unjustified burden in collecting information, an emphasis consistent with the Act, is not to diminish the importance of collecting information whenever agencies have legitimate program reasons for doing so. Rather, the concern is that the burdens imposed should not exceed the benefits to be derived from the information. Moreover, if the same benefit can be obtained by alternative means that impose a lesser burden, that alternative should be adopted.

Section 8a(3). *Electronic Information Collection.* Section 7l articulates a basic assumption of the Circular that modern information technology can help the government provide better service to the public through improved management of government programs. One potentially useful application of information technology is in the government's collection of information. While some information collections may not be good candidates for electronic techniques, many are. Agencies with major electronic information collection programs have found that automated information collections allow them to meet program objectives more efficiently and effectively. Electronic data interchange (EDI) and related standards for the electronic exchange of information will ease transmission and processing of routine business transaction information such as invoices, purchase orders, price information, bills of lading, health insurance claims, and other common commercial documents. EDI holds similar promise for the routine filing of regulatory information such as tariffs, customs declarations, license applications, tax information, and environmental reports.

Benefits to the public and agencies from electronic information collection appear substantial. Electronic methods of collection reduce paperwork burden, reduce errors, facilitate validation, and provide increased convenience and more timely receipt of benefits.

The policy in Section 8a(3) encourages agencies to explore the use of automated techniques for collection of information, and sets forth conditions conducive to the use of those techniques.

Section 8a(4). *Records Management.* Section 8a(4) begins with the fundamental requirement for Federal records management, namely, that agencies create and keep adequate and proper documentation of their activities. Federal agencies cannot carry out their missions in a responsible and responsive manner without adequate recordkeeping. Section 7h articulates the basic considerations concerning records management. Policy statements concerning records management are also interwoven throughout Section 8a, particularly in subsections on planning (8a(1)(j)), information dissemination (8a(6)), and safeguards (8a(9)).

Records support the immediate needs of government—administrative, legal, fiscal—and ensure its continuity. Records are essential for protecting the rights and interests of the public, and for monitoring the work of public servants. The government needs records to ensure accountability to the public which includes making the information available to the public. Each stage of the information life cycle carries with it records management responsibilities. Agencies need to record their plans, carefully document the content and procedures of information collection, ensure proper documentation as a feature of every information system, keep records of dissemination programs, and, finally, ensure that records of permanent value are preserved.

Preserving records for future generations is the archival mission. Advances in technology affect the amount of information that can be created and saved, and the ways this information can be made available. Technological advances can ease the task of records management; however, the rapid pace of change in modern technology makes decisions about the appropriate application of technology critical to records management. Increasingly the records manager must be concerned with preserving valuable electronic records in the context of a constantly changing technological environment.

Records schedules are essential for the appropriate maintenance and disposition of records. Records schedules must be prepared in a timely fashion, implement the General Records Schedules issued by the National Archives and Records Administration, be approved by the Archivist of the United States, and be kept accurate and current. (See 44 U.S.C. 3301 et seq.) The National Archives and Records Administration and the General Services Administration provide guidance and assistance to agencies in implementing records management responsibilities. They also evaluate agencies' records management programs to determine the extent to which they are appropriately implementing their records management responsibilities.

Sections 8a(5) and 8a(6). *Information Dissemination Policy.* Section 8a(5). Every agency has a responsibility to inform the public within the context of its mission. This responsibility requires that agencies distribute information at the agency's initiative, rather than merely responding when the public requests information.

The FOIA requires each agency to publish in the **Federal Register** current descriptions of agency organization, where and how the public may obtain information, the general methods and procedural requirements by which agency functions are determined, rules of procedure, descriptions of forms and how to obtain them, substantive regulations, statements of general policy, and revisions to all the foregoing (5 U.S.C. 552(a)(1)). The Privacy Act also requires publication of information concerning "systems of records" which are records retrieved by individual identifier such as name, Social Security Number, or fingerprint. The Government in the Sunshine Act requires agencies to publish meeting announcements (5 U.S.C. 552b (e)(1)). The PRA (44 U.S.C. 3507(a)(2)) and its implementing regulations (5 CFR Part 1320) require agencies to publish notices when they submit information collection requests for OMB approval. The public's right of access to government information under these statutes is balanced against other concerns, such as an individual's right to privacy and protection of the government's deliberative process.

As agencies satisfy these requirements, they provide the public basic information about government activities. Other statutes direct specific agencies to issue specific information dissemination products or to conduct information dissemination programs. Beyond generic and specific statutory requirements, agencies have responsibilities to disseminate information as a necessary part of performing their functions. For some agencies the responsibility is made explicit and sweeping; for example, the Agriculture Department is directed to "...diffuse among people of the United States, useful information on subjects connected with agriculture...." (7 U.S.C. 2201) For other agencies, the responsibility may be much more narrowly drawn.

Information dissemination is also a consequence of other agency activities. Agency programs normally include an organized effort to inform the public about the program. Most agencies carry out programs that create or collect information with the explicit or implicit intent that the information will be made public. Disseminating information is in many cases the logical extension of information creation or collection.

In other cases, agencies may have information that is not meant for public dissemination but which may be the subject of requests from the public. When the agency establishes that there is public demand for the information and that it is in the public interest to disseminate the information, the agency may decide to disseminate it automatically.

The policy in Section 8a(5)(d) sets forth several factors for agencies to take into account in conducting their information dissemination programs. First, agencies must balance two goals: maximizing the usefulness of the information to the government and the public, and minimizing the cost to both. Deriving from the basic purposes of the PRA (44 U.S.C. 3501), the two goals are frequently in tension because increasing usefulness usually costs more. Second, Section 8a(5)(d)(ii) requires agencies to conduct information dissemination programs equitably and in a timely manner. The word "equal" was removed from this Section since there may be instances where, for example, an agency determines that its mission includes disseminating information to certain specific groups or members of the public, and the agency determines that user charges will constitute a significant barrier to carrying out this responsibility.

Section 8a(5)(d)(iii), requiring agencies to take advantage of all dissemination channels, recognizes that information reaches the public in many ways. Few persons may read a **Federal Register** notice describing an agency action, but those few may be major secondary disseminators of the information. They may be affiliated with publishers of newspapers, newsletters, periodicals, or books; affiliated with on-line database providers; or specialists in certain information fields. While millions of information users in the public may be affected by the agency's action, only a handful may have direct contact with the agency's own information dissemination products. As a deliberate strategy, therefore, agencies should cooperate with the information's original creators, as well as with secondary disseminators, in order to further information dissemination goals and foster a diversity of information sources. An adjunct responsibility to this strategy is reflected in Section 8a(5)(d)(iv), which directs agencies to assist the public in finding government information. Agencies may accomplish this, for example, by specifying and disseminating "locator" information, including information about content, format, uses and limitations, location, and means of access.

Section 8a(6). *Information Dissemination Management System.* This Section requires agencies to maintain an information dissemination management system which can ensure the routine performance of certain functions, including the essential functions previously required by Circular No. A–3. Smaller agencies need not establish elaborate formal systems, so long as the heads of the agencies can ensure that the functions are being performed.

Subsection (6)(a) carries over a requirement from OMB Circular No. A–3 that agencies' information dissemination products are to be, in the words of 44 U.S.C. 1108, "necessary in the transaction of the public business required by law of the agency." (Circular No. A–130 uses the expression "necessary for the proper performance of agency functions," which OMB considers to be equivalent to the expression in 44 U.S.C. 1108.) The point is that agencies should determine systematically the need for each information dissemination product.

Section 8a(6)(b) recognizes that to carry out effective information dissemination programs, agencies need knowledge of the marketplace in which their information dissemination products are placed. They need to know what other information dissemination products users have available in order to design the best agency product. As agencies are constrained by finite budgets, when there are several alternatives from which to choose, they should not expend public resources filling needs which have already been met by others in the public or private sector. Agencies have a responsibility not to undermine the existing diversity of information sources.

At the same time, an agency's responsibility to inform the public may be independent of the availability or potential availability of a similar information dissemination product. That is, even when another governmental or private entity has offered an information dissemination product identical or similar to what the agency would produce, the agency may conclude that it nonetheless has a responsibility to disseminate its own product. Agencies should minimize such instances of duplication but could reach such a conclusion because legal considerations require an official government information dissemination product.

Section 8a(6)(c) makes the Circular consistent with current practice (See OMB Bulletins 88–15, 89–15, 90–09, and 91–16), by requiring agencies to establish and maintain inventories of information dissemination products. (These bulletins eliminated annual reporting to OMB of title-by-title listings of publications and the requirement for agencies to obtain OMB approval for each new periodical. Publications are now reviewed as necessary during the normal budget review process.) Inventories help other agencies and the public identify information which is available. This serves both to increase the efficiency of the dissemination function and to avoid unnecessary burdens of duplicative information collections. A corollary, enunciated in Section 8a(6)(d), is that agencies can better serve public information needs by developing finding aids for locating information produced by the agencies. Finally, Section 8a(6)(f) recognizes that there will be situations where agencies may have to take appropriate steps to ensure that members of the public with disabilities whom the agency has a responsibility to inform have a reasonable ability to access the information dissemination products.

Depository Library Program. Sections 8a(6)(g) and (h) pertain to the Federal Depository Library Program. Agencies are to establish procedures to ensure compliance with 44 U.S.C. 1902, which requires that government publications (defined in 44 U.S.C. 1901 and repeated in Section 6 of the Circular) be made available to depository libraries through the Government Printing Office (GPO).

Depository libraries are major partners with the Federal Government in the dissemination of information and contribute significantly to the diversity of information sources available to the public. They provide a mechanism for wide distribution of government information that guarantees basic availability to the public. Executive branch agencies support the depository library program both as a matter of law and on its merits as a means of informing the public about the government. On the other hand, the law places the administration of depository libraries with GPO. Agency responsibility for the depository libraries is limited to supplying government publications through GPO.

Agencies can improve their performance in providing government publications as well as electronic information dissemination products to the depository library program. For example, the proliferation of "desktop publishing" technology in recent years has afforded the opportunity for many agencies to produce their own printed documents. Many such documents may properly belong in the depository libraries but are not sent because they are not printed at GPO. The policy requires agencies to establish management controls to ensure that the appropriate documents reach the GPO for inclusion in the depository library program.

At present, few agencies provide electronic information dissemination products to the depository libraries. At the same time, a small but growing number of information dissemination products are disseminated only in electronic format.

OMB believes that, as a matter of policy, electronic information dissemination products generally should be provided to the depository libraries. Given that production and supply of information dissemination products to the depository libraries is primarily the responsibility of GPO, agencies should provide appropriate electronic information dissemination products to GPO for inclusion in the depository library program.

While cost may be a consideration, agencies should not conclude without investigation that it would be prohibitively expensive to place their electronic information dissemination products in the depository libraries. For electronic information dissemination products other than on-line services, agencies may have the option of having GPO produce the information dissemination product for them, in which case GPO would pay for depository library costs. Agencies should consider this option if it would be a cost effective alternative to the agency making its own arrangements for production of the information dissemination product. Using GPO's services in this manner is voluntary and at the agency's discretion. Agencies could also consider negotiating other terms, such as inviting GPO to participate in agency procurement orders in order to distribute the necessary copies for the depository libraries. With adequate advance planning, agencies should be able to provide electronic information dissemination products to the depository libraries at nominal cost.

In a particular case, substantial cost may be a legitimate reason for not providing an electronic information dissemination product to the depository library program. For example, for an agency with a substantial number of existing titles of electronic information dissemination products, furnishing copies of each to the depository libraries could be prohibitively expensive. In that situation, the agency should endeavor to make available those titles with the greatest general interest, value, and utility to the public. Substantial cost could also be an impediment in the case of some on-line information services where the costs associated with operating centralized databases would make provision of unlimited direct access to numerous users prohibitively expensive. In both cases, agencies should consult with the GPO, in order to identify those information dissemination products with the greatest public interest and utility for dissemination. In all cases, however, where an agency discontinues publication of an information dissemination product in paper format in favor of electronic formats, the agency should work with the GPO to ensure availability of the information dissemination product to depository libraries.

Notice to the Public. Sections 8a(6)(i) and (j) present new practices for agencies to observe in communicating with the public about information dissemination. Among agencies' responsibilities for dissemination is an active knowledge of, and regular consultation with, the users of their information dissemination products. A primary reason for communication with users is to gain their contribution to improving the quality and relevance of government information—how it is created, collected, and disseminated. Consultations with users might include participation at conferences and workshops, careful attention to correspondence and telephone communications (e.g., logging and analyzing inquiries), or formalized user surveys.

A key part of communicating with the public is providing adequate notice of agency information dissemination plans. Because agencies' information dissemination actions affect other agencies as well as the public, agencies must forewarn other agencies of significant actions. The decision to initiate, terminate, or substantially modify the content, form, frequency, or availability of significant products should also trigger appropriate advance public notice. Where appropriate, the Government Printing Office should be notified directly. Information dissemination products deemed not to be significant require no advance notice.

Examples of significant products (or changes to them) might be those that:

(a) are required by law; e.g., a statutorily mandated report to Congress;

(b) involve expenditure of substantial funds; (c) by reason of the nature of the information, are matters of continuing public interest; e.g., a key economic indicator;

(d) by reason of the time value of the information; command public interest; e.g., monthly crop reports on the day of their release;

(e) will be disseminated in a new format or medium; e.g., disseminating a printed product in electronic medium, or disseminating a machine-readable data file via on-line access.

Where members of the public might consider a proposed new agency product unnecessary or duplicative, the agency should solicit and evaluate public comments. Where users of an agency information dissemination product may be seriously affected by the introduction of a change in medium or format, the agency should notify users and consider their views before instituting the change. Where members of the public consider an existing agency product important and necessary, the agency should consider these views before deciding to terminate the product. In all cases, however, determination of what is a significant information dissemination product and what constitutes adequate notice are matters of agency judgment.

Achieving Compliance with the Circular's Requirements. Section 8a(6)(k) requires that the agency information dissemination management system ensure that, to the extent existing information dissemination policies or practices are inconsistent with the requirements of this Circular, an orderly transition to compliance with the requirements of this Circular is made. For example, some agency

information dissemination products may be priced at a level which exceeds the cost of dissemination, or the agency may be engaged in practices which are otherwise unduly restrictive. In these instances, agencies must plan for an orderly transition to the substantive policy requirements of the Circular. The information dissemination management system must be capable of identifying these situations and planning for a reasonably prompt transition. Instances of existing agency practices which cannot immediately be brought into conformance with the requirements of the Circular are to be addressed through the waiver procedures of Section 10(b).

Section 8a(7). *Avoiding Improperly Restrictive Practices.* Federal agencies are often the sole suppliers of the information they hold. The agencies have either created or collected the information using public funds, usually in furtherance of unique governmental functions, and no one else has it. Hence agencies need to take care that their behavior does not inappropriately constrain public access to government information.

When agencies use private contractors to accomplish dissemination, they must take care that they do not permit contractors to impose restrictions that undercut the agencies' discharge of their information dissemination responsibilities. The contractual terms should assure that, with respect to dissemination, the contractor behaves as though the contractor were the agency. For example, an agency practice of selling, through a contractor, on-line access to a database but refusing to sell copies of the database itself may be improperly restrictive because it precludes the possibility of another firm making the same service available to the public at a lower price. If an agency is willing to provide public access to a database, the agency should be willing to sell copies of the database itself.

By the same reasoning, agencies should behave in an even-handed manner in handling information dissemination products. If an agency is willing to sell a database or database services to some members of the public, the agency should sell the same products under similar terms to other members of the public, unless prohibited by statute. When an agency decides it has public policy reasons for offering different terms of sale to different groups in the public, the agency should provide a clear statement of the policy and its basis.

Agencies should not attempt to exert control over the secondary uses of their information dissemination products. In particular, agencies should not establish exclusive, restricted, or other distribution arrangements which interfere with timely and equitable availability of information dissemination products, and should not charge fees or royalties for the resale or redissemination of government information. These principles follow from the fact that the law prohibits the Federal Government from exercising copyright.

Agencies should inform the public as to the limitations inherent in the information dissemination product (e.g., possibility of errors, degree of reliability, and validity) so that users are fully aware of the quality and integrity of the information. If circumstances warrant, an agency may wish to establish a procedure by which disseminators of the agency's information may at their option have the data and/or value-added processing checked for accuracy and certified by the agency. Using this method, redisseminators of the data would be able to respond to the demand for integrity from purchasers and users. This approach could be enhanced by the agency using its authority to trademark its information dissemination product, and requiring that redisseminators who wish to use the trademark agree to appropriate integrity procedures. These methods have the possibility of promoting diversity, user responsiveness, and efficiency as well as integrity. However, an agency's responsibility to protect against misuse of a government information dissemination product does not extend to restricting or regulating how the public actually uses the information. Agencies should not attempt to condition the resale or redissemination of its information dissemination products by members of the public.

User charges. Title 5 of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 9701) establishes Federal policy regarding fees assessed for government services, and for sale or use of government property or resources. OMB Circular No. A–25, User Charges, implements the statute. It provides for charges for government goods and services that convey special benefits to recipients beyond those accruing to the general public. It also establishes that user charges should be set at a level sufficient to recover the full cost of providing the service, resource, or property. Since Circular No. A–25 is silent as to the extent of its application to government information dissemination products, full cost recovery for information dissemination products might be interpreted to include the cost of collecting and processing information rather than just the cost of dissemination. The policy in Section 8a(7)(c) clarifies the policy of Circular No. A–25 as it applies to information dissemination products.

Statutes such as FOIA and the Government in the Sunshine Act establish a broad and general obligation on the part of Federal agencies to make government information available to the public and to avoid erecting barriers that impede public access. User charges higher than the cost of dissemination may be a barrier to public access. The economic benefit to society is maximized when government information is publicly disseminated at the cost of dissemination. Absent statutory requirements to the contrary, the general standard for user charges for government information dissemination products should be to recover no more than the cost of dissemination. It should be noted in this connection that the government has already incurred the costs of creating and processing the information for governmental purposes in order to carry out its mission.

Underpinning this standard is the FOIA fee structure which establishes limits on what agencies can charge for access to Federal records. That Act permits agencies to charge only the direct reasonable cost of search, reproduction and, in certain cases, review of requested records. In the case of FOIA requests for information dissemination products, charges would be limited to reasonable direct reproduction costs alone. No search would be needed to find the product, thus no search fees would be charged. Neither would the record need to be reviewed to determine if it could be withheld under one of the Act's exemptions since the agency has already decided to release it. Thus, FOIA provides an information "safety net" for the public.

While OMB does not intend to prescribe procedures for pricing government information dissemination products, the cost of dissemination may generally be thought of as the sum of all costs specifically associated with preparing a product for dissemination and actually disseminating it to the public. When an agency prepares an information product for its own internal use, costs associated with such production would not generally be recoverable as user charges on subsequent dissemination. When the agency prepares the product for public dissemination, and disseminates it, costs associated with preparation and actual dissemination would be recoverable as user charges.

When agencies provide custom tailored information services to specific individuals or groups, full cost recovery, including the cost of collection and processing, is appropriate. For example, if an agency prepares special tabulations or similar services from its databases in answer to a specific request from the public, all costs associated with fulfilling the request would be charged, and the requester should be so informed before work is begun.

In a few cases, agencies engaging in information collection activities augment the information collection at the request of, and with funds provided by, private sector groups. Since the 1920's, the Bureau of the Census has carried out, on request, surveys of certain industries at greater frequency or at a greater level of detail than Federal funding would permit, because gathering the additional information is consistent with Federal purposes and industry groups have paid the additional information collection and processing costs. While the results of these surveys are disseminated to the public at the cost of dissemination, the existence and availability of the additional government data are special benefits to certain recipients beyond those accruing to the public. It is appropriate that those recipients should bear the full costs of information collection and processing, in addition to the normal costs of dissemination.

Agencies must balance the requirement to establish user charges and the level of fees charged against other policies, specifically, the proper performance of agency functions and the need to ensure that information dissemination products reach the public for whom they are intended. If an agency mission includes disseminating information to certain specific groups or members of the public and the agency determines that user charges will constitute a significant barrier to carrying out this responsibility, the agency may have grounds for reducing or eliminating its user charges for the information dissemination product, or for exempting some recipients from the charge. Such reductions or eliminations should be the subject of agency determinations on a case by case basis and justified in terms of agency policies.

Section 8a(8). *Electronic Information Dissemination*. Advances in information technology have changed government information dissemination. Agencies now have available new media and formats for dissemination, including CD-ROM, electronic bulletin boards, and public networks. The growing public acceptance of electronic data interchange (EDI) and similar standards enhances their attractiveness as methods for government information dissemination. For example, experiments with the use of electronic bulletin boards to advertise Federal contracting opportunities and to receive vendor quotes have achieved wider dissemination of information about business opportunities with the Federal Government than has been the case with traditional notices and advertisements. Improved information dissemination has increased the number of firms expressing interest in participating in the government market and decreased prices to the government due to expanded competition. In addition, the development of public electronic information networks, such as the Internet, provides an additional way for agencies to increase the diversity of information sources available to the public. Emerging applications such as Wide Area Information Servers and the World-wide Web (using the NISO Z39.50 standard) will be used increasingly to facilitate dissemination of government information such as environmental data, international trade information, and economic statistics in a networked environment.

A basic purpose of the PRA is "to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government." (44 U.S.C. 3501(3)) Agencies can frequently enhance the value and practical utility of government information as a national resource by disseminating information in electronic media. Electronic collection and dissemination may substantially increase the usefulness of government information dissemination products for three reasons. First, information disseminated electronically is likely to be more timely and accurate because it does not require data re-entry. Second, electronic records often contain more complete and current information because, unlike paper, it is relatively easy to make frequent changes. Finally, because electronic information is more easily manipulated by the user and can be tailored to a wide variety of needs, electronic information dissemination products are more useful to the recipients.

As stated at Section 8a(1)(h), agencies should use voluntary standards and Federal Information Processing Standards to the extent appropriate in order to ensure the most cost effective and widespread dissemination of information in electronic formats.

Agencies can frequently make government information more accessible to the public and enhance the utility of government information as a national resource by disseminating information in electronic media. Agencies generally do not utilize data in raw form, but edit, refine, and organize the data in order to make it more accessible and useful for their own purposes. Information is made more accessible to users by aggregating data into logical groupings, tagging data with descriptive and other identifiers, and developing indexing and retrieval systems to facilitate access to particular data within a larger file. As a general matter, and subject to budgetary, security or legal constraints, agencies should make available such features developed for internal agency use as part of their information dissemination products.

There will also be situations where the agency determines that its mission will be furthered by providing enhancements beyond those needed for its own use, particularly those that will improve the public availability of government information over the long term. In these instances, the agency should evaluate the expected usefulness of the enhanced information in light of its mission, and where appropriate construct partnerships with the private sector to add these elements of value. This approach may be particularly appropriate as part of a strategy to utilize new technology enhancements, such as graphic images, as part of a particular dissemination program.

Section 8a(9). *Information Safeguards*. The basic premise of this Section is that agencies should provide an appropriate level of protection to government information, given an assessment of the risks associated with its maintenance and use. Among the factors to be considered include meeting the specific requirements of the Privacy Act of 1974 and the Computer Security Act of 1987.

In particular, agencies are to ensure that they meet the requirements of the Privacy Act regarding information retrievable by individual identifier. Such information is to be collected, maintained, and protected so as to preclude intrusion into the privacy of individuals and the unwarranted disclosure of personal information. Individuals must be accorded access and amendment rights to records, as provided in the Privacy Act. To the extent that agencies share information which they have a continuing obligation to protect, agencies should see that appropriate safeguards are instituted. Appendix I prescribes agency procedures for the maintenance of records about individuals, reporting requirements to OMB and Congress, and other special requirements of specific agencies, in accordance with the Privacy Act.

This Section also incorporates the requirement of the Computer Security Act of 1987 that agencies plan to secure their systems commensurate with the risk and magnitude of loss or harm that could result from the loss, misuse, or unauthorized access to information contained in those systems. It includes assuring the integrity, availability, and appropriate confidentiality of information. It also involves protection against the harm that could occur to individuals or entities outside of the Federal Government as well as the harm to the Federal Government. Such protection includes limits on collection and sharing of information and procedures to assure the integrity of information as well as requirements to adequately secure the information.

Incorporation of Circular No. A–114. OMB Circular No. A–114, Management of Federal Audiovisual Activities, last revised on March 20, 1985, prescribes policies and procedures to improve Federal audiovisual management. Although OMB will rescind Circular No. A–114, its essential policies and procedures will continue. This revision provides information resources management policies and principles independent of medium, including paper, electronic, or audiovisual. By including the term "audiovisual" in the definition of "information," audiovisual materials are incorporated into all policies of this Circular.

The requirement in Circular No. A–114 that the head of each agency designate an office with responsibility for the management oversight of an agency's audiovisual productions and that an appropriate program for the management of audiovisual productions in conformance with 36 CFR 1232.4 is incorporated into this Circular at Section 9a(10). The requirement that audiovisual activities be obtained consistent with OMB Circular No. A–76 is covered by Sections 8a(1)(d), 8a(5)(d)(i) and 8a(6)(b).

Procurement policies contained in Circular No. A–114 will be incorporated into an Office of Federal Procurement Policy Letter.

The National Archives and Records Administration will continue to prescribe the records management and archiving practices of agencies with respect to audiovisual productions at 36 CFR 1232.4, "Audiovisual Records Management."

Section 8b, *Information Systems and Information Technology Management*

Section 8b(1) *Evaluation and Performance Measurement.* OMB encourages agencies to stress several types of evaluation in their oversight of information systems. As a first step, agencies must assess the continuing need for the mission function. If the agency determines there is a continuing need for a function, agencies should reevaluate existing work processes prior to creating new or updating existing information systems. Without this analysis, agencies tend to develop information systems that improve the efficiency of traditional paper-based processes which may be no longer needed. The application of information technology presents an opportunity to reevaluate existing organizational structures, work processes, and ways of interacting with the public to see whether they still efficiently and effectively support the agency's mission.

Benefit-cost analyses provide vital management information on the most efficient allocation of human, financial, and information resources to support agency missions. Agencies should conduct a benefit-cost analysis for each information system to support management decision making to ensure: (a) alignment of the planned information system with the agency's mission needs; (b) acceptability of information system implementation to users inside the Government; (c) accessibility to clientele outside the Government; and (d) realization of projected benefits. When preparing benefit-cost analyses to support investments in information technology, agencies should seek to quantify the improvements in agency performance results through the measurement of program outputs.

The requirement to conduct a benefit-cost analysis need not become a burdensome activity for agencies. The level of detail necessary for such analyses varies greatly and depends on the nature of the proposed investment. Proposed investments in "major information systems" as defined in this Circular require detailed and rigorous analysis. This analysis should not merely serve as budget justification material, but should be part of the ongoing management oversight process to ensure prudent allocation of scarce resources. Proposed investments for information systems that are not considered "major information systems" should be analyzed and documented more informally.

While it is not necessary to create a new benefit-cost analysis at each stage of the information system life cycle, it is useful to refresh these analyses with up-to-date information to ensure the continued viability of an information system prior to and during implementation. Reasons for updating a benefit-cost analysis may include such factors as significant changes in projected costs and benefits, significant changes in information technology capabilities, major changes in requirements (including legislative or regulatory changes), or empirical data based on performance measurement gained through prototype results or pilot experience.

Agencies should also weigh the relative benefits of proposed investments in information technology across the agency. Given the fiscal constraints facing the Federal government in the upcoming years, agencies should fund a portfolio of investments across the agency that maximizes return on investment for the agency as a whole. Agencies should also emphasize those proposed investments that show the greatest probability (i.e., display the lowest financial and operational risk) of achieving anticipated benefits for the organization. OMB and GAO are creating a publication that will provide agencies with reference materials for setting up such evaluation processes.

Agencies should complete a retrospective evaluation of information systems once operational to validate projected savings, changes in practices, and effectiveness in serving affected publics. These post-implementation reviews may also serve as the basis for agency-wide learning about effective management practices.

Section 8b(2) *Strategic Information Resources Management (IRM) Planning.* Agencies should link to, and to the extent possible, integrate IRM planning with the agency strategic planning required by the Government Performance and Results Act (Pub.L. 103–62). Such a linkage ensures that agencies apply information resources to programs that support the achievement of agreed-upon mission goals. Additionally, strategic IRM planning by agencies may help avoid automating out-of-date, ineffective, or inefficient procedures and work processes.

Agencies should also devote management attention to operational information resources management planning. This operational IRM planning should provide a one to five year focus to agency IRM activities and projects. Agency operational IRM plans should also provide a listing of the major information systems covered by the management oversight processes described in Section 8b(3). Agency operational planning for IRM should also communicate to the public how the agency's application of information resources might affect them. For the contractor community, this includes articulating the agency's intent to acquire information technology from the

private sector. These data should not be considered acquisition sensitive, so that they can be distributed as widely as possible to the vendor community in order to promote competition. Agencies should make these acquisition plans available to the public through government-wide information dissemination mechanisms, including electronic means.

Operational planning should also include initiatives to reduce the burden, including information collection burden, an agency imposes on the public. Too often, for example, agencies require personal visits to government offices during office hours inconvenient to the public. Instead, agencies should plan to use information technology in ways that make the public's dealing with the Federal government as "user-friendly" as possible.

Each year, OMB issues a bulletin, requesting copies of agencies' latest strategic IRM plans and annual updates to operational plans for information and information technology.

Section 8b(3) *Information Systems Management Oversight.* Agencies should consider what constitutes a "major information system" for purposes of this Circular when determining the appropriate level of management attention for an information system. The anticipated dollar size of an information system or a supporting acquisition is only one determinant of the level of management attention an information system requires. Additional criteria to assess include the maturity and stability of the technology under consideration, how well defined user requirements are, the level of stability of program and user requirements, and security concerns.

For instance, certain risky or "cutting-edge" information systems require closer scrutiny and more points of review and evaluation. This is particularly true when an agency uses an evolutionary life cycle strategy that requires a technical and financial evaluation of the project's viability at prototype and pilot testing phases. Projects relying on commercial off-the-shelf technology and applications will generally require less oversight than those using custom-designed software.

While each phase of an information system life cycle may have unique characteristics, the dividing line between the phases may not always be distinct. For instance, both planning and evaluation should continue throughout the information system life cycle. In fact, during any phase, it may be necessary to revisit the previous stages based on new information or changes in the environment in which the system is being developed.

The policy statements in this Circular describe an information system life cycle. It does not, however, make a definitive statement that there must be four versus five phases of a life cycle because the life cycle varies by the nature of the information system. Only two phases are common to all information systems—a beginning and an end. As a result, life cycle management techniques that agencies can use may vary depending on the complexity and risk inherent in the project.

One element of this management oversight policy is the recognition of imbedded and/or parallel life cycles. Within an information system's life cycle there may be other subsidiary life cycles. For instance, most Federal information systems projects include an acquisition of goods and services that have life cycle characteristics. Some projects include software development components, which also have life cycles. Effective management oversight of major information systems requires a recognition of all these various life cycles and an integrated information systems management oversight with the budget and human resource management cycles that exist in the agency.

Section 8b(2) of the Circular underscores the need for agencies to bring an agency-wide perspective to a number of information resources management issues. These issues include policy formulation, planning, management and technical frameworks for using information resources, and management oversight of major information systems. Agencies should also provide for coordinated decision making (Section 8b(3)(f)) in order to bring together the perspectives from across an agency, and outside if appropriate. Such coordination may take place in an agency-wide management or IRM committee. Interested groups typically include functional users, managers of financial and human resources, information resources management specialists, and, as appropriate, the affected public.

Section 8b(4) *Use of Information Resources.* Agency management of information resources should be guided by management and technical frameworks for agency-wide information and information technology needs. The technical framework should serve as a reference for updates to existing and new information systems. The management framework should assure the integration of proposed information systems projects into the technical framework in a manner that will ensure progress towards achieving an open systems environment. Agency strategic IRM planning should describe the parameters (e.g., technical standards) of such a technical framework. The management framework should drive operational planning and should describe how the agency intends to use information and information technology consistent with the technical framework.

Agency management and technical frameworks for information resources should address agency strategies to move toward an open systems environment. These strategies should consist of one or multiple profiles (an internally consistent set of standards), based on the current version of the NIST's Application Portability Profile. These profiles should satisfy user requirements, accommodate officially recognized or de facto standards, and promote interoperability, application portability, and scalability by defining interfaces, services, protocols, and data formats favoring the use of nonproprietary specifications.

Agencies should focus on how to better utilize the data they currently collect from the public. Because agencies generally do not share information, the public often must respond to duplicative information collections from various agencies or their components. Sharing of information about individuals should be consistent with the Privacy Act of 1974, as amended, and Appendix I of this Circular.

Services provided by IPSOs to components of their own agency are often perceived to be "free" by the service recipients because their costs are budgeted as an "overhead" charge. Service recipients typically do not pay for IPSO services based on actual usage. Since the services are perceived to be free, there is very little incentive for either the service recipients or the IPSO managers to be watchful for opportunities to improve productivity or to reduce costs. Agencies are encouraged to institute chargeback mechanisms for IPSOs that provide common information processing services across a number of agency components when the resulting economies are expected to exceed the cost of administration.

Section 8b(5) *Acquisition of Information Technology.* Consistent with the requirements of the Brooks Act and the Paperwork Reduction Act, agencies should acquire information technology to improve service delivery, reduce the cost of Federal program administration, and minimize burden of

dealing with the Federal government. Agencies may wish to ask potential offerors to propose different technical solutions and approaches to fulfilling agency mission requirements. Evaluating acquisitions of information technology must assess both the benefits and costs of applying technology to meet such requirements.

The distinction between information system life cycles and acquisition life cycles is important when considering the implications of OMB Circular A–109, Acquisition of Major Systems, to the acquisition of information resources. Circular A–109 presents one strategy for acquiring information technology when:

i) The agency intends to fund operational tests and demonstrations of system design;

ii) The risk is high due to the unproven integration of custom designed software and/or hardware components;

iii) The estimated cost savings or operational improvements from such a demonstration will further improve the return on investment; or

iv) The agency wants to acquire a solution based on state-of-the-art, unproven technology.

Agencies should comply with OMB Circular A–76, Performance of Commercial Activities, when considering conversion to or from in-house or contract performance.

Agencies should ensure that acquisitions for new information technology comply with GSA regulations concerning information technology accessibility for individuals with disabilities [41 C.F.R. 201–20.103–7].

Section 9a(11). *Ombudsman*. The senior agency official designated by the head of each agency under 44 U.S.C. 3506(b) is charged with carrying out the responsibilities of the agency under the PRA. Agency senior information resources management officials are responsible for ensuring that their agency practices are in compliance with OMB policies. It is envisioned that the agency senior information resources management official will work as an ombudsman to investigate alleged instances of agency failure to adhere to the policies set forth in the Circular and to recommend or take corrective action as appropriate. Agency heads should continue to use existing mechanisms to ensure compliance with laws and policies.

[The remainder of Appendix IV, which covers sections 9 and 10, is unchanged. *See* 50 FR 52750–51 (December 24, 1985).]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–523–6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–2470).

S.J. Res. 187/P.L. 103–278
Designating July 16 through July 24, 1994, as "National Apollo Anniversary Observance". (July 20, 1994; 108 Stat. 1408; 1 page)

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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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1, 2 (2 Reserved)	(869-022-00001-2)	$5.00	Jan. 1, 1994
3 (1993 Compilation and Parts 100 and 101)	(869-022-00002-1)	33.00	[1] Jan. 1, 1994
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1994. The CFR volume issued April 1, 1990, should be retained.

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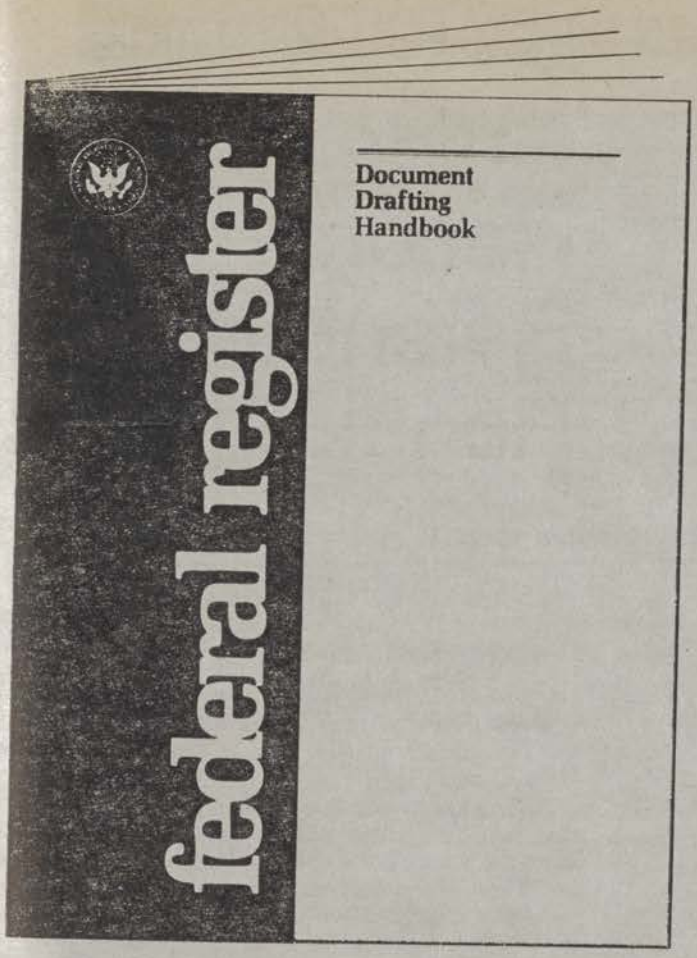

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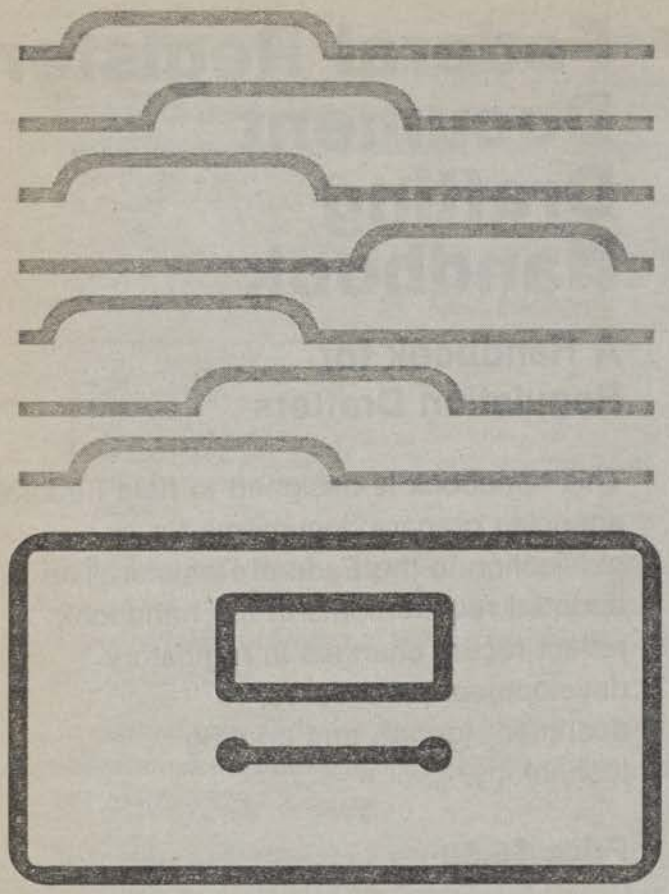

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in the Code of Federal Regulations (CFR)

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